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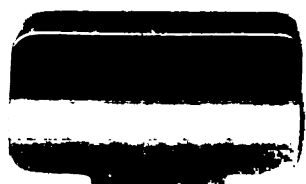
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THE
PACIFIC REPORTER,
VOLUME 15,

CONTAINING

ALL THE DECISIONS OF THE SUPREME COURTS

OF

California, Colorado, Kansas, Oregon, Nevada, Arizona,
Idaho, Montana, Washington, Wyoming,
Utah, and New Mexico.

OCTOBER 13, 1887—JANUARY 12, 1888.

ST. PAUL:
WEST PUBLISHING COMPANY.
1888.

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COURT RULE.

SUPREME COURT OF ARIZONA.

Rule IV., § 1, is amended to read as follows:

"In all causes the party bringing an action into this court shall file with the transcript a complete abstract of the record therein, referring to the appropriate pages of the record by numerals on the margin, and shall cause such abstract to be printed in a neat and workman-like manner on one side only, upon paper suited to the use of ink; the pages to be the same size as those of the PACIFIC REPORTER, and bound on the side of the page. Six copies of the same shall be filed in each case."

Adopted September 29, 1887.

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RANDS and others v. BRAIN.

(*Supreme Court of Utah.* July 30, 1887.)

DESCENT AND DISTRIBUTION—ALLOWANCE TO WIDOW AND CHILDREN—TITLE OF WIDOW.

Comp. Laws Utah, § 850, which provides that when one, dying intestate, leaves property, the value of which does not exceed \$1,000, "the probate court shall assign, for the support of the widow, and minor children if there be no widow, the whole of the estate," does not give to the widow the title in fee-simple to the property assigned, where there are minor children. On rehearing, affirming original decision in 14 Pac. Rep. 129.

On petition for rehearing.

Arthur Brown, for appellants. *C. O. Whittemore*, for respondent.

HENDERSON, J. This is a petition for rehearing. The cause was decided at the present term. 14 Pac. Rep. 129. The defendant asks for a rehearing, and in support of it he contends for the construction of the statute claimed by him on the former argument.

The arguments and considerations set forth in his petition were fully and carefully considered by us before the case was determined. We can concede all that counsel say as to the necessity and propriety of providing for minor children, and we think the legislative intent should be executed. As stated in our former opinion, we do not think it was intended to give the title in fee-simple to the widow alone, to the exclusion of all other members of the family, when there are minor children constituting the family. Counsel concede that such members of the family have an interest in the property, and would have in the fund created by the sale by her, which might be protected in equity, but minor children are not usually in condition to protect such rights, and it was not unreasonable that the legislature should protect their rights by giving them an ownership in the title of which they could only be divested by the ordinary methods, and in a way to protect their equities.

The motion for rehearing is denied.

ZANE, C. J., and BOREMAN, J., concur.

(6 Utah, 273)

UNITED STATES v. SMITH.

(*Supreme Court of Utah.* September 2, 1887.)

BIGAMY—EVIDENCE TO SUPPORT CONVICTION.

A verdict of guilty, in a prosecution for cohabitation with two wives, will be sustained, where, cohabitation with the second wife being admitted, a legal marriage v.15p.no.1—1

is shown between the defendant and the first wife; that he had frequently been seen about the house of the first wife; and that he had stated that "he would live with his wives, and he didn't care who knew it." On rehearing, affirming 14 Pac. Rep. 291.

On petition for rehearing. See 14 Pac. Rep. 291.

Geo. S. Peters, for the United States. *A. G. Sutherland*, for appellant.

ZANE, C. J. The defendant by his counsel moves the court for a rehearing of this appeal. The points made in this petition, and the arguments urged in their support, were presented by counsel in their arguments at the hearing, and were then duly considered, so far as we deemed their consideration necessary. We see no sufficient reason to change the conclusion reached at the former hearing.

The motion for a rehearing is denied.

BOREMAN and HENDERSON, JJ., concur.

(5 Utah, 274)

PEOPLE v. CHALMERS.

(*Supreme Court of Utah*. September 2, 1887.)

1. CRIMINAL PRACTICE—CONVICTION FOR BATTERY UNDER INDICTMENT FOR ASSAULT WITH INTENT TO KILL.

Under an indictment for an assault with intent to kill, which alleges that the defendant, "with a pistol loaded with gunpowder and bullets, in and upon one J. P. made an unlawful and felonious assault, and did shoot off one of the bullets at and against the person of the said J. P.," defendant may be convicted of a battery, under Laws Utah 1878, § 301, which provides "that the jury may find the defendant guilty of an offense, the commission of which is necessarily included in that with which he is charged." On rehearing, affirming 14 Pac. Rep. 131.

2. APPEAL—RECORD—MUST CONTAIN RULINGS OBJECTED TO.

A party must preserve in the record any ruling of the trial court, whether made upon an objection to evidence or in charging the jury, if he wishes to rely upon the same as error.

On rehearing. See 14 Pac. Rep. 131.

A. G. Sutherland, for appellant. *Geo. S. Peters*, for the People.

ZANE, C. J. This appeal was heard and decided at a former session of the present term. The defendant had been tried in the lower court upon an indictment charging him with an assault upon one John Pitt with intent to murder, and had been found guilty of a battery. Upon the trial the court had charged the jury that they might find the defendant guilty of a battery under the indictment, if they so believed beyond a reasonable doubt. To this portion of the charge the defendant had excepted, and desired to assign the giving of it as error. But the charge to the jury was not found in the record, and the court refused to consider the exception. Appellant's counsel insists upon a rehearing, for the reason the argument was not heard upon that point. A party must preserve in the record any ruling of the trial court, whether made upon an objection to evidence or in charging the jury, if he wishes to rely upon the same as error.

The point, however, that the defendant should not have been found guilty under the indictment of a battery was considered under the error alleged in overruling the motion for a new trial. The court said: "Counsel for the defendant also urges that the jury was not authorized to find the defendant guilty of a battery upon the indictment upon which he was tried. It is alleged in the indictment that the defendant, with a pistol loaded with gunpowder and bullets, in and upon one John Pitt made an unlawful and felonious assault, and did shoot off one of the bullets at and against the person of the said John Pitt. A battery is any willful and unlawful use of force or violence upon the person of another. Comp. Laws Utah 1876, p. 592. The

indictment describes a battery as defined in the statute. It was stated that the assault was upon Pitt, and that the bullet was shot at and against his person. Section 301, Laws Utah 1878, provides that 'the jury may find the defendant guilty of an offense, the commission of which is necessarily included in that with which he is charged.' While an assault with intent to murder might be charged without describing a battery, this charge does include that offense. The acts constituting the crime as charged in the indictment include those essential to the description of a battery. At common law there could be no conviction for a misdemeanor on any indictment for a felony. The reason upon which the rule was established, was that persons indicted for a misdemeanor had certain advantages at the trial, such as to make a full defense by counsel, and to have a copy of the indictment, and a special jury, which advantages were not then permitted under indictments for felony. Such reasons do not exist in this territory, and we therefore disregard the rule. When a minor offense is included in a greater, the defendant may be acquitted of the latter, and convicted of the former, unless the allegation is in a form not charging the lower. Bish. Crim. Law, §§ 780, 794, note; Whart. Crim. Law, §§ 616, 617."

The motion for a rehearing is denied.

BOREMAN and HENDERSON, JJ., concur.

(5 Utah, 276)

MCDONOUGH v. SMITH.

(*Supreme Court of Utah*, September 2, 1887.)

APPEAL—REVIEW—FINDINGS OF FACT BY TRIAL COURT—ERROR MUST BE APPARENT.

When the evidence is conflicting, the judgment of the lower court will not be reversed because of an alleged error in finding any essential fact, unless such finding is shown to be clearly erroneous, and against the weight of evidence.

Error to district court, Second judicial district; BOREMAN, Judge.
Chas. W. Lane, for appellant. *Pressly Denny*, for respondent.

ZANE, C. J. This cause was instituted in the Second judicial district court in order to recover \$150, with interest, alleged to have been paid by plaintiff to defendant through mistake. A trial by jury was waived, and the case was tried by the court. The court found from the evidence that the plaintiff executed a note to defendant for the sum of \$200 borrowed by one Josiah Rogerson; that after the note became due, Rogerson paid it, but after the payment the defendant, Smith, instituted a suit upon the note against the plaintiff in a justice court of Beaver county, and without service of summons, and without the knowledge of the plaintiff, then defendant, obtained a judgment for the amount of the note with interest; that a few days thereafter the plaintiff's wife, in the absence of her husband, in order to prevent a levy under an execution issued on the judgment in the justice's court, with plaintiff's money paid \$150 to defendant. From these findings of fact the court stated as a conclusion of law that plaintiff was entitled to recover the \$150 with interest, and entered judgment accordingly. To reverse this judgment the defendant has appealed to this court. The defendant assigns as error the findings of the court below that Rogerson paid the note upon which the judgment was rendered in the justice's court; and, also, in finding that the defendant in the justice's court, here plaintiff, was not duly served with notice of the pendency of the suit.

We have considered the evidence as to these facts, as it appears in the record, and, while the evidence is conflicting, we are not satisfied that the weight of the evidence is against either of the findings of the court below. This court will not reverse a judgment of a lower court because of alleged error in finding any essential fact when there is doubt as to which side the evidence pre-

ponderates. Such an error must be clear, and the conviction must be abiding, and the court satisfied before reversal for such an error. We find no error in this record.

The judgment of the court below is affirmed.

BOREMAN and HENDERSON, JJ., concur.

(5 Utah, 277)

PEOPLE v. SOLOMON and another.

(Supreme Court of Utah. September 2, 1887.)

BAIL—ACTION AGAINST SURETIES—PLEADING—COMPLAINT.

In an action upon a bail-bond, the complaint alleged that the accused "was admitted to bail," and that she did not appear at the trial. *Held*, on demurrer, not to be equivalent to an allegation of a release of the accused from custody in consideration of the undertaking of the sureties.

Appeal from district court, Third district; C. S. ZANE, Judge.

W. H. Dickson, for the People. Hoge & Burmester, for appellants.

BOREMAN, J. It appears from the record in this case that one Fanny Davenport was charged with keeping a house of ill-fame, and upon her arrest therefor the defendants (appellants) became bail for her appearance, executing and delivering the undertaking sued on for her release. She was indicted on this and other charges, and the district court made an order for her appearance in court at a specified time, to "abide such order as the court shall make concerning her." She appeared at the appointed time by her attorney, but not in person, and her attorney offered to enter her plea for her. This offer was rejected, and thereupon the undertaking was forfeited. The present action was instituted upon the undertaking thus forfeited, against the appellants, the sureties thereon. The appellants (defendants below) filed their demurrer to the complaint, and the demurrer being overruled, they filed their answer, setting forth that the accused appeared at the appointed time by her attorney, and offered to plead, but that her plea was refused; and that afterwards, on the same day, she again appeared by her attorney and offered her plea of "not guilty," and it was accepted and entered. After the filing of the answer of the defendants (appellants) the district attorney moved the court for judgment upon the pleadings, which motion was by the court granted; and thereupon the appellants brought the case to this court.

1. It was objected to the complaint that it failed to allege that said Davenport was released from custody. In reply to this objection it is contended that although the complaint does not in terms state that the accused was discharged from custody, yet that the allegation that she was "admitted to bail" is equivalent thereto. The release from custody is in contemplation of law to take place after the execution and acceptance of the undertaking. It is declared in the undertaking itself, in speaking of the charge, that "said defendant having been held to answer thereon, and *admitted to bail* by said commissioner," etc., the sureties undertook that she should appear, etc. This language indicates that the accused had already been admitted to bail before the undertaking was given; but it is not contended that the accused had been released from custody before the execution of the undertaking; and, in fact, if she had been, there was no consideration for the undertaking. It is clear, therefore, that the "admission to bail," spoken of in the undertaking, was not a discharge from custody. Our criminal practice act defines the expression as follows, viz.: "Sec. 384. Admission to bail is the order of a competent court or magistrate that the defendant be discharged from actual custody upon bail." Laws Utah 1878, p. 142. The same meaning seems to attach to the words generally, wherever used in the statutes. Laws 1878, tit. "Bail." The "admission to bail" is therefore the order of a court or magistrate for a

prisoner's discharge, and is not the discharge itself. It is manifest that this is the sense in which the words are used in the complaint.

2. The statement that the accused did not appear is not equivalent to saying that the accused was released on bail, nor did it necessarily include such a release. Had she been at large from any other cause than the giving and accepting of the bail, the sureties would not be responsible. The undertaking could be of no validity unless the prisoner was discharged by reason of its being given. It is that which gives to the undertaking its vitality. The complaint should state every such fact necessary to its validity, and without such allegation the complaint is fatally defective. It did not state facts sufficient to constitute a cause of action. *Los Angeles Co. v. Babcock*, 45 Cal. 253. This point being decisive of the case, it is unnecessary to consider other points. The judgment and order of the lower court are reversed and the cause remanded, with directions to the lower court to sustain the demurrer to the complaint, with leave to the plaintiff to amend.

ZANE, C. J., and HENDERSON, J., concur.

(73 Cal. 348)

PEOPLE v. CLOUGH and another. (No. 20,558.)

(*Supreme Court of California*. September 10, 1887.)

1. CRIMINAL PRACTICE—EVIDENCE—TESTIMONY OF ACCOMPLICE.

The court instructed the jury: "If you believe that an accomplice has testified in this case, and you believe beyond all reasonable doubt from his testimony, to a moral certainty, that the defendant is guilty of the alleged offense in the information mentioned, and then in connection therewith you believe there is evidence, outside of that, which tends to connect the defendant with the commission of the offense,—outside of showing the commission of the offense itself and the circumstances thereof, then it would be your bounden duty to convict him." *Held*, that this was consistent with Pen. Code Cal. § 1111, providing that "a conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient, if it merely shows the commission of the offense, or the circumstances thereof."¹

2. SAME.

Under Pen. Code Cal. § 1111, the evidence corroborating the testimony of an accomplice need not tend to establish the precise facts testified to by the accomplice. It is sufficient if it tends to connect the defendant with the commission of the crime.¹

In bank. Appeal from superior court, Tulare county; WM. W. CROSS, Judge.

Atwell & Bradley, for appellant. *Geo. A. Johnson*, Atty. Gen., for respondent.

MCKINSTRY, J. The defendant Clough was convicted of burglary of the first degree. As portion of his charge, the judge of the superior court instructed the jury, in the precise language of section 1111 of the Penal Code, as follows: "A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient, if it merely shows the commission of the offense or the circumstances thereof." And in another portion of his charge the learned judge said: "Where a number of persons have been engaged in the commission of an offense, when any one of them turns state's evidence and testifies to the circumstances

¹ Respecting the sufficiency of accomplice testimony, see *People v. Elliott*, (N. Y.) 12 N. E. Rep. 602, and note; *People v. Kunz*, (Cal.) 14 Pac. Rep. 836. As to who is an accomplice within the rule, see *Smith v. State*, (Tex.) 5 S. W. Rep. 219, and note.

under which the alleged crime was committed, no one of the parties engaged in the commission of the crime can be convicted upon the testimony of the accomplice, unless there is other evidence outside of his testimony which tends to connect the defendant with the commission of the offense, and the connection is not sufficient if it simply shows the offense or the circumstances of the offense itself."

The language last quoted added no force to the charge previously given in the language of section 1111 of the Penal Code, but we are of opinion that it could not have been understood by the jury as laying down any different rule from that declared in the section referred to. It was, in effect, a statement that, to justify a conviction, there must be evidence independent of the testimony of the accomplice, tending to connect the defendant with the commission of the offense, and that such independent evidence was not sufficient if it merely showed the commission of the offense or the circumstances thereof. After calling the attention of the jury to the distinction between proof of a fact and evidence tending to prove it, the learned judge proceeded: "Whenever the prosecution introduces evidence which tends to connect the defendant with the commission of the given offense, then the jury may take into consideration, and should do so, the evidence of the accomplice, for the purpose of determining whether or not the defendant is guilty of the given offense; but this evidence, which tends to prove the connection of the defendant with the commission of the alleged offense, must be evidence upon propositions other than those showing the fact of the offense itself committed and the circumstances thereof." The judge then told the jury, in substance, that, even if they should believe, beyond a reasonable doubt, from the testimony of the accomplice, that the defendant was guilty, yet if there was no other independent evidence tending to connect the defendant with the commission of the offense, it was their bounden duty to acquit him. And immediately afterwards the judge said: "But if you believe that an accomplice has testified in this case, and you believe beyond all reasonable doubt from his testimony, to a moral certainty, that the defendant is guilty of the alleged offense in the information mentioned, and then in connection therewith you believe there is evidence, outside of that, which tends to connect the defendant with the commission of the offense,—outside of showing the commission of the offense itself and the circumstances thereof,—then it would be your bounden duty to convict him."

We do not think the repetition of the word "outside" in the foregoing citation could have misled. As first used it was evidently intended to exclude the testimony of the accomplice, and to require the corroborating evidence to consist of matter substantiated otherwise than by such testimony. The instruction last cited is excepted to by appellant, on the ground that "it invades the province of the jury, and sets aside the provisions of section 1111 of the Penal Code, because that section does not make it incumbent upon the jury to convict upon the evidence of an accomplice, although it may be corroborated in some slight respects." And it was said in argument: "The jury is to be the judge of the evidence, and to say to the jury that it *must* convict a defendant upon any corroboration of the testimony of an accomplice, is to say that which no court in this state has a right to say." But the court did not tell the jury that it was their bounden duty to convict the defendant if there was any evidence tending to corroborate the accomplice, but, in effect, if they believed the testimony of the accomplice, and that testimony proved defendant's guilt beyond reasonable doubt, they should convict, provided there was evidence, independent of such testimony, which "tended" to connect the defendant with the offense. The statute does not make it necessary that the evidence bearing upon the corroborative fact shall prove the ultimate fact beyond all reasonable doubt. "The corroborating evidence may be slight; nevertheless the requirements of the statute are fulfilled if there be any cor-

roborating evidence which, of itself, *tends* to connect the accused with the commission of the offense." *People v. Melvane*, 39 Cal. 616.

The point in opposition to the instruction may be stated thus: A jury has no legal right to believe the testimony of an accomplice unless he is corroborated in the manner prescribed in the Penal Code; they can only convict upon the testimony of the accomplice *and* its corroborations; in other words, in case the independent circumstances tending to connect the defendant with the alleged offense do not establish his guilt beyond a reasonable doubt, they must of themselves persuade and lead to a belief of the accomplice's testimony. It might be contended that the instruction was erroneous because some evidence tending to corroborate might not corroborate the testimony of the accomplice and render it credible; and thus the accomplice's testimony and the slight evidence of corroboration might fail to establish the defendant's guilt to a moral certainty. But section 1111 of the Penal Code does not require that the corroborating evidence shall be such as shall prove that the accomplice has told the truth; nor does it declare that he must be presumed to have sworn falsely—such presumption to be overcome only in case the other evidence shall show he has told the truth. It simply requires that in addition to his testimony—however trustworthy that testimony—there must, to justify a conviction, be evidence tending to connect the defendant with the commission of the offense. Of course mere evidence of the *corpus delicti* is not such evidence. The purpose of the statute is made more apparent by a view of the law as it stood prior to its passage. In Power's *Rosc. Crim. Ev.* it is said that the condition of the English law as to the corroboration of accomplices was "somewhat peculiar." *Crim. Ev.* 121. It has been repeatedly laid down, both in England and the United States, that a conviction on the testimony of an accomplice, uncorroborated, is legal. *Rex v. Atwood*, 1 Leach, 464; *Rex v. Durham*, 1d. 478, and other cases cited in *Roscoe*; 2 *Roy. Rec.* 38; 1 *Wheeler, Crim. Cas.* 448; 5 *Roy. Rec.* 94; *People v. Costello*, 1 *Denio*, 83; *State v. Brown*, 3 *Strob.* 508; *Stocking v. State*, 7 *Ind.* 326; *Dick v. State*, 30 *Miss.* 593; *State v. Stebbins*, 29 *Conn.* 463; *State v. Watson*, 31 *Mo.* 361; *Steinham v. U. S.*, 2 *Paine*, 168. While the law was fully established in England that one charged with crime could be convicted upon the uncorroborated testimony of an accomplice, the judges almost invariably advised juries not to convict upon such uncorroborated testimony. They sometimes went further and directed an acquittal where the testimony of an accomplice was the only evidence. In *Roscoe* it is said the law was in an anomalous state. "For it is universally agreed by all the authorities that, if the accomplice were uncorroborated, a judge would be wrong who did not advise the jury not to convict; whereas the court of criminal appeal would be bound to pronounce an opinion that the judge who did not so advise them was right."

The apparent anomaly is done away with by section 1111 of our Penal Code. Under it, although the jurors are the sole determinators of the facts proved by the evidence, yet if there is *no* evidence, other than the testimony of the accomplice, tending to connect the defendant with the commission of the offense, the judge may direct an acquittal. This, however, simply because the statute prohibits a verdict based upon testimony of an accomplice alone, even although the jury may believe such testimony to be entirely true, and that it establishes the defendant's guilt beyond reasonable doubt; not because the jurors are prohibited from *believing* the testimony of the accomplice in the absence of the corroboration mentioned in the statute. The legislature might have declared an accomplice incompetent to be a witness; but he may be a witness, and the legislature have not said that he shall not be believed if uncorroborated, but that a *conviction* shall not be had upon his testimony, unless there is other evidence tending to prove the defendant's complicity in the offense charged. As to those who have faith in their movements, the worlds move notwithstanding any attempt to forbid such faith. The law-makers have deemed the

motives to intellectual assent too complicated and too sacred to be interfered with. But they have limited the practical consequences of the reliance of jurors upon the testimony of an accomplice, by providing that no verdict shall be based on his testimony, in the absence of other evidence tending to prove the guilt of the defendant. If, however, there is *any* independent evidence tending to prove such connection of the defendant with the crime, the superior court will not be justified in directing an acquittal; and it is obvious that the power so to direct must be exercised with extreme caution.

On the argument it was suggested that the court below excluded from the consideration of the jury all the evidence, except the testimony of the accomplice, and any independent evidence tending to connect the defendant with the offense charged. But the instructions left it with the jury to decide whether they should believe the testimony of the accomplice. In deciding that question they were bound to take into consideration all testimony contradictory of that of the accomplice, and all circumstances—including the fact that he *was* an accomplice, if he was one—tending in their nature to affect his credibility. The jury were told carefully to scrutinize all the testimony, and were properly charged as to reasonable doubt. The instructions with respect to the testimony of an accomplice were needlessly prolix and repetitive, but there was no substantial error in the charge prejudicial to the rights of defendant. There was evidence, other than the testimony of the accomplice, tending to connect the defendant with the offense charged.

Judgment and order affirmed.

We concur: SEARLS, C. J.; TEMPLE, J.; THORNTON, J.; SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.

(73 Cal. 355)

PEOPLE v. DAVIS. (No. 20,327.)

(Supreme Court of California. September 10, 1887.)

1. HOMICIDE—INFORMATION—CHARGING FELONIOUS INTENT.

An information for murder charged that defendant "did willfully, feloniously, premeditatedly, and of his malice aforethought, make an assault in and upon one William Krumdick, a human being, and did then and there inflict upon the body of said William Krumdick a mortal wound, of which said mortal wound, so inflicted by said James Davis, the said William Krumdick did afterwards * * * die," etc. *Held*, that the charge was not merely that the *assault*, but also the infliction of the mortal wound, was felonious and of defendant's malice aforethought.

2. SAME—SUFFICIENCY OF INFORMATION.

Under Pen. Code Cal. §§ 950, 959, prescribing the requisites of indictments and informations, and requiring a statement of the facts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended, an information for murder is sufficient if it charges that the defendant did unlawfully, feloniously, and of his malice aforethought, kill the deceased, naming him, and stating the appropriate time and place.

3. JURY—CHALLENGE TO PANEL.

A departure from the forms prescribed by articles 3 and 4, c. 1, Code Civil Proc. Cal., with respect to the "drawing and return" of the jury, such as may deprive a defendant of an opportunity to secure a competent and impartial jury, is ground for a challenge to the panel.

In bank. Appeal from superior court, Lake county; R. J. HUDSON, Judge. *Spencer & Henning and Crawford & Tabor*, for appellant. *Geo. A. Johnson*, Atty. Gen., for respondent.

MCKINSTRY, J. Appellant was found guilty of murder of the second degree, and sentenced to imprisonment in the state prison. The information is as follows:

"*State of California against James Davis*—Information for murder.

"James Davis is accused by the district attorney of said Lake county by this information of the crime of murder, committed as follows: 'The said James Davis, on the ninth day of December, A. D. eighteen hundred and eighty-six, at the said county of Lake, and state of California, did willfully, feloniously, premeditatedly, and of his malice aforethought, make an assault in and upon one William Krumdick, a human being, and did then and there inflict upon the body of the said William Krumdick a mortal wound, of which said mortal wound, *so inflicted* by said James Davis, the said William Krumdick did afterwards, to-wit, on the thirteenth day of February, 1887, die, in the county of Lake aforesaid, contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the people of the state of California.'"

Under our statutes an indictment or information is sufficient if it charges that the defendant did unlawfully, feloniously, and of his malice aforethought, kill the deceased, naming him, and the time and appropriate place being stated. *People v. Cronin*, 34 Cal. 200; *People v. Murphy*, 39 Cal. 55. And in the cases cited it was held that the sufficiency of an indictment is not to be tested by the rules of the common law, but by the requirements of our statute. In *People v. Martin*, 47 Cal. 102, the indictment averred that the defendants "willfully, unlawfully, feloniously, and of their malice aforethought, in and upon one Valentine Eichler, did make an assault, and with an ax, in and upon the head of said Valentine Eichler, then and there feloniously, willfully, and of their malice aforethought, did strike and beat, giving to said Valentine Eichler then and there, and with the ax aforesaid * * * divers mortal wounds, of which the said Valentine Eichler instantly died," contrary, etc. The indictment was held good, notwithstanding it did not conclude with words to the effect, "and so the grand jury say that the defendants, the said Valentine Eichler, in manner and form aforesaid, feloniously, willfully, and of their malice aforethought, did kill and murder," contrary, etc. That case holds, in effect, that, although it is not necessary to state the instrument wherewith the mortal blow was given, yet if the indictment charges that the defendant inflicted the mortal blow of which deceased died, "feloniously, willfully, and of his malice aforethought," it is sufficient.

In the present case the information was demurred to on the ground that it neither charges that defendant killed the deceased willfully and of malice aforethought, nor that he inflicted the wound, of which the deceased died, willfully and of his malice aforethought. Does the information charge that the mortal blow was stricken "willfully, unlawfully, feloniously, premeditatedly, and of malice aforethought?" If so, it is sufficient, within the authority of the cases above cited.

In *State v. Owen*, 1 Murph. 458, it was said that, at the common law, where the death is occasioned by a wound, bruise, or other assault, the stroke should be expressly laid. In that case it was charged that the defendant, "in and upon one Patrick Conway, in the peace of God and the state then and there being, feloniously, willfully, and of his malice aforethought, did make an assault, and that he, the said John Owen, with a certain stick of no value, which he, said John Owen, in both his hands, then and there had and held, in and upon the head and face of him, the said Patrick Conway, then and there feloniously, willfully, and of his malice aforethought, did strike and beat, giving to the said Patrick Conway *then and there*, with the stick aforesaid, in and upon the head and face of him, the said Patrick Conway, several mortal wounds, of which said several mortal wounds the said Patrick Conway then and there instantly died." In that case it was held that the words "then and there," preceding the averment that the wounds were mortal, so connected that averment with the allegation that the blows

were struck "feloniously, willfully, and of his malice aforethought," as to make these last words applicable to the giving of the mortal wounds. And in their opinion the supreme court of North Carolina refer with approbation to certain English decisions. Thus: "Where the indictment charged that A. feloniously and of his malice aforethought assaulted B., and with a sword, etc., and *then and there* struck him, etc., (held) the first allegation 'feloniously and of his malice aforethought,' applied to the assault, ran also to the stroke to which it is essential." And so where an indictment stated that the prisoner did willfully, feloniously, and of her malice aforethought, mix poison with the intent the same should be taken and eaten by the deceased, "*and the said poison then and there* delivered to the deceased," the indictment was held sufficient by all the judges, without the words "feloniously and of her malice aforethought," immediately preceding the allegation of delivering the poison; for they considered that these words ran by the word "*and*" and the words "*then and there*," and became applicable to the delivery of the poison.

We think like reasoning is applicable to the information before us, and that the charge is not merely that the *assault*, but also the infliction of the mortal wound, was felonious and of defendant's malice aforethought. The acts constituting the alleged offense—murder—are stated "in ordinary and concise language, and in such manner as to enable a person of ordinary understanding to know what is intended." The acts charged in the information as constituting murder are "clearly and distinctly set forth in ordinary and concise language," etc. Pen. Code, §§ 950, 959. The demurrer was properly overruled, and the motion in arrest of judgment properly denied.

The defendant challenged the panel of jurors upon the ground that the panel was not selected and drawn in conformity with the requirements of articles 3 and 4, c. 1, tit. 3, of the Code of Civil Procedure; and specified certain particulars in which the provisions of the Code had been departed from. The challenge was denied by the prosecution, and the court proceeded to try the same. A strict conformity to the statutory method of selecting, returning, and drawing grand and trial jurors is practicable, and cannot be too strongly recommended. A departure from the forms prescribed with respect to the "drawing and return" of the jury, such as may deprive a defendant of an opportunity to secure a competent and impartial jury, is ground for challenge to the panel. It is difficult to lay down a rule which shall indicate in every case as the question arises what is or is not sufficient compliance with the statute; but we are satisfied that in the case before us there was no such "material departure" from the forms prescribed with respect to the drawing or return of the jury as required the court below to allow the challenge to the panel. Pen. Code, §§ 1059, 1065.

Judgment and order affirmed.

We concur: SEARLS, C. J.; TEMPLE, J.; THORNTON, J.; SHARPSTEIN, J.; PATERSON, J.; MCFARLAND, J.

(73 Cal. 360)

CERF v. REICHERT, Surveyor General. (No. 12,201.)

(Supreme Court of California. September 12, 1887.)

1. PUBLIC LANDS—PURCHASER AT EXECUTION SALE—RIGHT TO PATENT.

A. purchased a quantity of state land, paid a portion of the purchase money, and received the usual certificate of purchase. Plaintiff purchased the land at execution sale, received a sheriff's deed, paid the residue of the purchase money, but was refused a patent by the register of the land-office for failure to present the certificate of purchase, as provided by Pol. Code Cal. §§ 3518, 3519. The certificate had been assigned to another party by A. Held, that plaintiff was entitled to a patent for the land under section 2, act of March 27, 1872 (St. Cal. 1871-72, p. 587,) providing that where lands have been sold by the state, and certificates of purchase issued

upon part payment of the purchase money, and such lands have been subsequently sold under execution, and a sheriff's deed issued therefor, the register of the state land-office shall issue to the grantee named in such deed a patent for such lands upon making full payment, etc.

2. SAME—CAL. ACT MARCH 27, 1872, NOT REPEALED BY AMENDMENT OF 1874.

The act of March 27, 1872, (St. Cal. 1871-72, p. 587,) provides that where lands have been sold by the state, and certificates of purchase issued upon part payment of the purchase money, and such lands have been subsequently sold under execution, and a sheriff's deed issued therefor, the register of the land-office shall issue to the grantee named in such deed, or his assignee, a patent for such lands, upon the production and surrender of the sheriff's deed and assignment, if any, and upon making full payment, etc. Held, that as that act was passed during the session of 1872, it prevails over the provisions of the Political Code inconsistent therewith, the latter being presumed to have been enacted on the first day of the session; and hence the act of March 27, 1872, is not to be revealed by implication by the amendment of 1874 to section 3518 of the Political Code, permitting the owner of a certificate of purchase, *lost, destroyed, or beyond his control*, to make proof thereof, and to procure a duplicate certificate.

3. STATUTES—ENACTMENT—CALIFORNIA POLITICAL CODE ENACTED ON FIRST DAY OF SESSION.

The provisions of the Political Code of California are to be construed as having been passed on the first day of the session of the legislature of 1872, and the laws of that session, where inconsistent with the Code, are to prevail.

In bank. Application for writ of mandate from Sacramento county.

A. C. Bolton, for petitioner. Geo. A. Johnson, Atty. Gen., for respondent.

SEARLS, C. J. This is an application for a *mandamus* to compel the respondent, as register of the state land-office, to issue to the petitioner a patent to the W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, and lots 3 and 4 of section 16, in township 10 S., range 2 W., Mt. Diablo B. and M. An alternative writ issued, to which respondent made answer, and the cause is submitted upon an agreed statement of facts. In July, 1868, one Otis Ashley applied to purchase the land in question, paid 20 per cent. of the purchase price thereof, and, in due time, received the usual certificate of purchase. In 1883 a judgment was obtained against Ashley, under which an execution issued, pursuant to which his interest in the land above specified was sold by the sheriff, and purchased by the petitioner. There having been no redemption, Cerf, in due time, received a sheriff's deed of the premises, paid the residue of the purchase money, presented a receipt showing such payment, together with his sheriff's deed to the respondent, and demanded a deed, which was refused. After petitioner received his sheriff's deed, Ashley assigned his certificate of purchase, but to whom does not appear, and no report of such assignment had been made to the respondent when the patent was demanded.

Upon these facts the contention of the attorney general is that the respondent was not bound to deliver the patent to petitioner until the certificate of purchase, or a duplicate thereof, issued in lieu thereof, was surrendered.

The Political Code was approved March 12, 1872, and took effect January 1, 1873. Section 3519 of such Code provided that upon final payment for any tract of state land, and "upon the surrender of the certificate of purchase by the person entitled to the same," a patent should be prepared, etc. No provision was made for issuing a patent, except upon the surrender of the certificate of purchase. Section 3518 of the same Code provided that if a certificate of purchase was *lost or destroyed*, a duplicate might issue upon the proofs and notice specified therein, which duplicate should have the force and effect of the original. In *Duncan v. Gardner*, 46 Cal. 25, this court held that the certificate must be surrendered before the register could be compelled to issue a patent, and that a writ of *mandamus* would not lie without an offer to surrender the certificate. The Code made no provision for cases where the certificate, though not lost or destroyed, was yet beyond the reach or control of

the owner. Certificates of purchase, and all rights acquired thereunder, were subject to sale by deed or assignment, duly executed. Pol. Code, § 3515.

On the twenty-seventh day of March, 1872, an act was approved entitled "An act for the relief of the purchasers of state lands," by the second section of which it was provided that, where lands had been sold by the state, and certificates of purchase issued upon part payment of the purchase money, and such lands had been subsequently sold under execution, and a sheriff's deed issued therefor, the register of the state land office was directed to issue to the grantee named in such deed, or his assignee, a patent for such lands, upon the production and surrender of the sheriff's deed and assignment, if any, and upon making full payment, etc.

The provisions of the Political Code are to be construed as having been passed on the first day of the session of the legislature of 1872, and the laws of that session are, where inconsistent with the Code, to prevail. It follows that the act of March 27, 1872, (St. 1871-72, p. 587,) became a law, whether consistent with the Code or not. It applied to cases where the holder under a sheriff's deed, who could not usually present the certificate of purchase, and who, though holding the title of the original purchaser, could not procure a patent under the Code of 1872.

In 1874 section 3518 of the Political Code was amended so as to permit the owner of a certificate of purchase, *lost, destroyed, or beyond his control*, to make proof thereof as provided in the section, and to procure a duplicate certificate. The amendment extended the right to receive a duplicate to cases where, although not lost or destroyed, the certificate was *beyond the control* of the owner. The amendment does not in terms repeal the act of March 27, 1872, but respondent contends that its effect is to repeal by necessary implication that act. Repeal by implication is not favored, and it is only in cases of clear repugnancy that a repeal by implication occurs.

In *Ex parte Smith*, 40 Cal. 419, it was said: "An act of the legislature is repealed by a subsequent act when it appears from the last act that it was intended to take the place of or repeal the former, and when the two acts are so inconsistent that effect cannot be given to both. That they are repugnant in principle merely forms no reason why both may not stand." It was further said in the same case that "an exception is not repugnant to the general rule, or, if it be, it is only to the extent of the exception."

The legislature of 1872 found a class of cases to which the general law, that the certificate of purchase must be presented to the register, could not well be applied; for those cases they provided that the sheriff's deed should stand in lieu of the certificate; thus creating an exception to the general rule which specified the certificate as the only evidence upon which the patent could issue. This legislation still left a class of cases unprovided for. As the exception only applied to sheriff's deeds, a party claiming under a tax deed, or by any other title than such sheriff's deed, and who could not aver that he was the owner of the certificate, and that it was lost or destroyed, and not having such certificate in his possession, was without remedy. We may well suppose that the object of the amendment of 1874 to section 3518 was intended to apply to this class of cases. At all events, we fail to detect any repugnancy in the law which provides generally for the evidence of ownership of state lands, which shall entitle parties to patents, and at the same time creates an exception under which different evidence shall suffice in a single class of cases.

We are of opinion that the act of March 27, 1872, was not repealed by the amendment of 1874 to section 3518 of the Political Code, and that it remains in full force and vigor. The holder of the certificate of purchase is not a party to the proceeding, and his rights (if any he has) cannot be concluded by the effect of our action.

Let the writ be made peremptory, so as to require respondent to prepare a patent and certificate, as required by law, and submit the same to the governor,

and upon such patent being signed by the latter, and duly attested and sealed, to countersign and deliver the same to petitioner, Cerf.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; MCKINSTRY, J.; THORNTON, J.; PATERSON, J.; TEMPLE, J.

(73 Cal. 378)

PEOPLE v. RASCHKE. (No. 20,291.)

(*Supreme Court of California*. September 14, 1887.)

1. APPEAL—BILL OF EXCEPTIONS—SIGNING AFTER PRESCRIBED TIME—PRESUMPTION.

When a bill of exceptions is settled, but not within the time required by statute, the reasons of the court for signing it after the prescribed time will not be inquired into, but it will be presumed that they were sufficient.

2. LARCENY—FELONIOUS INTENT—INSTRUCTION.

Defendant obtained goods under contract, and with the consent of the owner, but with the felonious intent to steal them. On the trial for larceny, the instruction of the court omitted the element of *felonious intent*, charging that if the jury believed that defendant intended to convert the goods to his own use, and did so convert them, then he was guilty of larceny. There was no language used which was equivalent to felonious intent, or which conveyed the idea of stealing. *Held* error. MCKINSTRY and THORNTON, JJ., dissenting.

3. SAME—SPECIAL PROPERTY IN DEFENDANT.

Under Penal Code of California, where possession of goods is obtained under contract, and with the consent of the owner, and a *special property* in them passes to the taker, but there is a felonious intent to steal at the time possession of the goods is obtained, this is such felonious taking as constitutes larceny.

4. SAME—GRAND LARCENY—VALUE OF PROPERTY FOUND IN DEFENDANT'S POSSESSION.

Defendant, with his confederates, feloniously obtained goods amounting in value to more than the sum fixed for grand larceny. *Held*, that he was guilty of grand larceny, even though the goods found upon his premises did not amount to more than that sum.

In bank. Appeal from superior court, San Francisco; T. K. WILSON, Judge. *R. Percy Wright*, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

MCFARLAND, J. The attorney general contends that the bill of exceptions in this case cannot be considered because it was not presented and settled within the time mentioned in the Code; but as it *was* settled "we will not inquire into the reasons which may have induced the action of the judge in signing the bill of exceptions after the statutory period, but will presume they were sufficient." *People v. Sprague*, 53 Cal. 422; *People v. Lee*, 14 Cal. 510.

The information accused the appellant, jointly with one T. Furlong, of the crime of grand larceny. He was convicted as charged, and appeals from the judgment. The information charges that the appellant and said Furlong "did feloniously steal, take, and carry away," a large number of small articles, principally glass and crockery ware, and amounting in value to \$58.60, "the personal property of one I. Bernard."

Appellant's point that the verdict was against the evidence—that is, that the findings of fact which the jury must have made are not supported by the evidence—is not tenable. There was considerable evidence on all contested questions of fact.

Appellant contends also that admitting all the facts as claimed by the prosecution, such facts do not constitute larceny; and that, therefore, the verdict is against law. And these facts, which the jury had the right to find, were substantially as follows: The appellant, together with said Furlong and one Lewandowsky, by false representations as to their property, financial ability, future intentions, etc., induced said Bernard to sell and deliver to them the property alleged to have been stolen. Bernard delivered the property to them at a place on the corner of Folsom and Twenty-third streets, in San Fran-

cisco, where they proposed to open and conduct a saloon and fruit store, and took from two of them a promissory note due in 30 days; but the understanding was that the property in the goods was to remain in Bernard until the note was paid. A couple of weeks afterwards, but before the maturity of the note, Bernard, hearing that there was some trouble at the place above named, went there and found the saloon closed and the property gone. Procuring a search-warrant, he went to appellant's residence, and found some of the property secreted there—appellant having denied that he had it. There were other circumstances in proof not necessary to state here, from all of which the jury might have found a felonious intent on the part of appellant and his associates from the beginning of the transaction. The contention of appellant, however, is that, as the possession of the goods was obtained by appellant and his associates under the contract, and with the consent of their owner, and as a *special property* in them also passed, therefore there could not have been that felonious taking which is necessary to constitute larceny.

Larceny, under the present provisions of the Penal Code—so far, at least, as they are applicable to this case—is substantially the same as at common law. We have examined a great many adjudicated cases, both English and American, where the question was, what is a sufficient "taking" within the definition of the crime of larceny? At first it was, no doubt, the rule that the element of trespass was a necessary ingredient of the crime; and that, when the possession of the thing charged to have been stolen had been originally obtained by the consent of the owner, there could be no larceny. It was soon held, however, that there might be larceny where there had been, in fact, a delivery by the owner, but where there had been no change of property, nor of legal possession, and where there was a mere temporary custody given for a special purpose, or where the possession had been obtained fraudulently, with a felonious intent. 2 Russ. Crimes, (8th Amer. Ed.) 21 *et seq.* The most difficult phases of the question arise where a defendant charged with larceny has by false and fraudulent pretenses obtained possession of the property under the guise of a purchase and sale. It is clear that in such a case, where there has been a change both of the legal possession and the entire property of the owner in the thing delivered, there can be no larceny; otherwise where there has been a change of possession, but *no change of property*. Some doubt has been entertained, however, on the question whether or not there could be larceny where there had been a change of possession without a change of the general title, but accompanied by the creation of some sort of trust or special right in the fraudulent buyer; but with respect to that question the law is undoubtedly settled to be that if there was a felonious intent to steal, at the time possession of the goods was obtained, then there was a sufficient "taking" to constitute larceny. As early as the time when "East's Pleas of the Crown" was written, the learned author of that treatise, after an exhaustive review of the cases decided down to that date, declared the rule to be as follows: "*First*, that where, notwithstanding a delivery by the owner in fact, the legal possession remains exclusively in him, larceny may be committed exactly the same as if no delivery had been made; *secondly*, that where by the delivery a special property, and consequently a legal possession, apart from any felonious intent, would be transferred, if it be found that such delivery were fraudulently procured with a felonious intent to convert the property so acquired, then, also, the taking amounts to larceny." 2 East, P. C. 682. The rule thus stated was clearly the law established by the adjudicated cases reported at that time; it has not been changed, but has been recognized by subsequent cases down to the present time, and is to-day a part of the English and American common law. The principal case noticed by text writers as indicating a different rule is *Wilson v. State*, 1 Port. (Ala.) 118; but an examination of that case will show that the syllabus, which does indicate a different rule, is not justified, either by the facts of the case or the text of the

opinion of the court. The rule, as above stated, no doubt gives a somewhat dangerous power to a jury. As was said by the supreme court of Pennsylvania, the secret intention of a defendant, and the time when that intention was formed in his mind—whether before or after he obtained the property—are matters about which a jury, in many cases, can have no certain knowledge; and their power, in times of excitement, might be arbitrarily exercised to satisfy their own prejudices or public expectation. *Lewer v. Com.*, 15 Serg. & R. 99. On the other hand, Judge COWEN regretted that the rule had not been applied to cases where the absolute title to the property passed. *Ross v. People*, 5 Hill. 294. At all events we must declare the law as we find it; and if change be desirable, the change must be made by the legislature. The general authorities on the question are too numerous to cite here. Most of them are referred to in the first pages of the second volume of Russell on Crimes, (8th Amer. Ed.) and in East's Pleas of the Crown, under the head of "Larceny and Robbery." A case precisely like the one at bar has not arisen in this state to our knowledge; but this court has recognized the rule as above stated in *People v. Stone*, 16 Cal. 370; *People v. Jersey*, 18 Cal. 338; *People v. Smith*, 23 Cal. 280; and in other cases.

The point made by appellant that the goods found on his premises did not amount to more than \$50, and that, therefore, he was not guilty of grand larceny, cannot be successfully maintained. If he was guilty of larceny at all, it was because he, with his alleged confederates, in the first instance, feloniously obtained the goods from Bernard; and the goods thus obtained amounted in value to over \$50.

We have discussed the foregoing questions because they will necessarily arise if the case be tried again; for the judgment must clearly be reversed, because the instructions to the jury were erroneous in one important and material matter. The charge of the court followed the rule hereinbefore stated with one marked exception; it did not include the element of *felonious intent*. The court, referring to the specific features of the case as presented by the evidence, told the jury several times, and in various forms of language, (substantially,) that if appellant, or those whom he aided and abetted, obtained possession of the goods by false representations, and the title did not pass, and that, at the time possession was so obtained, the party obtaining possession of the goods intended to convert them to his own use, and did so convert them, then appellant was guilty of larceny. But nowhere in the instructions on that point were the jury told that the appellant, at the time possession of the goods was obtained, must have had a "felonious intent;" nor was any language used which was the equivalent of felonious intent, or which conveyed the idea of *stealing*. Of course, the intent to convert the property to his own use, in a certain sense, and perhaps in a popular sense, as understood by the jury, is present with the buyer at every sale, whether the sale be honest or fraudulent. But every fraudulent purchaser of property who intends to convert it to his own use, is not guilty of larceny. It would hardly be contended that an insolvent merchant could be convicted of that crime because he bought goods on credit when he knew that he could not, and would not, pay for them. Persons frequently gain advantages over others in trades, by false representations, without having that felonious intent to steal which actuates thieves when they commit genuine larcenies. In a case, therefore, like the one at bar, when the charge sought to be proven was in the nature of a *constructive* larceny, and where a jury might have confused mere moral delinquency with crime, it was material to the appellant's rights to have the jury instructed that the felonious intent must have existed at the time possession of the goods was obtained. For this reason the judgment must be reversed.

Judgment is reversed and cause remanded.

We concur: SEARLS, C. J.; TEMPLE, J.; PATERSON, J.

MCKINSTRY, J. I concur in the judgment, and with what is said by Mr. Justice MCFARLAND, except as to what is said with respect to the charge of the court. I agree, however, that the charge was ambiguous, and was such as may have misled and confused the minds of the jurors.

THORNTON, J. I dissent. The foregoing opinion drawn up by MCFARLAND, J., as to the charge to the jury by the trial court, directly conflicts with *People v. Smallman*, 55 Cal. 185, where the point passed on in this case is distinctly made, considered, and decided. The obtaining possession of personal property by artifice or fraud, where title does not pass to the taker, with an intent, at the time of the taking, to convert it to the taker's use, and the subsequent conversion of it to his use by the taker, is a felonious taking, and is larceny. *People v. Smallman, supra*; *U. S. v. Durkee*, 1 McAll. 196-206. I am of the opinion that the judgment should be affirmed.

(73 Cal. 394)

ROBERTS v. ELDRED. (No. 11,937.)

(Supreme Court of California. September 15, 1887.)

1. PARTNERSHIP—DISSOLUTION—ACCOUNTING—BOOKS OF ACCOUNT.

In an action for the dissolution of a partnership, and for an accounting, the evidence showed that the defendant, who had charge of the books, had made false entries, not giving plaintiff credit when he should, making improper charges against him, and improper credits in his own favor. The referee to whom the cause was referred found a balance in favor of plaintiff, and the report of the referee was adopted by the trial court; but the books of the firm showed a small balance in favor of defendant. *Held*, that the judgment of the lower court would not be disturbed on appeal, there being nothing in the record to show that the result arrived at by the referee and the court below was not correct.

2. SAME—EXPERT BOOKS—EVIDENCE.

In an action for the dissolution of a partnership, and for an accounting, when the evidence showed that the books had been so improperly kept by the defendant that it was impossible to tell anything about the condition of the affairs of the partnership from said books, the attorneys stipulated that experts should be employed by the referee to reduce the books to intelligible shape. The experts made out a set of new books from the old books. *Held*, that the expert books were properly admitted in evidence in connection with the report of the referee.

3. SAME—REAL ESTATE—FIRM PROPERTY.

Real estate purchased by partners and deeded to them in their individual names, and paid for out of the firm's moneys, assessed for taxation in the firm's name, and used in the prosecution of the firm's business, is firm property.¹

4. SAME—ITEMS ACCRUING SINCE SUIT COMMENCED.

In an action for the dissolution of a partnership, and for an accounting, the amount of a payment on a note and mortgage on firm property, made by plaintiff since the commencement of the suit, was considered in the accounting. *Held*, that the averment in the complaint that the mortgage was unpaid was a mere matter of evidence, and not to be regarded; and that it was proper to include the payment in the accounting.

5. PLEADING—MISJOINDER—WAIVER.

Where an item is set forth in the complaint, and there is no demurrer for misjoinder, it is too late to raise the objection on appeal.

6. ANSWER—VERIFICATION—PRESUMPTION.

Where the record states that the answer was verified, but does not say by whom, there being but one defendant, the court will infer that it was verified by him, unless the contrary is made to appear.

7. APPEAL—ERROR IN RELIEF—NEW TRIAL.

An error in the relief awarded by the court, upon the facts found, cannot be considered on motion for a new trial, but can only be presented upon appeal from the judgment.

Commissioners' decision. Department 2.

¹ Real property owned by a partnership, with partnership means, is to be treated in equity as personal property, for the purpose of settling the partnership affairs. *Davis v. Smith*, (Ala.) 3 South. Rep. —; *Pepper v. Thomas*, (Ky.) 4 S. W. Rep. 297, and note; *Sherley v. Thomasson*, (Ky.) 1 S. W. Rep. 530, and note.

Appeal from superior court, San Joaquin county; A. VAN R. PATERSON, Judge.

J. C. Byers and L. W. Elliott, for appellant. *J. A. Louttit*, (*S. D. Woods and A. L. Levinsky*, of counsel,) for respondent.

HAYNE, C. Action for dissolution of copartnership and accounting. The case was referred to the court commissioner to report the state of the accounts. After taking testimony the commissioner made his report, which consisted principally of matters of mere evidence, and showed that the balance coming to plaintiff was \$8,610.35. There was then a trial before the court. The court filed findings of its own, which referred to and adopted the report of the commissioner. Judgment was thereupon entered for dissolution of the copartnership, and the sale of the firm property, and the application of the proceeds to the payment of certain specified debts of the firm, and of the sum found due to the plaintiff, viz., \$8,610.35; and that judgment be docketed against defendant for any balance which might remain due to the plaintiff after such application of proceeds. The decree also declared these sums to be secured by lien on the firm property. The record is tangled and confused, and almost everything that occurred is alleged as error. We deem it sufficient to notice the following points:

1. It is said that the evidence does not show that so large a sum as \$8,610.35 was due to the plaintiff. But we cannot say from the record that it was not. The record shows that the conduct of the defendant was most reprehensible. For two years before suit "he didn't do anything but spend his time at Haines & Snyder's stable across the street." He had charge of the books, but kept them in a grossly improper manner, omitting to make entry of sums paid in by plaintiff, and making improper charges against plaintiff, and improper credits in his own favor. These books, although introduced in evidence, are very naturally not in the record. The fact that the "expert books" showed a balance in favor of plaintiff of only \$100, which is so much insisted on by appellant, does not seem to us to be very material. These expert books were merely an intelligible presentation of what was in the books of the firm, which were grossly incorrect and insufficient. In response to a question of the court as to whether everything was in the new books that was in the old books, the expert answered: "No, sir; our report will tell you they are not all entered. We did not claim to take the position of referee; we left that out very carefully. We posted every entry of cash, and all the entries that we found in the cash-books, into the new books, and made up a complete new set. We opened an account with every one that Mr. Eldred's books showed had paid in or received cash, and made no changes in the account, except some that were made under the testimony, and as directed by Mr. Eldred, the defendant, who was with us a good deal." Eldred's books, however, were incomplete. "He kept no ledger account to amount to anything, no account of sales or purchases, stock, bills receivable, profit and loss—nothing, in fact, but cash account, such as it was." Many of the accounts which he did keep were false, and credit was not given to plaintiff in cases where it ought to have been. It will not do for defendant to take refuge behind such books as these. If the result which the referee and the court arrived at was not correct, the record should have made the error appear. The only thing which is clearly apparent from this record, besides the misconduct of the defendant, is hopeless confusion in the accounts. It is eminently a case where the action of the court below should not be disturbed.

2. There was no error in admitting what are called the expert books. As above stated, the defendant failed in his duty in the matter of keeping accounts. "It was impossible to tell anything about the condition of the affairs according to the books of the firm as kept by Mr. Eldred." In view of this condition of affairs, the attorneys stipulated that experts should be employed

by the referee to reduce the accounts to some intelligible shape. These experts made out a set of books from the old books, as stated above, and we think that under the circumstances the court properly admitted them in connection with the report of the referee to enable the judge to comprehend the state of the accounts.

3. It is stated with confidence that there was no evidence that the real property ordered to be sold was partnership property. But it was bought while the parties were partners. The deed was made to "E. R. Roberts and H. P. Eldred." The defendant himself testifies that part of the price was a note "we gave him for part of the purchase price;" that plaintiff borrowed money on his own note for another portion of the price; that the firm paid this note, and that "I gave credit in the cash-book for it as a disbursement of the firm;" that "from the time we purchased this lot up to this date it has been used in the prosecution of the business of said firm as our shop and place of business;" that he caused the property to be assessed as firm property, and gave the assessor sworn statements to that effect; that he paid the taxes and credited himself on the books of the firm with such payments. And the plaintiff testified that "we bought the real estate in the complaint named as a firm, and for the firm, and it has always been used by the firm in its business." We think this evidence justified the court in treating it as firm property.

4. It is urged that the amount of a payment of a note and mortgage on the above real property, paid by plaintiff since the commencement of the action, should not have been considered in the accounting. But it was proper to include this payment. A court of equity will not make an incomplete settlement of accounts, but will go on and adjust the whole matter, even if it involves items accruing after the commencement of the suit. The evidence of this payment by plaintiff does not contradict any material allegation of the complaint. The averment that the mortgage was unpaid was true at the time it was made, and, besides, was a matter of mere evidence, and therefore was not to be regarded. It amounted merely to giving one item of the indebtedness. If it was proper to give one item of the indebtedness, it would be to give any other; and if it be proper to put in the debit side, it would be to put in the credit side; and in this way a complaint for an accounting would contain all the accounts.

5. When the defendant bought into the firm, he agreed to pay plaintiff \$1,796, which has not been paid; and this sum is part of the claim of plaintiff in his complaint. It is argued for the defendant that this indebtedness accrued before the formation of the partnership, and therefore was not properly a part of the accounting. Assuming this to be so, the claim was set forth in the complaint, and there was no demurrer for misjoinder. It is now too late to raise the objection.

6. There was no error in admitting the answer of the defendant, Eldred, in the attachment suit. The record states that this answer was verified, but does not say by whom. The natural inference is that the verification was by the defendant in the case, there being no other party defendant. If this was not the fact, it should have been made to appear. Compare *Clark v. Sawyer*, 48 Cal. 141, 142. Numerous other assignments of error in the admission of evidence are made, but we are unable to see that there was any error prejudicial to the defendant.

7. It is contended that the court went too far in decreeing that the sum due from defendant for his interest in the firm should be a lien on the partnership property, as it was not a matter between them as partners. But assuming this to be so, it is not an error which can be considered on motion for new trial. It is simply error in the relief awarded by the court upon the facts found, and hence can be presented only on appeal from the judgment. *Jenkins v. Frink*, 30 Cal. 595, 596; *Shepard v. McNeil*, 38 Cal. 74. In this case the appeal taken from the judgment has been dismissed.

We therefore advise that the order denying a new trial be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion, the order denying a new trial is affirmed.

(73 Cal. 385)

ROSE v. NEVADA & G. V. W. & L. CO. (No. 11,715.)

(Supreme Court of California. September 15, 1887.)

PUBLIC LANDS—ADDITIONAL ENTRY BY SOLDIERS AND SAILORS—OCCUPANCY—ALIENATION.

Rev. St. U. S. § 2306, which provides for an allowance of an additional entry of land to honorably discharged soldiers and sailors, is entirely independent of other sections of chapter 5, among which it is placed, and the provisions of other sections of that chapter respecting residence upon land entered are inapplicable to additional entries under section 2306; and one who has patented land under this section has the right to alien the land without having entered upon it.

Department 1. Appeal from superior court, Nevada county; F. D. SOWARD, Judge, of Sierra county, presiding.

Cross & Simonds, and *Gaylord & Searls*, for appellant. *Chas. W. Kitts* and *A. J. Ridge*, for respondent.

PATERSON, J. The patent to plaintiff's grantor was issued under the provisions of section 2306, Rev. St. U. S. This section was a part of the act of congress passed April 4, 1872, and is entirely independent of other sections of chapter 5, among which it is placed. Section 5596, Rev. St. U. S. Unlike our Codes, the Revised Statutes of the United States are not to be read as one act; it being expressly provided that "the arrangement and classification of the several sections of the revision have been made for the purpose of a more convenient and orderly arrangement of the same, and, therefore, no inference or presumption of a legislative construction is to be drawn by reason of the title under which any particular section is placed." Section 5600, Rev. St. U. S. Under the act referred to as amended in June, 1872, the additional entry allowed to honorably discharged soldiers and sailors was confined to lands contiguous to the tract embraced in the first entry. 17 St. at Large, 333. A year later this restriction was removed, and the section as originally passed was restored. The natural and logical conclusion to be drawn from these acts is that occupancy on the part of the claimant is not required. The government certainly did not intend that the beneficiary should abandon his original homestead, which he has cultivated and improved, in order to secure the additional number of acres which he is authorized by the statute to locate at another place. The provisions of other sections of chapter 5, respecting residences upon the land entered, are, therefore, inapplicable to the additional homestead entries under section 2306. *Knight v. Leary*, 54 Wis. 459, 11 N. W. Rep. 600. Assuming the irrevocable power of attorney from Gano and wife to Talbot to be as claimed by appellant, an assignment of the applicant's right to the land, and of Gano's right to his additional homestead, still we find nothing in the statutes referred to which will authorize us in holding such power of attorney to be null and void. As stated before, section 2306 is independent of the other provisions of chapter 5, and in the absence of an express prohibition against an alienation of the property by the claimant, after the issuance of a certificate from the general land-office, to locate in person or by agent a certain number of acres, we cannot say that the right so to alienate does not exist. It is a right which need not in terms be granted by the sovereign authority, for it exists if not expressly prohibited, or opposed to public policy. The location and entry were made in the name of Gano, the beneficiary of the act. Congress has not said that the right to sell should not exist before actual

entry, nor has it required any occupation, consideration, or duty of any kind, as a condition precedent. In all cases where it has been the intention of congress to prevent alienation by the beneficiary, such intention has been clearly expressed. Thus, the act of congress of 1854, under which the Sioux half-breed scrip was issued, provided expressly that no transfer or conveyance of the certificate should be valid. *Myers v. Croft*, 13 Wall. 291; *Mullen v. Wine*, 26 Fed. Rep. 206.

The commissioner of the general land-office has authority to make such regulations respecting the disposal of the public lands as he may deem proper, and such regulations, when not repugnant to the acts of congress, have the force and effect of laws. *Poppe v. Athearn*, 42 Cal. 607. The right of claimants to enter additional lands under section 2306, through attorneys and assignees, has been the subject of much discussion among the officers of the land department of the government. In a letter to the secretary of the interior, dated February 17, 1877, the commissioner called attention to the injustice and hardship of rules which had been formulated and adopted by the department regulating entries under section 2306. Acting upon the suggestions therein contained, Secretary Chandler directed a modification of his former decision so as to allow entries to be made by agents and assignees under certain restrictions. The officers of the land department received Gano's entry under his power of attorney to Talbot, considered the evidence respecting his claim to the land described in the complaint, and upon their decision the patent of the government has been issued to him in his name. There is nothing in the regulations under which they acted repugnant to the acts of congress, and their action is final and conclusive.

We have considered this case upon its merits, disregarding the question of the sufficiency of appellant's assignments of error, or his right to attack the validity of the patent without showing that his claim is connected with the paramount source of title.

The judgment and order are affirmed.

We concur: TEMPLE, J.; MCKINSTRY, J.

(73 Cal. 389)

GOLDEN STATE & MINERS' IRON-WORKS v. DAVIDSON and another.
(No. 11,608.)

(Supreme Court of California. September 15, 1887.)

1. ACTION AGAINST PARTNERSHIP—PARTNERS NOT SERVED—MORTGAGE—PRIORITY BEFORE JUDGMENT.

Two of several mining partners mortgaged their interest in the mining property to plaintiff, and subsequently defendants brought an action against the partnership for supplies furnished. In this action two of the partners were not served with summons, and did not appear. The action was not brought under Code Civil Proc. Cal. § 388, which provides for the suing of associates transacting business under a common name, by such name; service upon one being service upon all, and the judgment binding the joint property of all the associates. *Held*, that under Code Civil Proc. Cal. § 414, providing that "where an action is against two or more defendants, jointly or severally liable, and the summons is served on one or more, but not on all, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants," the partners not served were not bound by the judgment, and, the partners who were bound having mortgaged their interest to plaintiff before the judgment was obtained by defendants, such mortgage was a prior lien upon the property.

2. SAME—PRIORITY OF FIRM CREDITORS—REALTY—RULE OF EQUITY.

Defendants held a judgment against the joint property of a partnership, and plaintiff was a mortgagee of the interest of two of the partners; the mortgage having been executed before defendants obtained their judgment. Having foreclosed the mortgage, plaintiff brought an action of ejectment against defendants, who had purchased the property at the execution sale under their judgment. *Held*, that

the rule as to the priority of firm creditors, so far as real property is concerned, is a rule of equity, and not of law, and could not avail defendants in the action at law where the equitable right was not set up.

Commissioners' decision. Department 1.

Appeal from superior court, Calaveras county; C. V. GOTTSCHALK, Judge. *Gray & Haven*, for appellant. A. C. Adams, W. K. Boucher, and A. L. Rhodes, for respondent.

* Ejectment for an undivided seven-tenths of a mine.

HAYNE, C. On November 13, 1880, and subsequently, Richard F. Knox, Joseph Osborne, W. T. Robinson, S. P. Ely, and Phillip V. R. Ely were mining partners engaged in working the Esperance mine, the legal title to which stood as follows: Eight-tenths in Knox and Osborne, (one of these eight-tenths being held in trust for Robinson) three-twentieths in S. P. Ely, and one-twentieth in Phillip V. R. Ely. On December 13, 1880, Knox and Osborne mortgaged their seven-tenths to the plaintiff. It does not appear whether or not this mortgage was recorded. On October 10, 1882, the property as mortgaged was sold under a decree of foreclosure. Although the defendants were parties to the suit, the decree reserved the question as to the priority of their judgment mentioned below. The plaintiff became the purchaser at the sale, and in due time obtained the sheriff's deed. The defendants' title is as follows: Between February 28, 1881, and September 12th of the same year, the partnership became indebted to the defendants for supplies furnished and money paid in and about the working of the mine; and on September 23, 1881, the defendants commenced an action at law against the five partners to recover what was due on such indebtedness. No service of summons was had upon the two Elys, who were non-residents, and they did not appear. On December 13, 1881, a judgment was rendered against all the partners, by which it was ordered, adjudged, and decreed that the plaintiffs in said action (defendants herein) "do have and recover of and from the said defendants, Richard F. Knox, Joseph Osborne, W. T. Robinson, Samuel P. Ely, and Phillip V. R. Ely, partners and associates doing business under the firm name of Knox & Osborne, the sum of \$5,035.17, in gold coin of the United States, together with plaintiffs' costs and disbursements amounting to the sum of \$72." The judgment contained the following provision: "And it is further ordered and adjudged that the said plaintiffs do have execution against the separate property of the defendants, Richard F. Knox, Joseph Osborne, and W. T. Robinson, or either of them, *the parties served with process in this action*, as well as against the joint property of all the said defendants, partners, and associates, as aforesaid."

An appeal was taken from this judgment, but no stay of execution was had, and pending the appeal execution was issued, and on February 27, 1882, the property was sold to the defendants, who, after the usual period, received the sheriff's deed. Upon the appeal it was held that the action was not brought under section 388 of the Code of Civil Procedure, in relation to persons transacting business under a common name; and that section 414 of the Code did not authorize a judgment against the joint property; and that inasmuch as the two Elys had not been served with process, and had not appeared, the judgment should be modified by striking out their names. The court did not, however, order the clause above quoted, as to the joint property, to be stricken out. *Davidson v. Knox*, 67 Cal. 143, 7 Pac. Rep. 413. It will be perceived, therefore, that since the title acquired under the foreclosure proceedings related back to the date of the mortgage (*Bank v. Hodgdon*, 64 Cal. 98) the plaintiffs herein had the elder title, but only as to the interests of two of the partners; while the defendants had the junior title, although it purported to include the interests of all the partners, and was derived through a debt against the firm.

The court below gave judgment for the defendants, upon the theory that partnership creditors have a priority against creditors of individual partners. We think this was erroneous, for two reasons:

1. Even if it be assumed in favor of respondents that the judgment in *Davidson v. Knox* could be enforced against the joint property of the partners, it does not follow that the purchasers at an execution sale under this judgment acquired the legal title as against the appellant's mortgage. Conceding the rule as to the priority of firm creditors to its fullest extent, it is, at all events so far as real property is concerned, a rule of equity and not of law. See *Duryea v. Burt*, 28 Cal. 580. The priority is worked out through the lien of the partners. *Jones v. Parsons*, 25 Cal. 104, 105; *Story*, Partn. § 97. And if it be true that the purchaser of a specific tract at a sheriff's sale under a judgment at law is subrogated to this lien, it must be asserted by appropriate proceedings in equity, and cannot avail him in an action at law where the equitable rights are not set up. See *Ross v. Heintzen*, 36 Cal. 320; *McCauley v. Fulton*, 44 Cal. 362; and compare *Allen v. Phelps*, 4 Cal. 258, 259.

2. But the judgment in *Davidson v. Knox* was not against all the partners, nor could it be enforced against their joint property. This was held upon the appeal in that case, (67 Cal. 143, 7 Pac. Rep. 413.) It is true that the execution sale took place before this decision was rendered, and was under the judgment before it was modified. But the case is authority for the proposition that the action was not brought under section 388 of the Code of Civil Procedure. And if that be so, there was no way in which the joint or the several interest of the Elys could be affected, without service of summons upon them, or their appearance. Hence the purchaser at the execution sale did not acquire their interest in the partnership property. *Wiseman v. McNulty*, 25 Cal. 230. Leaving out their interests, and the interest of Robinson, (because it was merely equitable, and cannot be considered in ejectment,) it is manifest that the respondents can claim to have acquired only the interest of Knox and Osborne, which passed under a prior lien to the appellants.

We think that upon the evidence the court below should have rendered judgment in favor of the plaintiff for seven-tenths of the property. And we therefore advise that the judgment and order appealed from be reversed, and cause remanded for a new trial.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

(73 Cal. 411)

CORBIN v. WACHHORST. (No. 12,103.)

(Supreme Court of California. September 19, 1887.)

NEGOTIABLE INSTRUMENTS—CONSIDERATIONS—MONEY LOANED FOR GAMBLING PURPOSES.

A promissory note given to plaintiff for money loaned to be used in throwing dice can be enforced, where it appears that plaintiff loaned the money in good faith to the defendant, and it does not appear that plaintiff won any of the consideration of the note, or defendant lost any of it, in the game, or that there was any fraud or conspiracy to cheat defendant or induce him to play.

Commissioners' decision. Department 1.

Appeal from superior court, Sacramento county; T. B. McFARLAND, Judge. W. A. Anderson and Grove L. Johnson, for appellant. Lincoln & White, for respondent.

FOOTE, C. Plaintiff brought an action against the defendant founded upon the following promissory note:

"\$350.

SACRAMENTO, January 30, 1886.

"One day after date, for value received, I promise to pay to Jas. H. Corbin, or order, three hundred and fifty dollars.
H. WACHHORST."

From the judgment rendered against him, and an order denying a new trial of the action, the latter has appealed. The grounds of his defense as set up in the action were: (1) That about the time he executed the note he was intoxicated, and that he was further plied with intoxicating liquors by the plaintiff, and fraudulently induced to sign the note without knowing what he did, and without any consideration whatever. (2) That the note was given for a consideration, if any, which is contrary to the policy of the law and to good morals in this: "That on said thirtieth day of January, 1886, the defendant visited the saloon of the plaintiff, and while in a state of intoxication was further plied with intoxicating liquors, and then induced by plaintiff to engage in a gambling dice game with plaintiff, and while in a condition not to know what he was doing, fraudulently, and with the intent to deprive defendant of his money, was induced by plaintiff to wager large sums of money upon a throw of dice; upon which defendant is informed by plaintiff that he lost a large sum of money with plaintiff, and that for these alleged losses plaintiff, taking advantage of the incapacitated condition of the defendant, fraudulently obtained his signature to the alleged instrument. That there was no other consideration for said alleged promissory note, and that the same was for money alleged to have been lost by defendant while playing at dice with plaintiff."

Upon evidence which is sufficient to sustain them, the findings of the court upon the issues thus made were: That on the day of the date of the note sued on, the defendant made and delivered it to the plaintiff. That the plaintiff is still the owner and holder of the note, and that no part thereof has been paid, although the defendant had been requested to pay it before suit brought. That "on the evening of the said thirtieth of January, between 5 and 6 o'clock, defendant entered the saloon of plaintiff, in Sacramento city, and requested plaintiff to engage with him in the game of throwing dice. Plaintiff consented, and after they had played a short time, a third person came into the saloon and joined with them in the game; subsequently a fourth person also played with them. The game was played for money, and also occasionally for drinks, and was continued until about 10 o'clock P. M. Plaintiff did not play all the time; he would quit sometimes to attend to matters of business about the saloon, but he played in the game most of the time. During the evening defendant borrowed money a number of times from plaintiff. When a sum was borrowed the amount was written generally by defendant himself on a card, and when another loan was made the last card was torn up, and the whole amount written upon a new one. About, or a little after, 9 o'clock the whole amount thus borrowed was \$350. Plaintiff then took a blank promissory note from a book containing numerous blanks of that kind, and, after dating it, wrote in the sum of \$350 and handed it to defendant, telling him that it was a note for \$350, the amount which he owed him, and asked him to sign it. Defendant took the note, looked at it a few minutes, and then, signed it and handed it to plaintiff. No part of the consideration of the note was money won by plaintiff from defendant; it was all for money loaned by plaintiff to defendant, which plaintiff took out of his money drawer and his safe. Plaintiff himself was not winner at the game, and of the players it does not appear who was winner or loser when the game ended, about 10 o'clock. There is no evidence of any fraud, or any conspiracy to cheat defendant or to induce him to play. The allegation of the answer, that at the time the note was signed defendant was 'in a state of intoxication which incapacitated him from entering into the alleged or any contract whatever,' is not sustained by the evidence, and I therefore find it to be not true. I find that none of the averments of subdivisions 2, 3, and 4 are true."

The game in which these parties were engaged was not one forbidden by any statute of this state. Admitting that the plaintiff knew the money which the defendant borrowed from him was to be used afterwards in the game of dice-throwing, he did not loan it with a view to have it used in a game declared by law to be unlawful, and was entitled to recover on a contract the consideration of which was money loaned. It is claimed that the Civil Code provides that a contract is not lawful when it is "contrary to good morals." Conceding, without deciding, that a note given for money lost at dice-throwing is a contract based upon "an immoral consideration," and still the defendant was liable on the note, for he borrowed money from the plaintiff, and gave the note therefor, and if the defendant used it in playing at dice-throwing as he did, and the plaintiff knew it would be so used when he loaned it, and the plaintiff, as he did, loaned the money in good faith to the defendant, who knew what he was doing, and the plaintiff is not shown to have won the money for which the note was given, nor the defendant to have lost it in the game, the latter is liable on the note. *Poorman v. Mills*, 39 Cal. 345. For *non constat* from the findings but what the money loaned in good faith to a man competent to contract, may be still in his possession, or have been used for some other purpose to his advantage.

There is no prejudicial error shown by the record, and the judgment and order should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(73 Cal. 399)

GOULD v. HUNTLEY. (No. 11,647.)

(Supreme Court of California. September 15, 1887.)

1. FRAUDULENT CONVEYANCES—SALE OF PERSONAL PROPERTY—CHANGE OF POSSESSION.

In an action to recover a mare levied on by defendant under an execution against G. and H., it appeared that plaintiff bought the mare with a ranch of G., his father, taking immediate possession and management of the ranch. G. then went east, where he remained six months, and then returned, and lived with plaintiff on the ranch pursuant to a stipulation in the conveyance. Previous to the sale plaintiff had cared for the mare, and used her in G.'s employ. After the sale G. occasionally drove her, and she was being led by him when levied on. *Held*, that there was sufficient evidence of an immediate delivery, and an actual and continued change of possession, to sustain a judgment for plaintiff, under Civil Code Cal. § 3440, relating to fraudulent conveyances.¹

2. SAME.

In an action to recover a header levied on by defendant under execution against G. and H., the evidence showed that plaintiff and H. bought the header in partnership, and, after a few days, H. transferred his interest to plaintiff, on plaintiff's agreement to pay their vendors for the header, which plaintiff did. Plaintiff afterwards had exclusive use of the header, and it was on his ranch when levied on. H. was on the ranch part of the time, but owned a place where he was most of the time. *Held*, that there was sufficient evidence of a sale, accompanied by an immediate delivery, and an actual and continued change of possession, within the statute relating to fraudulent conveyances. Civil Code Cal. § 3440.¹

Commissioners' decision. Department 2.

Appeal from superior court, Placer county; B. F. MYRES, Judge.

J. E. Prevett and Freeman, Johnson & Bates, for appellant. *Taylor & Holl*, for respondent.

¹Respecting the change of possession sufficient to overcome the presumption of fraud, as against the creditors of the vendor, and when that is question for the jury, see *Stull v. Weigle*, (Pa.) 8 Atl. Rep. 578; *McClain v. Buck*, (Cal.) 14 Pac. Rep. 876; *Hogan v. Cowell*, (Cal.) 14 Pac. Rep. 780; *Dodge v. Jones*, (Mont.) 14 Pac. Rep. 707; *Young v. Poole*, (Cal.) 13 Pac. Rep. 492; *Cook v. Rochford*, (Cal.) 12 Pac. Rep. 568, and note.

BELCHER, C. C. This is an action to recover the possession or value of one bay mare and one header, which were levied upon and sold by the defendant, as sheriff of the county of Placer, under an execution duly issued upon a judgment against Joseph G. Gould and C. A. Hines, and it is stipulated that the only question involved is as to the sufficiency of the plaintiff's possession of the mare and header, to enable him to hold them as against the creditors of his vendors. It appears from the record that Joseph G. Gould was the father of plaintiff, and owned a ranch in Placer county, known as the "Gould Place." Concerning the ranch and mare the plaintiff testified as follows: "The 'Gould Place' spoken of was my father's ranch up to September, 1884. At that time my father conveyed this ranch to me, and I immediately went into possession of the entire ranch, buildings and everything, and from that time to the present I have been in possession of the same, and have conducted the business of farming there. Immediately after my father conveyed the ranch to me he went east and remained until March, 1885. When he came back he came to the ranch, and since then he has lived in the same house with me, because he reserved this right in the conveyance to me. He is seventy-nine years old. I bought the mare the same time the ranch was conveyed to me, and I have ever since had exclusive possession of the ranch and mare, except that my father lived in the house with me and drove the mare several times to Sacramento. * * * I bought the mare from my father in September, 1884. I had used her in my father's employ for over six months before the purchase, and had principally cared for her during that time. I kept her both before and after the sale on the Gould place. * * * My father has not exercised any authority or control over the mare since I bought her, or over anything on the ranch since he conveyed it to me, except as above stated."

Concerning the header the plaintiff testified:

"C. A. Hines and I bought the header in the spring of 1884, and also the beds, and brought them into the field and ran them in partnership for a few days; then he turned his interest in them over to me on condition that I would pay our vendors for them, which I afterwards did. Hines did not afterwards use the header. * * * After Hines let me have his interest in the header and beds, I ran the machine myself during the balance of the season, cutting grain whenever I could get a job; Hines had nothing more to do with it, and after the ranch was conveyed to me by my father, I took the header and beds home and put them under shelter, where they remained until they were attached. Hines, who is married to my sister, has been on the ranch some of the time since I owned it, but not continuously. He has a place of his own, 50 miles away, where he has been most of the time." The above is substantially all the testimony there is in the case, except that a deputy-sheriff was called as a witness for the defendant, and, having stated that he levied the execution on the twenty-fifth of March, 1885, said: "At the time I found her [the mare] and levied upon her, J. G. Gould had her by the halter. He was leading her for the purpose of putting her to a horse. C. E. Gould was not present." Upon this testimony the court below gave judgment in favor of plaintiff, and denied the defendant's motion for a new trial.

It is now claimed for the appellant that the plaintiff's possession of the property in question was not such as is required by section 3440 of the Civil Code, and that the court therefore erred in giving the plaintiff judgment. So far as it relates to the header, we are satisfied that the judgment was right, and the motion properly denied. There can be no question that when Hines sold to the plaintiff his interest in the header, the sale was accompanied by an immediate delivery, and followed by an actual and continued change of possession.

And, so far as it relates to the mare, we think the judgment must also be sustained. The ranch was conveyed to plaintiff in September, and he took and held the actual and exclusive possession of it for six months. The mare

was sold to the plaintiff at the same time, and, so far as we can see, his possession of her during the whole six months was open and unequivocal, carrying with it the usual marks and indications of ownership. It was such as to give evidence to the world of the claims of the new owner. It was an open, visible change manifested by such outward signs as rendered it evident that the possession of the vendor had wholly ceased. *Stevens v. Irwin*, 15 Cal. 506; *Cahoon v. Marshall*, 25 Cal. 201. And it was not necessary that the plaintiff's possession of the mare be continued indefinitely. It was said by REDFIELD, J., in delivering the opinion of the supreme court of Vermont: in *Dewey v. Thrall*, 13 Vt. 284: "After a sale of personal chattels has become perfected by such a visible, notorious, and continued change of possession, that the creditors of the vendor may be presumed to have notice of it, the vendee may lend or let, or employ the vendor to sell, or perform any other service about the thing with the same safety he may a stranger." So in *Stevens v. Irwin*, *supra*, this court said: "This possession must be continuous—not taken to be surrendered back again—not formal, but substantial. But it need not, necessarily, continue indefinitely, when it is *bona fide* and openly taken, and is kept for such a length of time as to give general advertisement to the *status* of the property, and the claim to it by the vendee." See, also, *Godchaux v. Mulford*, 26 Cal. 316. In the light of these decisions we cannot say that the plaintiff's possession of the mare was not sufficient, the court below having found that it was, and we think, therefore, that the judgment and order should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(2 Ariz. 272)

THE TOMBSTONE TOWN-SITE CASES.

REILLY v. BLACKMORE. SAME v. BERRY. MOUNTAIN MAID MIN. CO. v. REILLY.

(Supreme Court of Arizona. September 1, 1887.)

1. PUBLIC LANDS—TOWN-SITE—MINING CLAIM—CONFLICTING PATENTS.
Where a patent to a town-site and a patent to a mining claim conflict, that one will be sustained which first vests the right.
2. SAME.
A town-site patent does not vest a right in lands known at the time to be mineral lands.
3. SAME.
A town-site patent will not be defeated by discovery of mineral and location of mineral lands as such after the town-site patent.
4. SAME.
The right to mineral lands vests at the time of a valid location. A location void for uncertainty prior to a town-site afterwards amended and made the basis of a patent will not defeat a town-site patent prior to such amendment.
5. MINING CLAIM—LOCATION—EFFECT OF PATENT.
The granting of a patent is *res adjudicata* that lands were mineral lands at the time of location, and known to be such.
6. SAME—EVIDENCE.
A location uncertain as to lands claimed, unaided by proof of monuments, possession, or working, cannot be evidence that lands were then known to be mineral lands.

(Syllabus by the Court.)

Appeal from district court, Cochise county; BARNES, Judge.

Thos. Mitchell and Goodrich & Smith, for appellees. *Geo. G. Berry*, for appellants.

BARNES, J. The question presented in these cases is between a title derived from the Tombstone town-site patent, and one derived from a patent to the Mountain Maid Mining Company. The date of entry of the town-site, is April 9, 1880. The mining patent was dated August 15, 1882. February 25, 1879, there was filed a notice of location of the Mountain Maid mine. This notice is so uncertain that the land claimed cannot be identified. It is aided by no evidence whatever. November 20, 1880, the record was amended, and on August 15, 1882, a patent was issued to the land described in the amendment. This amendment was after the entry of the town-site. The mining title cannot be superior to the town-site title, unless the location, earlier than the town-site, be held to have fixed the title. A location of a mining claim, to fix the title as against after acquired rights by entry and patent, should be sufficiently clear to designate the ground claimed, and should be marked on the ground by monuments, showing the extent of possession. If the location on its face be uncertain, the uncertainty could be aided by evidence of the possession, or of monuments; but a location notice, on its face uncertain and without evidence of what land was occupied, cannot be evidence for any purpose. An amendment afterwards made, describing different land or making certain what was uncertain, cannot revert back to the original defective location. The entry of the town-site intervening after the first location and before the amendment must be prior in right as it is prior in time. If this were not so, it would open the door to great wrongs. A person might locate a mining claim, and then, by doing \$100 worth of work annually, lie still and permit title to be acquired from a town-site, buildings erected, thousands of dollars spent, and then apply for a patent, amend his record, and swing his claim around, so as to include the most valuable improvements, and hold the same under his mining claim; and there is no limit to the time he might wait. It would be monstrous to give that construction to the mining act of 1872 and the town-site act as would make such a result possible. A town-site entry upon land not known to be mineral land at the time of entry is prior to any after acquired mining claim. *Deffebach v. Hawke*, 115 U. S. 392; 6 Sup. Ct. Rep. 95.

We have reviewed with care the *Butte City Smoke-House Lode Cases*, 12 Pac. Rep. 858, and *King v. Thomas*, Id. 865. We concur with these cases in holding that all mines, mining claims, and possessions held under existing laws are excluded from the terms of a town-site patent; that mining claims, located before the town-site entry, are paramount thereto. We also go so far as to say that lands upon which is any mine of gold, silver, cinnabar, or copper, or known to be such mineral lands, at the time of a town-site entry, are not included in such town-site entry. If those cases are to be construed as holding that if minerals be discovered in lands conveyed by a town-site patent, after the patent, and located as such, that such after-discovery and location become paramount to a town-site patent, and take such lands out from the operation of such patent, we do not concur with them. The question does not arise in the *Smoke-House Cases*. In the *King Case* there is some doubt as to whether this question is passed upon. The court in that case properly held that whether the lands were as a matter of fact mineral lands is *res adjudicata* by the patent to the mining claim. They held that the Silver King was a valid mining claim at the time of the issuing of the town-site patent. This view of these cases will meet with approbation, and clearly states the law as we understand it. The case before us, however, seeks to apply the principle to an invalid mining claim, prior to the town-site patent, and without proof that any mine existed prior to the town-site entry, or that the lands were known to contain mineral veins or deposits, or that there was any possession under existing laws. This is a very different question. To hold that every purchaser of a lot under a town-site patent, who erects valuable improvements thereon, ever after rests upon the precarious chance of having his title

and possession defeated by the discovery of minerals sufficient in amount to sustain a mining claim, is further than we can go. The supreme court in the *Deffebach Case*, *supra*, seem to have had this in mind, and to have recoiled from it, and they go no further than to hold "that a title to known mineral land cannot be acquired under the town-site laws."

We therefore hold that the Tombstone town-site patent is paramount to the patent to the Mountain Maid mine. The judgments are affirmed.

WRIGHT, C. J., concurs.

(2 Ariz. 288)

O'DOHERTY v. TOOLE.

(*Supreme Court of Arizona*. September 25, 1887.)

1. FRAUDULENT CONVEYANCES—BETWEEN HUSBAND AND WIFE.

Real estate, conveyed by a husband to his wife, where the deed has not been recorded, and where husband openly has charge of and use of property conveyed, where it is listed for taxation in his name, and he pays taxes on the same, may be reached to satisfy a judgment against the husband.

2. LIMITATION OF ACTIONS—CLAIMS AGAINST AN ESTATE.

The statute barring all claims against an estate, if not presented within 10 months, does not bar action to subject said property to a judgment.

3. EXECUTORS AND ADMINISTRATORS—ACTION AGAINST ESTATE—PARTIES.

The administrator is not a necessary party to such an action.

(*Syllabus by the Court*.)

Appeal from county court of Pima; GREGG, County Judge.

J. A. Anderson, for appellant. *Hereford & Lovell*, for respondent.

WRIGHT, C. J. The main questions raised by the record in this case are: (1) Had the appellant and creditor, under the general law, the right to pursue the property fraudulently conveyed by the debtor, in the hands of the vendee, without joining the executor of the deceased debtor? (2) If so, has the law of this territory contravened that right, or by it is the debt barred and the right lost, because the claim was not presented for allowance in the probate court within the 10 months allowed by said law?

John O'Doherty, the appellant and creditor, had recovered judgment against James H. Toole, the husband of respondent, Louisa M. Toole, and one Hudson, during the life-time of said Toole, in the district court of Pima county, for about \$3,800. The exact date of the judgment was May 29, 1884: the appellant having been a creditor of the said Toole some months prior to the date of the judgment. On the first day of November, 1882, Toole executed a deed to the respondent, his wife, whereby he deeded to her certain premises in the city of Tucson, worth at the time probably \$15,000. This was a voluntary conveyance, made in consideration of one dollar and love and affection; and the judge below, in his first conclusion of law, finds that the deed was fraudulent and void as to appellant, but that it vested a good title in respondent, as to said Toole, his heirs, devisees, and assigns; and, in his second conclusion of law, he finds that respondent was and is estopped from denying that said deed was and is void as to the creditors of the said Toole.

These findings or conclusions of law were undoubtedly correct. The evidence showed that, after Toole had executed this deed to his wife, the respondent, she and he suffered it to lie in a drawer, along with other papers of his, for nearly two years; that it was not recorded until two months after the assignment, in May, 1884; that during all that time the public, including appellant, had no intimation whatever that the property had been deeded by Toole to his wife; that, on the contrary, Toole gave the property in to the assessor as his, during the years 1883 and 1884, and paid the taxes thereon during those years; that he continued to act towards the property in every respect

as though it was his, thereby in a measure superinducing the deposits, by appellant and others, in the bank of Hudson & Co., and the consequent loss of their money. In a word, here was a case of actual fraud, and the court below so found. Now, the appellant was a judgment creditor of the said Toole; and his judgment having been regularly docketed, was and is a lien upon the property so conveyed by Toole to his wife, the respondent here; and while said property, by virtue of said conveyance, ceased to be a part of Toole's estate, the deed being good between the parties thereto, it was and still is subject to the lien of appellant's judgment. While, as the learned judge below observed, it was fraudulent and void as to creditors, it was good as to Toole and his heirs and assigns. Appellant's judgment, it was true, was a valid and subsisting claim also against the said Toole's estate; and, until the expiration of the 10 months allowed by statute for presenting claims, it might have been presented and allowed against said estate; but, because it was not thus presented and allowed, and is therefore forever barred as a claim against said estate, has the appellant lost his remedy against the property so fraudulently conveyed to respondent-as aforesaid? Clearly not, we think. Indeed, we believe no doctrine of equity is more generally and explicitly settled in this country by general law than that creditors may pursue property fraudulently conveyed into the hands of the vendee. This doctrine has come down from the old statute of 13 Eliz. An examination of the cases will show that the law has been settled, almost uniformly, in accordance with the spirit of that statute in all the states; and, while confined largely to the domain of chancery courts, its principles have generally obtained in courts of law; the main difference being that in the latter fraud must be proved, while in the former it is often presumed; in the one the chancellor stands upon the broad plains of conscience; in the other the judge may not go beyond certain stern and inflexible rules. It is the province of a court of conscience to tolerate no unclean thing. Honesty and fair dealing are the vitalizing currents of its healthy existence. He who would have others be honest, must be careful that he himself is not dishonest. Here no man is to be allowed to profit by his own wrong. He cannot rightfully ask that others keep their houses in order till he has dusted his own floors. As was said by Judge BLISS, of the supreme court of Missouri, in *McLaran v. Mead*, 48 Mo. 115: "The husband will not be permitted to hold property in the name of his wife, or withdraw it from the reach of his creditors, and give it to her, so as to shield it from execution." In that case reference is made to the strong case of *Gault v. Saffin*, 44 Pa. St. 307, where Judge READ holds that a husband cannot fraudulently cover up his property through the agency of his wife; but that the same, when thus covered up, may be discovered by the creditors of the husband. To pursue property fraudulently conveyed by a testator in his lifetime, it is not necessary to have the deed first set aside. The judgment creditor may go into a court of equity, and have a decree ordering the sale of the property to satisfy his debt. And where there is a voluntary conveyance by a husband to his wife of real estate, and such conveyance is not recorded, although the husband is insolvent; and the husband continues to act towards the property as though it were still his own, and thereby deceives his creditors to their injury,—a court of equity will set aside said conveyance as void, or grant other proper relief, at the instance of the creditors. See *Fellows v. Smith*, 40 Mich. 689; *Lee v. Figg*, 37 Cal. 328; *Lander v. Beers*, 48 Cal. 546; *Robinson's Ex'r v. Robards*, 15 Mo. 459; *King v. Moon*, 42 Mo. 551.

Thus far, then, the court below was right in its findings that said deed from Toole to his wife was fraudulent and void as to the former's creditors, and that the latter was estopped from denying that such was the case. We entertain no doubt, however, that the court was in error in deciding that the judgment creditor, the appellant here, having failed to present his judgment as a claim against Toole's estate in the probate court of Pima county, within

the 10 months allowed by the statutes of the territory, could not maintain this action because his claim was thereby forever barred as a claim against said estate. The *nisi prius* judge had already found as a fact, as alleged in the complaint, that the estate of Toole was wholly insolvent. No beneficial purpose, therefore, would have been subserved by presenting appellant's judgment claim against it; the real estate conveyed by Toole to his wife, as we have already observed, having ceased to be a part of his estate. We repeat, it is true that the appellant, having failed to present his judgment claim against Toole's estate within the 10 months allowed by statute, *it became thereby forever barred as a claim against said estate*; that is, the appellant lost his remedy to collect his debt against the estate proper. In construing statutes of limitation appertaining to various subjects, and found in different parts of the general body of laws, reference should always be had to the object designed to be accomplished in fixing each period of limitation. This period of limitation for presenting claims against an estate is brief,—purposely made so by the legislature. The object of administration is to pay off the debts and wind up the estate of the deceased, that the heir may not be long delayed in coming to his inheritance.

But would it not be unreasonable, and even unjust, to infer that, because forsooth the law-making department of the government had provided for the speedy transmission of estates from ancestors to descendants, it thereby became, in effect, the coadjutor of fraud, by contravening the well-established rules of equity, and by enabling a fraudulent dead man, through his representatives, to do what a dishonest live one could not do?

Clearly so; unless, possibly, the estate would suffer injury or the heirs incur loss, neither of which events could happen; for we have seen that the conveyance, though fraudulent, was good between the parties, and the property, by virtue thereof, ceased to be a part of Toole's estate; and his heirs, devisees, and assigns, being privy with him, are bound by his conveyance. Toole, if living, could not question the lien of appellant's judgment upon the property which he had fraudulently conveyed. Ought his representatives to be allowed to do so? True, as we say, by his fraudulent deed, Toole and his legal representatives were and are absolutely concluded, and the property it conveyed has become foreign to his estate; but it is also equally as true that appellant's judgment was and is a specific lien upon that property in the hands of respondent. Hence it is difficult to see how the court below arrived at the conclusion that, because appellant had failed to present his judgment claim against Toole's estate within the statutory period, this action which seeks to subject that property to the payment of his debt could not be maintained.

The learned counsel for the respondent contends that the court below did not find, as a *fact*, that the deed from Toole to his wife was made with *intent* to defraud creditors. The record does not bear out this claim. In the seventh finding of fact by the court below this language is used: "Said deed was made to provide against the hazards and contingencies of the banking business, and for the purpose of *hindering* and *delaying* the creditors of Hudson & Co." Toole himself was the "Co." We are entirely satisfied that the conduct of Toole and his grantee, the respondent here, contemporaneously with and after the execution of this deed, was such as fully warranted the judge below in finding *actual* fraud; such as rendered it null and void both as to existing and subsequent creditors.

Counsel relies upon the late case of *Bittinger v. Kasten*, (Ill.) 19 Reporter, 299. But that is by no means a parallel case. There the complaint did not allege insolvency on the part of *Kasten*, nor that he was indebted, beyond the plaintiff's claim, at the time of making the deed to his wife; neither did the court find that his subsequent conduct was fraudulent, nor that the conveyance was made to provide against any financial hazard, or was not recorded; but

it was admitted that the property was conveyed by the defendant to his wife as a reasonable provision for her. The court below and the appellate court seemed to have been satisfied of the good faith of the parties, and that the defendant, by having the property deeded to his wife, did not *intend* to delay or defraud his creditors. In other words, there was no *actual fraud*.

But the learned counsel for respondent contends that the executor of Toole's estate should have been requested and that he was the proper party to have brought the suit to have the fraudulent deed of his testator set aside, and the property revested in the estate as assets. Comp. Laws 1877, c. 29, §§ 202, 203, do give the executor or administrator the *right*, when the assets are not sufficient to pay the debts of the estate, to bring suit to set aside a fraudulent conveyance of the testator or intestate; and this for the sole purpose of paying the creditors' claims; but it does not say, and it surely does not mean, that the executor or administrator is the *only* party that has that right. Instead of being restrictive, was not this statute designed to aid the creditor, by conferring upon the executor or administrator of the fraudulent grantor the right to bring suit to set aside the fraudulent deed of such grantor, that the property thereby conveyed might be subjected to the payment of the creditor's debt? And does it not apply more particularly to *general creditors*, rather than to those creditors having *specific liens*? Did the conferring of a cumulative legal remedy, without words of divestiture, ever take away an equitable right? Because the statute says the executor *may*, does it mean that the judgement creditor himself shall not pursue the property fraudulently conveyed?

The territorial law confers this additional statutory right; but it does not take away the well-established equitable remedy. The legislature simply made that statutory which was already within the clearly defined rules of equity; but it certainly did not mean that, to that extent, there should be no equitable remedy in the creditor. The utmost construction, of which we think this statute would admit would be that the remedy is cumulative and concurrent with that of the general creditor. The administrator, in those states where the right is by statute conferred upon him, is certainly not a *necessary* party to a suit to subject property, fraudulently conveyed by his intestate, to the payment of the debt of a judgment creditor. See *Merry v. Fremont*, 44 Mo. 518; *Zoll v. Soper*, 75 Mo. 460; *Hagan v. Walker*, 20 Curt. Dec. 17; *Morris v. Morris*, 5 Mich. 180; *Hills v. Sherwood*, 48 Cal. 393. The horn-books clearly support this view. Mr. Wait, in his admirable work on *Fraudulent Conveyances*, at page 177, § 113, uses this language: "The legislation, clothing personal representatives with the power to appeal to the courts to annul covenous alienations made by the deceased, is highly salutary in practice. The *concurrent* right of the creditor to seek redress is also of the utmost importance; for the personal representative is usually selected by, or is a near relative of, the deceased, and may in some cases be prompted by motives of friendship or self-interest to shield the parties who have depleted the estate, and in some instances is himself the fraudulent alienee." See, also, page 175, § 112. Also, *Bump. Fraud. Conv.* (3d Ed.) 548.

It is ordered that the judgment of the county court be reversed, and the cause remanded to the district court of Pima county, with directions to enter up judgment in favor of appellant, and against respondent, declaring said deed by James H. Toole to his wife, the respondent here, fraudulent and void as to creditors, including appellant, and ordering the property conveyed by said deed to be sold by the sheriff of said county, and the proceeds, after payment of costs of sale, devoted to the payment of appellant's debt; and for interest and costs of both suits. If there should be a surplus remaining over, it should be paid over to Mrs. Toole, the respondent; who will hold it, however, subject to the claims of other creditors of her husband, James H. Toole, should there be any.

BARNES, J. By the probate act it is provided that, "if a claim be not presented within ten months after the first publication of the notice, it shall be forever barred." Comp. Laws, 1647. This provision is borrowed from the statutes of California, where it has received judicial construction. In *Fallon v. Butler*, 21 Cal. 24, it was held that a mortgage upon real estate may be foreclosed by action against the administrator, although the debt has not been presented as a claim against the estate and allowed, where the only object is to reach the property mortgaged, and no judgment is asked against the estate. In that case the court holds that the term "claims" in the probate court act "only has reference to such debts or demands as might have been enforced against him [intestate] by personal action for the recovery of money, and upon which only a money judgment could have been rendered." "In this sense a mortgage lien is not a claim against the estate." This case is approved in *Pechaud v. Rinquet*, 21 Cal. 76; *Willis v. Farley*, 24 Cal. 498; *Orr's Estate*, 29 Cal. 104, and *Brown v. Orr*, Id. 122. However, in *Ellis v. Polhemus*, 27 Cal. 350, the court held the word "claim" to be broad enough to embrace a mortgage or any other lien. In *Christy v. Dana*, 34 Cal. 553, foreclosure was sought against property conveyed by decedent in his life-time. The court held that it was not barred because not presented against estate of decedent, "as intestate at the time of his death had no interest in the land." In *Sichel v. Carrillo*, 42 Cal. 505, mortgage by a wife on her separate property, to secure note of the husband, was sought to be foreclosed, and it was held not to be barred by failure to present claim against the estate of husband. In *Schadt v. Heppe*, 45 Cal. 433, foreclosure was sought against property set apart to widow as a homestead. The claim was not presented, and it was held not to be barred, as "the estate has no interest whatever in the property mortgaged." In *Pittee v. Shipley*, 46 Cal. 154, the question arose squarely, and the court held that a mortgage upon property which becomes general assets of the estate is barred if the claim is not presented within 10 months. In the case at bar a judgment had ripened into a lien in the life-time of intestate. After his death the widow asserted title under an unrecorded deed, which is held to be fraudulent as against creditors. This deed is binding upon intestate and his heirs, but is voidable as to creditors. The property is not a general asset of the estate; hence the cases above cited (*Christy v. Dana*, *Sichel v. Carrillo*, and *Schadt v. Heppe*) must govern. This suit to enforce that judgment lien, and no more, and, as the mortgage is sought to be foreclosed against the estate, may be maintained. For these reasons I concur in the decision of this case.

PORTER, J. I concur in the judgment of affirmance.

(73 Cal. 403)

PEOPLE v. RAMIREZ. (No. 20,838.)

(Supreme Court of California. September 15, 1887.)

1. DYING DECLARATION—IMPENDING DEATH.

Upon the trial of an indictment for murder, a dying declaration was offered in evidence, the first sentence of which was, "I, A., believing I am about to die, do make this, my dying statement." The surgeon who attended deceased testified to his condition, and the character of his wounds, and that on the day before the declaration was made witness informed deceased that he was going to die, and he thereupon expressed a wish to make a dying declaration. *Held*, that the admission of such declaration in evidence was not erroneous.¹

2. HOMICIDE—WITNESS—CROSS-EXAMINATION.

Where, on a trial for murder, the testimony of defendant's witness tended to show that deceased was exhibiting a belligerent propensity just before the killing, and that one P., a co-defendant, was endeavoring to restore peace by inducing deceased to withdraw from the company, he may be asked, on cross-examination, whether P. did not "come out and run the deceased over a hundred yards at that time."

3. SAME.

Such witness may be asked, on cross-examination, also, whether P. did not come out and point a pistol at deceased, and say, "Don't you fight that man R."

In bank. Appeal from superior court, Santa Clara county; D. BELDEN, Judge.

J. R. Patton, for appellant. *Geo. A. Johnson*, Atty. Gen., for the State.

SHARPSTEIN, J. Appellant was tried on a charge of murder, convicted, and sentenced to be hanged. This appeal is from the judgment and order denying his motion for a new trial. One of the grounds upon which he insists that his motion for a new trial should be granted is that the dying declaration of the deceased was improperly admitted in evidence. The condition of the deceased and the character of his wounds were testified to by his attending physician and surgeon, who further testified to having informed the deceased the day before he made his dying declaration that he was going to die, and he thereupon expressed a wish to make a dying declaration. The opening sentence of the declaration is as follows: "I, Fernando Asero, believing I am about to die, do make this, my dying statement." We think it sufficiently appears from all the evidence before us on this point that this declaration was made under a sense of impending death, and therefore was properly admitted. As reported, the facts in *People v. Hodgdon*, 55 Cal. 72, are not the same as in this case.

The defendant's witness, Torres, testified on his examination in chief to what occurred between the deceased and one Prado and some other persons just prior to the homicide. On his cross-examination witness was asked this question: "Didn't Prado come out and run the deceased over a hundred yards at that time?" The question was objected to as immaterial and incompetent. The objection was overruled, and the defendant excepted. The objection was properly overruled. The evidence of this witness tended to prove that deceased was exhibiting a belligerent propensity just before the shooting commenced, and that Prado was endeavoring to restore peace by inducing deceased to withdraw from the company he was in. Prado and defendant were jointly charged, although the latter had a separate trial. It was material for the defendant to prove that deceased brought on the affray, and for the prosecution to show the reverse. This witness was also asked on cross-examination: "Didn't Prado come out and point a pistol at deceased and say, 'Don't you fight that man Roderiguez?'" To which there was the same objection as to the preceding question, the same ruling and exception. We think the rul-

¹ Respecting the circumstances that will justify the admission of dying declarations, see *State v. Newhouse*, (La.) 2 South Rep. 799, and note; *Luker v. Com.*, (Ky.) 5 S. W. Rep. —.

ing of the court constitutes no error. It does not appear that the question was answered. But the witness did state, after narrating some other events, that he saw no other weapon than a pocket-knife which deceased had.

We discover no ground for disturbing the judgment or order denying the motion for a new trial. Judgment and order affirmed.

We concur: SEARLS, C. J.; THORNTON, J.; MCKINSTRY, J.; MCFARLAND, J.; PATERSON, J.; TEMPLE, J.

(73 Cal. 420)

MANNING v. DALLAS. (No. 12,002.)

(Supreme Court of California. September 20, 1887.)

1. LIMITATION OF ACTIONS—PLEADING THE STATUTE.

Under Code Civil Proc. Cal. § 458, the defendant cannot take advantage of the statute of limitations as a defense, unless it is specially pleaded either by setting forth the facts constituting the defense, or by citing the particular section and subdivision of the Code under which it is claimed the action is barred.

2. ASSUMPSIT—LABOR AND SERVICES.

Where under a complaint for services rendered, the plaintiff was entitled to recover such a sum as the defendant had agreed to give for his services, or, if no price was agreed upon, then such sum as his services were reasonably worth, the court instructed the jury that, "though the plaintiff has brought suit for a certain sum, you are authorized to bring in a verdict for such a sum as you may think his services were reasonably worth, if you find he is entitled to anything." *Held* no error.

3. SAME—COMPENSATION AT EMPLOYER'S DISCRETION.

The court refused to give the following instruction: "If from the evidence you find that the compensation M. was to receive from D. for his services was to be at the entire discretion of D., then I charge you that you must render a verdict for the defendant, no matter what you may think his services are worth," but instructed the jury that, "when services are rendered upon an understanding that the remuneration is to be at the discretion of the employer, no action is maintainable for the value of such services." *Held*, that whatever error there may have been in the court's refusal to give the former instruction was cured by the giving of the latter.

Commissioners' decision. Department 2.

Appeal from superior court, Stanislaus county; WM. O. MINOR, Judge.

Turner & Maddux, for appellant. Stonesifer & Minor, for respondent.

BELCHER, C. C. This action was brought to recover the balance due on a mutual, open, and current account for work and labor, alleged to have been performed by plaintiff for defendant between the ninth day of December, 1881, and the tenth day of January, 1886. The answer denied any indebtedness on a mutual, open, and current account, and alleged payment, and also alleged that so much of the account as accrued "during the years 1881, 1882, and 1883, has long since been barred and is barred by the provisions of chapter 3, tit. 2, pt. 2, of the Code of Civil Procedure of the state of California." The case was tried before a jury, resulting in a verdict and judgment in favor of the plaintiff. The defendant then moved for a new trial, and, his motion being denied, appealed from the judgment and order.

Several points are made on the statute of limitations, but they need not be separately considered. The statute was evidently not pleaded. There are only two ways of pleading the statute,—one by stating the facts showing the defense, and the other by stating "generally that the cause of action is barred by the provisions of section — (giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure." Section 458, Code Civil Proc. As neither of these ways was adopted, the attempt to plead it must be treated as altogether a failure. But if the statute had been properly pleaded, the same result must have been reached. There was testimony from which the jury might find, as they did, that the account was mutual, open, and current, and that no part thereof was barred.

At the request of the plaintiff the court instructed the jury as follows: "Though in this case the plaintiff has brought suit for a certain sum, yet I charge you that you are authorized to bring in a verdict for such a sum as under the evidence you may think his services were reasonably worth, if you find he is entitled to anything." It is claimed that this instruction was erroneous, because "the plaintiff bases his right to recover on a contract that he was to receive a certain amount for his services, and not on a *quantum meruit*." The instruction was properly given. Under the complaint the plaintiff was entitled to recover, if he had performed services for the defendant, such sum as the defendant had agreed to pay him for his services, or, if no price was fixed, then such sum as his services were reasonably worth. *Freeborn v. Glazer*, 10 Cal. 337; *Leitensdorfer v. King*, 7 Colo. 486, 4 Pac. Rep. 37; *Sussdorff v. Schmidt*, 55 N. Y. 324.

The court refused to instruct the jury, at the request of the defendant, as follows: "If from the evidence you find that the compensation Manning was to receive from Dallas for his services was to be at the entire discretion of Dallas, then I charge you that you must render a verdict for the defendant, no matter what you may think his services are worth," etc. It is insisted that this instruction was a proper one, and that the court erred in refusing to give it, citing *Moulin v. Columbet*, 22 Cal. 510. The answer is that the court, at the request of the defendant, did instruct the jury in the following language: "When services are rendered upon an understanding that the remuneration is to be at the discretion of the employer, no action is maintainable for the value of such services." If there was error in refusing to give the instruction as first asked, that error was obviously cured by the instruction as given.

The other points do not need special notice. After carefully looking at the whole record, we are satisfied that no error was committed prejudicial to the defendant, and the judgment and order should therefore be affirmed.

We concur: FOOTE, C.; HAYNE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(70 Cal. 474)

MCCORMICK, Adm'r, etc., v. ROSSI. (No. 11,096.)

(*Supreme Court of California.* August 27, 1886.)

VENDOR AND VENDEE—BREACH OF CONTRACT—PART PAYMENT—EQUITY WILL NOT DECREE FORFEITURE.

Equity will not decree a forfeiture of a vendee's rights under a contract for the sale of a mining claim, and thereby deprive him of the possession of the mine and of the amount paid towards the purchase price, although he may have failed to work the mine as required by the contract, and to pay the balance of the purchase price when due.

Commissioners' decision. Department 1.
Appeal from superior court, Placer county.

BELCHER, C. C. This is an action upon a contract made by the plaintiff's intestate for the sale of a mining claim, to the defendant, for the sum of \$6,500. It is alleged in the complaint that the defendant had paid only \$1,300 of the agreed purchase price; that he had failed to work the mine as required by the contract; that the full amount of the purchase money had become due, and that in consequence of his failure to pay the same he had by the terms of the contract forfeited all his rights thereunder. The prayer is that it be "decreed that defendant has committed a breach of said contract, and has forfeited all his rights thereunder and to the possession of said property." The defendant in his answer alleged that he had paid \$1,504.50 of the purchase

money; and he denied that by not paying the balance thereof or otherwise he had failed to comply with the terms of the contract, or had forfeited all or any of his rights under it. Judgment was entered declaring forfeited all the defendant's rights under the contract, and ordering the possession of the property to be restored to the plaintiff; and the defendant appealed. In *Keller v. Lewis*, 53 Cal. 118, the court said: "It is a universal rule in equity never to enforce either a penalty or forfeiture. 2 Story, Eq. Jur. § 1319, and cases cited. On the contrary, equity frequently interposes to prevent the enforcement of a forfeiture law." Judgment declaring a forfeiture had been entered in that case, and was reversed. This case is in all essential particulars like that, and the judgment here should also be reversed, and the cause remanded, with leave to the plaintiff to amend his complaint if so advised.

SEARLS and FOOTE, CC., concurred.

BY THE COURT. For reasons given in the foregoing opinion the judgment is reversed, and cause remanded, with leave to the plaintiff to amend his complaint if so advised.

(9 Colo. 414)

PEOPLE *ex rel.* SEELEY v. MAY, Treasurer.

(Supreme Court of Colorado. December Term, 1886.)

1. COUNTIES—LIMITATION OF INDEBTEDNESS—CONSTITUTIONS OF COLORADO AND MISSOURI.
Constitution of Colorado, art. 11, § 6, providing that "the aggregate amount of indebtedness of any county for all purposes shall not at any time exceed twice the amount above herein limited," is a limitation of indebtedness, whatever its form, including county warrants and debts contracted under the direct authority of the legislature; and differs from the constitution of Missouri, which limits taxation as well as indebtedness.
2. SAME—PAYMENT OF TAXES BY VOID WARRANTS—JUDGMENT UPON WARRANTS.
The legal status of a judgment obtained upon county warrants, void because issued after the limit of constitutional indebtedness has been reached, will not be decided in advance, in an action to compel the receiving of such warrants in payment of taxes.

Petition for rehearing. For former opinions, see 10 Pac. Rep. 641, and 12 Pac. Rep. 838.

Teller & Orahood & Markham & Dillon, for plaintiffs. *Danl. E. Parke*, Co. Atty., and *H. B. Johnson*, for defendant.

PER CURIAM. We have carefully reconsidered all the matters in this case from the beginning. We have re-examined the views expressed in the several opinions rendered, and the authorities by which they are sustained. We have carefully and candidly considered the objections thereto made by counsel, and feel called upon to adhere to the doctrine announced, without change or modification, as the only true interpretation of the constitutional provision involved, and as unanswerably supported by both reason and authority. Misstatements, or at least misconception, of our position require us to notice: (1) One of the differences between our constitution and the constitution of Missouri, discussed in the original arguments alluded to in the opinion of Justice HELM, is that the constitution of Missouri, unlike ours, limits taxation as well as indebtedness. (2) We are not to be understood as deciding in advance the legal status of a judgment obtained upon void warrants by reason of a failure to plead the constitutional limitation. Where such a judgment has been sustained, it has been upon the proposition that the question of the validity of the warrants upon which it was founded was *res adjudicata*, and no longer the subject of inquiry. We do not care to further notice or fully characterize the argument of counsel on the petition for rehearing. It is sufficient to say that it misquotes the language, misrepresents the views, and misstates the positions of the court. Its language is intemperate, and its

spirit unworthy. We order it stricken from our files, as dishonoring them and its author.

The petition for rehearing is denied.

(2 Ariz. 275)

DALTON and others v. RENTARIA and others.

(*Supreme Court of Arizona. September 25, 1887.*)

1. **ESTOPPEL—IRRIGATION—PERMITTING PARTY TO MAKE IMPROVEMENTS IN GOOD FAITH.**
One who stands passively by and allows another to open out fields and irrigate them with water for 16 years, under the belief that he has a vested right to an equal user thereof, is estopped from subsequently denying this right.¹
2. **SAME—EVIDENCE—MAP MADE BY MILITARY GOVERNOR.**
A map made by order of a military governor having no authority to adjudicate the civil rights of a citizen, is not competent evidence of those rights.
3. **APPEAL—OBJECTIONS TO PLEADINGS MUST BE RAISED BELOW.**
An objection to a pleading not raised in the court below will not be considered on appeal.
4. **TRIAL—ISSUES—FINDINGS.**
Every issue of law or fact raised by the pleadings requires a finding, but it is error for the court to find and decide questions upon which neither side have invoked judicial action.

Appeal from county court, Pima county; GREGG, Judge.

Barll, Campbell & Stephens, for appellants. *Hereford & Lovell*, for respondents.

WRIGHT, C. J. Plaintiffs brought this suit in the county court of Pima county, in March, 1885, to restrain the defendants from preventing the waters of the Santa Cruz river from flowing through certain *acequias*, whereby said waters were conducted upon plaintiff's land. After averring that said lands had been owned and cultivated by plaintiffs, or those under whom they claim, for a period of time ranging from 16 to 50 years, the complaint then, among other things, alleges "that during all the times herein mentioned said lands have been irrigated from the waters of the Santa Cruz river, from one main *acequia*, and distributed by others, which were kept in common repair for the use of all, below one and one-half miles above said Silver lake, in proportion to the lands respectively cultivated. That for more than sixteen years these plaintiffs, their grantors and lessors, have contributed their respective proportion of labor and expense in maintaining all of said *acequias*, for irrigating said lands, equally with defendants, and all others below said point. That said lands are agricultural, capable of raising valuable crops; but without irrigation no crops can be raised, and those now growing will perish, and plaintiffs lose the labor performed, seed sown, and expenses incurred attending the same. The defendants refuse to permit these plaintiffs to use any of the waters of the said Santa Cruz river to irrigate their respective lands. That said defendants, although requested to permit said water to flow through said *acequias* upon plaintiffs' lands, as plaintiffs were entitled to have them do, and as has been always heretofore permitted, disregarding said right, since the said thirtieth day of March, 1885, have unlawfully prevented the use of said waters, and threaten to so continue to wholly deprive plaintiffs of the enjoyment thereof."

The answer denies and traverses the allegations of the complaint, except that it admits that lots 13 and 14 in section 10, and 23 and 24 in section 11, and the south 10 acres in section 11, had been occupied for 23 years; and the

¹ Concerning the subject of estoppel by conduct, see *Johnson v. Fire Ins. Co.*, (Ky.) 2 S. W. Rep. 151, and note; *Life Ins. Co. v. Slee*, (Ill.) 12 N. E. Rep. 543; *Gallinger v. Traffic Co.*, (Wis.) 30 N. W. Rep. 790; *Ward v. Life Ins. Co.*, (Ind.) 9 N. E. Rep. 365; *Preston v. Witherspoon*, Id. 585; *Wardlaw v. Rayford*, (S. C.) 3 S. E. Rep. 71; *Fuller v. Harris*, 29 Fed. Rep. 814; *Roberts v. Hinson*, (Ga.) 2 S. E. Rep. 752; *Reid v. Ladue*, (Mich.) 32 N. W. Rep. 916.

said answer further admits that the greater part of plaintiffs' land as described in the complaint had been cultivated for 16 years. These admissions on the record are significant, and evoke a serious reflection. If the greater part of the plaintiffs' lands has been cultivated for the last 16 years, it was done with or without defendants' consent. If without their consent, have they not been guilty of laches, unreasonable delay, and inexcusable neglect in waiting 16 years without taking any steps to restrain the wrongful acts of plaintiffs? If the defendants were fairly put upon their guard; if they had actual knowledge that plaintiffs were diverting waters that belonged to defendants by virtue of prior appropriation; if they stood by for 16 years or more, and saw the plaintiffs build their houses, open out their lands, and put them in cultivation, expend their money in the improvement of these homes, pay their proportion of the expense, and bear their proportion of the labor in building and repairing the *acequias*, and otherwise do and perform such acts as indicated that plaintiffs believed they had equal rights with defendants to the waters of the Santa Cruz river,—do not all these circumstances serve to imply that defendants waived or abandoned any exclusive prior right to said waters? At least, was there not such unreasonable delay as that they are now precluded from complaining? Will parties be permitted to stand by for 16 years or more, and see new fields put in cultivation, irrigated, forsooth, with water to which they have an exclusive prior right, see large sums expended in erecting new homes, and witness new and important interests intervene, and then be heard to complain? *A fortiori*, defendants will not be heard to complain if these things were done with their consent. Indeed, our opinion is, in this case, that acquiescence, non-action, on the part of the defendants, for so long a time, *gave* consent. They could not consent "till right vested, and then *dissent*." So that it is really immaterial whether the irrigation was done with or without defendants' consent, if they stood passively by. See *Smith v. Hamilton*, 20 Mich. 433; *Parke v. Kilham*, 8 Cal. 78; *Joyce v. Williams*, 26 Mich. 332.

In the case of *Niven v. Belknap*, 2 Johns. 573, Judge THOMPSON held that *silence* worked an estoppel. In delivering the opinion of the court he says: "Though it does not appear positively from the evidence that Belnap took any active agency in this negotiation, yet his *presence* and *silence* are equally efficacious and binding upon him, if the complainant was thereby misled and deceived. There is an *implied*, as well express, assent; as where a man who has a title, and knows it, and either encourages or does not forbid the purchase, he, and all claiming under him, shall be bound by such purchase." "It is very justly and forcibly observed by a writer on this subject (Rob. Frauds, 130) that there is a negative fraud in imposing a false apprehension on another by silence, where silence is treacherously expressive. *In equity, therefore, where a man has been silent when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent.*" And in case of *Gregg v. Von Phul*, 1 Wall. 274, the learned judge used this language: "No one is permitted to keep silent when he should speak, and thereby mislead another to his injury."

In the case at bar, the defendants allowed the plaintiffs, or those under whom they claim, to open out their fields, and irrigate them with water of the Santa Cruz river, as though they had a vested right therein; to vote for and participate in the election of water overseers or commissioners; to pay their proportion of the assessment for water development, etc.; to pay their part of the expenses, and do their part of the labor, in cleaning and repairing the *acequias*; to expend large sums of money in payment for their lands, putting them in cultivation, and building their homes,—and all this, too, for a period of 16 years or more. Can the defendants now exclude the plaintiffs from a participation in the use of these waters? We are of the opinion that they cannot. See *Dickerson v. Colgrove*, 100 U. S. 578; *Kirk v. Hamilton*, 102 U. S. 68, and authorities there cited. Judge HARLAN, in this case,

quotes from *King v. Inhabitants of Butterson*, 6 Term R. 554, in which Justice LAWRENCE said: "I remember a case some years ago in which Lord MANSFIELD would not suffer a man to recover in ejectment where he had stood by and seen the defendant build on his land." This doctrine of equitable estoppel *in pais* will apply to cases even in courts of law.

It might be observed that, in this case, it is true there were occasionally disputes about who had the prior right to the use of the water. Indeed, from the defendants' testimony, especially that of Mr. Oury, these individual disputes had occurred prior to 1862, a period anterior to the time, as alleged in defendants' answer, when the plaintiffs first cultivated their lands; so that some of these disputes must have occurred between occupants of the "Old Fields" alone, while some of them may have occurred between occupants of the "New Fields" alone. But the testimony all shows, from first to last, that the plaintiffs always claimed an equal right to the use of said waters. The testimony, we think, also shows that plaintiffs also equally enjoyed the use of said waters, and there seems to have been a pretty general acquiescence in the plaintiffs' said use until the year 1885, when by some means, which are not apparent from the evidence, Carrillo, Hughes, and Davis became the acting water commissioners, by whose authority, perhaps, whether legitimate or not, Rentaria, the acting water judge or overseer, prevented the flow of said waters through said *acequias* upon plaintiffs' land; and this suit is therefore the first distinct contest between the cultivators of the "Old" and "New Fields," involving their respective rights to the use of the waters of the Santa Cruz river.

Again, the admissions in defendants' answer raise another important question. All the evidence shows—in fact, it would go without saying—that the lands in the valley of the Santa Cruz river, both the "Old and New Fields," are absolutely worthless for agricultural purposes without the waters from said river. Now, if the greater portion of plaintiffs' land has been in cultivation for 16 years or more, it must inevitably have been irrigated with waters from the Santa Cruz river; and taking the averment in defendants' answer as true, that plaintiffs only had the use of the *surplus* water, is not the conclusion inevitable that there is, ordinarily, enough water in said river to irrigate, with the necessary, reasonable, and economical use of the water, all the lands in said valley, both old and new? If the plaintiffs got the benefit of the *surplus* water only, there must have been quite a quantity of it,—enough to fructify their crops; for certainly they would not have remained there for 16 years with their families, and starved. It seems to us the admissions in the defendants' answer are inconsistent with the theory that plaintiffs had only the use of the *surplus* water. The evidence of plaintiffs shows that they used the water of the Santa Cruz river just the same as the defendants; while defendants' evidence, although claiming rights prior to plaintiffs' to the use of the water, and that plaintiffs had only the right to use the *surplus* water, yet it is not seriously denied that plaintiffs actually *did use* the said waters, as claimed in the complaint.

Now, we are well aware of the well-settled rule that where the evidence is sufficient to support the finding, or where the evidence is conflicting, although it may greatly preponderate against the said finding, the appellate court will not, at law, interfere; where, however, in equity, the evidence is clearly insufficient, or where there is no evidence at all, it is otherwise. Besides, the object of a motion for a new trial is to enable the appellate court to look into the evidence to see if it be sufficient to support the finding; and in looking into the evidence here we have not been able to escape the conclusion that the court below erred in its finding that plaintiffs used, without objection, only *surplus* water, after the "Old Fields" had been irrigated. True, there was abundance of evidence that they only had had the right to use such *surplus* water; but if they used water other than *surplus*, even without right, for 16 years,

without absolute hinderance by the defendants, can the defendants now complain? We think not: "If the owner of an estate stand by and see another expend money on an adjoining estate, the latter relying upon an existing right of easement in the other estate, without which such expenditure would be useless, *and do not interfere to prevent the work*, he will not be permitted to interrupt the enjoyment of such easement." See Bigelow, Estop. 512. This is almost exactly the case at bar; defendants certainly stood by and saw plaintiffs opening out their fields; they must have known, too, that plaintiffs would not be guilty of the extreme folly of going to such trouble and expense without expecting the use of the waters of the Santa Cruz river; this being the sole and solitary resource.

In a word, our view of this case brings it clearly within the rule of what is known as "estoppel by contract." Defendants may have had the prior right, but they lost it by their own conduct. They could have spoken, and were silent; they could have acted, and were passive. Counsel for defendants offered in evidence a map made by order of one Major Ferguson, in 1862, when martial law had been declared in Tucson, to show, as counsel stated, the boundary lines, *i. e.*, the lines beyond which the settlers of the "New Fields," in the use of water, could not go, as *per* determination of commissioners appointed, not by the people, but by the said Ferguson, under those martial-law proceedings. The plaintiffs, by counsel, objected to the admission of said map. The court, however, overruled the objection, and admitted the same. We think this was error. What jurisdiction or authority a military officer had to exercise judicial functions, (outside of military affairs,) or to authorize others to do so, and to adjudicate upon and settle the rights of citizens to the use of this water, and to order an official map made, circumscribing the limits of these water privileges, is more than we have been able to ascertain. Major Ferguson had been appointed military governor of Tucson by Gen. Carleton. The latter had no authority to confer, and he did not confer, judicial authority upon his subordinate to sit in judgment upon and determine the *civil* rights of a citizen, or to authorize others, not otherwise capacitated, so to do. There was no military necessity that these martial-law proceedings should be had, and this map be made, divesting and vesting the civil rights of the citizen. Martial law may enforce order, but has no jurisdiction over property rights.

These proceedings, according to the answer, were all had prior to the settlement of the "New Fields." Defendants are bound by that answer. Therefore we are unable to see any relevancy this map has in this case, or on what ground it could be competent to establish the fact for which it was offered.

Again, we think the defendants are barred by the statute of limitations of this territory, and by prescription, and that the court below erred in so finding. True, the complaint may have been obnoxious to criticism in this respect: the statute could have been pleaded more specifically; but the complaint avers "that each of which said tracts of land has been owned, possessed, occupied, and cultivated continually by plaintiffs or their predecessors in title for a period of not less than sixteen years;" and "that during all the times herein mentioned the said tracts of land have been irrigated by the waters of the Santa Cruz river, taken from said river by one main *acequia*, and distributed by several other *acequias*, which were constructed and kept in repair in common, and for the common use of all the people." No objection was raised in the trial below to this pleading. The answer of defendants specially denied each of these averments, except as to the time said lands had been cultivated; and the evidence largely concerned the length of time of plaintiffs' user; so that this issue was undoubtedly joined, and was the important question in this litigation. Criticisms will not be made, or objections raised, to a pleading for the first time in an appellate court. See *Crans v. Hunter*, 28 N. Y. 395; *White v. Railroad Co.*, 50 Cal. 417; *Hutchings v. Castle*, 48 Cal.

155; *King v. Davis*, 84 Cal. 100. With reference to the rights acquired in the use of water, estoppel *in pais*, and title by limitation and prescription, are very similar; and reasoning upon one will inevitably impinge upon that of the others, especially in a case like this. Indeed, title by limitation, and title by prescription, to real estate, are practically synonymous.

This issue was raised, then, and the court below failed to make a finding either of law or fact upon it; which we think was manifest error. But the court did make a finding, both of law and fact, upon an issue that was certainly not raised by either complaint or answer; viz.: "That the occupants of said gardens, [Chinese gardens,] which have had the continual use and enjoyment of said water for the irrigation thereof for more than five years continuously next before the commencement of this action, and claiming said right adversely to all others, are entitled to the continued use of so much water, upon Saturdays and Sundays, as may be necessary for the proper irrigation thereof." The court then proceeds to find that much of this Chinese garden land has been so occupied for from 6 to 15 years; and then proceeds to decide, in its opinion, that the defendants have acquired the right to the additional water necessary to irrigate these Chinese gardens, comprising, probably, 150 acres, by adverse user and prescription. There was no such issue in the case as this; the defendants did not raise it in their answer; and even the evidence that crept into the case on this point certainly was insufficient to justify the finding and decision. Neither side had invoked judicial action on this question. We are of opinion, therefore, that this much of the finding and decision, both of law and fact, of the learned judge below was error; it was *coram non judice*. These Chinese gardens, and the speculative inclinations of the owners, may have been the source of much trouble between the parties herein; and yet neither the pleadings nor evidence disclose it; the information is obtainable only in said finding and opinion.

The evidence shows that plaintiffs have always claimed an equal right to the use of the waters of the Santa Cruz river; and while, as we have already observed, the evidence also shows that defendants had the prior right, yet the plaintiffs, and those under whom they claimed, not only claimed an equal right, but they had *the use* of said waters without prevention by defendants until just before the commencement of this suit. Most of the defendants' testimony, aside from a mass of testimony as to damages, was as to the *prior right*, and not as to the *prior use*, of said water. Gallardo, an old gentleman, 72 years old, testified that at one time he had owned most of the "Old Fields" above. At that time water was common, and he told the settlers of the "New Fields" that he would not stop them; that the government protected agriculture; that they were children of the town and his neighbors. Juan Elias, another old citizen, testified that "the people below [the cultivators of the new fields] often won the fight, and elected the water overseers. They had equal shares of water." And Squire Charles H. Myers, the justice of the peace before whom these individual disputes about water came, says, in his testimony for the defendants, that he had before him probably a dozen of these disputes. Says he: "Whenever there was a quarrel about the water, there is a custom to appoint a commission, and they would go out and see whose grain needed the water the most. After they had seen the fields, they would come in and report, and say such and such a man's field, if it does not get it, [water,] will be lost; and that the field above could do without water till that got through. And, although they had no *right* to it below, under that system it was distributed to them; and it was understood among the Mexicans, and they always knew it was so, as long as they farmed here. And if the upper fields were suffering, and the lower fields were suffering, the lower fields would have to suffer, because the new fields were entitled to the water last." It is to be observed that there is not one word in this important witness' testimony about *surplus* water.

Mr. Bentaria, one of the principal defendants, in his testimony says: "They [the water committee, Hughes, Carrillo, and Davis; just where their authority comes from does not clearly appear,] told me not to let the water pass down there [on the new fields] *if they did not pay for it*. I told them that Mr. Maish [up at the mill] had all the water stopped. They [the committee] told me: 'If you can't take care of the fields down there, take care of the fields up here.'" The witness, who had been water judge for 12 years, was asked this question: "Before that time, [March, 1885,] *have you given the people below the lane water the same as you have those above the lane?* Answer. *Other years I had*; but Mr. Dalton and others were the first to buy tickets, and Mr. Leon and Pacheco had bought tickets, and I gave them the water. Q. What time did Maish shut off the water? A. About the fifteenth of March; he let it overflow. He got some men and raised the embankment higher around the pond. After he fixed his dam, he kept the water back for twelve days; then there was a little amount of water." He afterwards corrects the time, and makes it from the first to the fifteenth of April.

Another fact of some significance, tending to corroborate the testimony of plaintiffs, is that, as soon as the "New Fields" began to be settled, the "old common fence" was allowed to disappear. F. S. Leon, who, in 1862, under the martial-law proceedings, (which defendants had invoked for some reason in their case,) was appointed, not by the people, but by said Ferguson, the military governor of Tucson, one of the water commissioners, assumed to settle the rights of the disputants. When this witness was asked why that "old common fence" was allowed to disappear after the "New Fields" began to be settled, his answer was, "I don't know." The fact remains, however, that it did disappear about the time the "New Fields" began to be settled up and cultivated.

The evidence of these witnesses, (the most important and impartial for the defendants, perhaps,) together with plaintiffs' witnesses, and the other facts and circumstances of the case, undoubtedly show that, until a late date, there had been a general *sufferance* of an equal and equitable distribution of said waters; regard being had to those fields needing the water the most.

Beyond question, the settlers of the "Old Fields," most of them, had a prior right to these waters; but for 16 years or more they did not enforce it. Can they do it now? Are they not barred? Plaintiffs' adverse user of these waters for a time three times greater than the period of statutory limitations in this territory, has, we think, ripened into vested right to the equal use of the waters of the Santa Cruz river, with the cultivators of the "Old Fields," proportional to the number of acres in cultivation, and regard being had to the fields needing the water the most. See *Water Co. v. Richardson*, (Cal.) 14 Pac. Rep. 379, (June 27, 1887.)

We entertain the belief, from the evidence in this case, that there was a custom among these people in the distribution of this water; that that custom was certain, definite, uniform, and notorious; that it had in it the elements of equity and a good conscience, of neighborly kindness and good will, and that under it cultivators of the "Old Fields," while claiming the prior right to the use of said water, and the cultivators of the "New Fields," while claiming an equal right to the use thereof, had settled their wrangles and disputes, and had lived together as neighbors and friends for more than 16 years, and had ultimately acquiesced in an equitable and equal distribution of said water, giving it first to those fields that needed it the most; and this custom, we think, has acquired sufficient age to give it the force and sanction of law.

Judgment reversed, and cause remanded to First judicial district court in and for Pima county, with directions to enter judgment for plaintiffs, making perpetual the injunction.

WRIGHT, C. J., BARNES and PORTER, JJ., concur.

(2 Cal. Unrep. 793)

NEWMAN v. BANK OF CALIFORNIA and another. (No. 12,088.)

(*Supreme Court of California.* August 30, 1887.)

APPEAL—FILING TRANSCRIPT.

The filing of a transcript on appeal, within 40 days after the bill of exceptions is settled, is a sufficient compliance with rule 2, supreme court of California, requiring the transcript to be filed within 40 days after appeal taken.

In bank.

Motion to dismiss appeal on the ground that the transcript was not served and filed within 40 days after the appeal was taken. It appeared from the clerk's certificate of proceedings in the lower court that the motion to set aside the judgment and grant a new trial was made and denied on February 11, 1887, and that the time to prepare a bill of exceptions was extended from time to time, and finally settled on April 22, 1887. The transcript was filed within 40 days from that date. Rule 2 of the supreme court, upon which the motion was based, is as follows: "The appellant in a civil action shall, within 40 days after the appeal is perfected, and the bill of exceptions and the statement (if there be any) are settled, serve and file the printed transcript of the record, duly certified to be correct by the attorneys of the respective parties, or by the clerk of the court from which the appeal is taken."

BY THE COURT. The motion to dismiss the appeal herein is denied. We do not see that the appellant is in any default for not having filed the transcript on appeal; the bill of exceptions not having been settled until the twenty-second of April, 1887. Rule 2 of this court. Motion denied.

(73 Cal. 228)

Ex parte JOHNSON. (No. 20,322.)

(*Supreme Court of California.* August 25, 1887.)

BAWDY-HOUSE—ORDINANCE PROHIBITING RESORT TO—VALIDITY.

An ordinance of the city of Stockton declaring it to be unlawful for any person to visit, for the purpose of prostitution, any place maintained for the purpose of prostitution, and providing a penalty of a fine not exceeding \$500, or imprisonment not exceeding 3 months, or both, is valid, and not in conflict with the general laws of the state.

In bank. On writ of *habeas corpus* from superior court, San Joaquin county.

Petitioner was arrested for visiting a house for the purpose of prostitution, in violation of the following ordinance:

"The mayor and city council of the city of Stockton do ordain as follows, [ordinance No. 229:]

"Section 1. It shall be unlawful for any person or persons to keep, conduct, occupy, or maintain, for the purpose of prostitution, any building, house, room, or place within the corporate limits of the city of Stockton.

"Sec. 2. It shall be unlawful for any person to be or become an inmate of, or, for the purpose of prostitution, to frequent, any building, house, room, or place kept, conducted, occupied, or maintained for the purpose of prostitution.

"Sec. 3. It shall be unlawful for any male person to frequent any building or buildings, house or houses, place or places, kept, conducted, occupied, or maintained for the purpose of prostitution.

"Sec. 4. It shall be unlawful for any person or persons knowingly to rent, furnish, or permit to be used for the purpose of prostitution, any building, house, room, or place owned or controlled by such person or persons.

"Sec. 5. It shall be unlawful for any person, for the purpose of sexual intercourse, to visit, be, or remain in any building, house, room, or place kept, conducted, occupied, or maintained for the purpose of prostitution.

"Sec. 6. It shall be unlawful for any male person to live, room, or habitu-

ally associate with any female or females who keep, conduct, or maintain, or who are inmates of, or who, for the purpose of prostitution, frequent, any building, house, room, or place kept, conducted, occupied, or maintained for the purpose of prostitution.

"Sec. 7. It shall be unlawful for any person by words, actions, or signs, or by any means whatever, to solicit, entice, or attempt to entice, any person for the purpose of prostitution.

"Sec. 8. It shall be unlawful for any person to aid, abet, or assist any person or persons to do any of the things which are declared to be unlawful by the provisions of this ordinance.

"Sec. 9. Any person convicted of violating any of the provisions of this ordinance shall be punished by a fine of not more than five hundred dollars, or by imprisonment not exceeding three months, or by both such fine and imprisonment."

J. C. Campbell and *J. H. Budd*, for petitioner. *Frank R. Smith*, for respondent.

BY THE COURT. We are of the opinion that the city council of Stockton had authority to enact the ordinance under which petitioner was convicted, and that so far as it affects this prosecution it is not in conflict with the general laws of the state. The writ is dismissed, and the prisoner remanded.

(73 Cal. 226)

PEOPLE v. GUIDICE. (No. 20,333.)

(*Supreme Court of California.* August 25, 1887.)

1. ASSAULT WITH DEADLY WEAPON—SIMPLE ASSAULT—INSTRUCTIONS.

On a trial for assault with a deadly weapon, there being no evidence tending to show that a simple assault only had been committed, instructions are not erroneous which require the jury to acquit, or find the defendant guilty as charged.

2. SAME—SELF-DEFENSE—INSTRUCTIONS.

An instruction, as to the right of self-defense, that if the prosecuting witness made the first hostile demonstration in such a manner as would have justified a reasonable man, in defendant's situation, in believing that prosecutor intended to inflict upon him great bodily injury, and if, acting upon these appearances, and believing it necessary for his own protection, and to prevent great bodily injury to himself, defendant struck the prosecuting witness with a deadly weapon, he was justified in doing so, is correct.

In bank. Appeal from superior court, Santa Cruz county; *F. J. McCann*, Judge.

The charge of the trial court as to the right of self-defense, which is referred to in the opinion, was as follows:

"In this case it is not denied by defendant that he struck the prosecuting witness with an axe, but he claims it was done in necessary self-defense, and to repel a dangerous attack which the prosecuting witness was then making, or about to make, upon him. The right of self-defense of a party violently assaulted by another to repel such attack, and fully protect himself, is a law of nature. It antedates all written enactments, and is fully recognized in the laws and regulations of all civilized people. The right is expressly recognized by our own statute, and the conditions under which it may be asserted are clearly defined. These are that the party was not himself the first aggressor, or, if the aggressor, that he had in good faith withdrawn from the contest before he struck the blow. *Second*, that the striking was necessary to prevent the infliction upon himself of a great bodily injury by the party stricken.

"To justify the use of a deadly weapon in self-defense it must appear that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily harm, the attack upon the prosecuting witness was absolutely necessary; and it must appear that the prosecuting

witness was the assailant, or that the defendant had really and in good faith endeavored to decline further struggle before the blow was given. A bare fear of the commission of the offense, to prevent which defendant used a deadly weapon, is not sufficient to justify it; but the circumstances must be sufficient to excite the fears of a reasonable man, and the party attacking must have acted under the influence of such fears alone. It is not necessary, however, to justify the use of a deadly weapon, that the danger be actual. It is enough that it be an apparent danger; such an appearance as would induce a reasonable person, in defendant's position, to believe that he was in immediate danger of great bodily injury. Upon such appearances a party may act with safety; nor will he be held accountable though it should afterwards appear that the indications upon which he acted were wholly fallacious, and that he was in no actual peril. The rule in such cases is this: What would a reasonable person,—a person of ordinary caution, judgment, and observation,—in the position of the defendant, seeing what he saw, and knowing what he knew, suppose from this situation and these surroundings? If such reasonable person, so placed, would have been justified in believing himself in imminent danger, then the defendant would be justified in believing himself in such peril, and acting upon such appearances.

"The defendant is not necessarily justified because he actually believed that he was in imminent danger. When the danger is only apparent, and not actual and real, the question is, would a reasonable man, under all the circumstances, be justified in such belief? If so, the defendant will be so justified. If this was defendant's position, it was his right to repel the aggression, and fully protect himself from such apparent danger. If he could have withdrawn from the danger, it was his duty to retreat. Between his duty to flee and his right to kill he must fly, or, as the books have it, must retreat to the wall. But by this is not meant that a party must always fly, or even attempt flight. The circumstances of the attack must be such, the weapon with which he is menaced of such a character, that retreat might well increase his peril. By 'retreating to the wall' is only meant that the party must avail himself of any apparent and reasonable avenues of escape by which his danger might be averted, and the necessity of striking his assailant avoided. 'But if the attack is of such a nature, the weapon of such a character, that to attempt a retreat might increase the danger, the party need retreat no farther.' 'These definitions and interpretations of the law of self-defense are general rules that are to be applied by the jury to the situation and conduct of both the defendant and the prosecuting witnesses, as they shall determine that position and conduct to have been from the evidence in this cause.' 'Mere words of insult or of reproach, however grievous, will not justify an assault, a blow, or a threatening demonstration with a deadly weapon. But, while mere words will not justify an assault, they may possess significance, as illustrating or explaining the subsequent acts of the parties, and determining who is the first aggressor, especially if threats or menacing expressions are uttered. Leaving out of consideration the mere words of reproach, which of these parties was the aggressor? Which made the first attack?'

"If from the evidence you believe that, without any overt act or physical demonstration upon the part of the prosecuting witness Bowman sufficient to warrant the defendant, as a reasonable man, in believing that he was in great bodily danger, he, the defendant, struck witness Bowman with a deadly weapon, such striking, under such circumstances, was not justifiable. Upon the other hand, if you believe that the prosecuting witness himself made the first hostile demonstration against the defendant by drawing, or attempting to draw, a pistol, or otherwise assaulting him, in such a manner and under such circumstances as would have justified a reasonable man, in defendant's situation, in believing that the prosecuting witness was about to inflict upon defendant great bodily injury, the defendant was justified in acting upon

these appearances and belief; and if necessary for his own protection, and to prevent great bodily injury to himself, he struck prosecuting witness with a deadly weapon, he was justified in so doing, and your verdict should be one of acquittal.

"I believe, gentlemen, that is a full, complete, and intelligent definition of self-defense, and I presume you understand now how to apply it to the facts and circumstances in the case before you. You will now go to your room, and find whether the prisoner is innocent or guilty. If you find for the state, you will find the verdict as guilty; say so under the proper heading. If you find, under all the circumstances, that the defendant is not guilty, then your verdict will be just in those words, 'Not guilty.'"

J. Edward Marks, for appellant. *William T. Jetter* and *Geo. A. Johnson*, Atty. Gen., for the People.

TEMPLE, J. The defendant was charged with an assault with a deadly weapon, and, having been convicted, complains of certain instructions given by the court. It appeared in the evidence that the assault was made with an axe. The prosecuting witness and the defendant agree as to the mode in which the axe was used, and on this point the evidence is not conflicting. In effect, the court told the jury that they must find the defendant guilty as charged, or must acquit; thereby failing to charge that the crime of simple assault was included in the information, and that it was competent for them to find the defendant guilty of the lesser offense. If there was any evidence tending to show that a simple assault had been committed, the instruction was erroneous. We find no such evidence in the record. The real issue raised by the defendant was that he was acting in self-defense. The prosecuting witness said that he was assaulted by the defendant, who struck him with an axe, with such force as to knock him down. The defendant's account of the blow given is as follows: "I was afraid he would shoot, so I struck him with the blunt end of the axe I had in my hand. I tried to hit him on the arm that held up the pistol, but I missed his arm and struck him in the side. He fell down. He still held onto the pistol. I hit him twice more."

It may be true that an axe is not necessarily a deadly weapon; that whether, in the particular case, it is so or not, will depend upon the mode in which it is used. But here was a blow struck with force, intended to be sufficient to disable an antagonist, and actually knocking him down. So used, it was necessarily a deadly weapon, and the defendant was not injured by the failure of the court to instruct the jury as to simple assault. Besides, the defendant did not request any instruction upon that point.

The instruction in regard to the right to act in self-defense was taken from the case of *People v. Iams*, 57 Cal. 115, and has been approved by this court. It correctly lays down the law on that subject. In the case of *People v. Flahave*, 58 Cal. 249, it was said in the charge there reviewed that it must appear that it was absolutely necessary to prevent death or great bodily injury, to justify the use of a deadly weapon in self-defense. This instruction was not qualified by any statement of the right to act upon apparent danger. Here the right of the defendant to act upon appearances was fully and clearly stated.

Order and judgment affirmed.

We concur: SEARLS, C. J.; THORNTON, J.; SHARPSTEIN, J.; McFARLAND, J.; PATERSON, J.

MERRICK v. SUPERIOR COURT FOR THE CITY AND COUNTY OF SAN FRANCISCO. (No. 12,311.)

(*Supreme Court of California.* September 7, 1887.)

WRIT OF REVIEW—SUFFICIENCY OF PETITION.

In a petition for a writ of review, the petitioner alleged, as cause therefor, that the judge of the superior court had rendered judgment against him, when neither he nor his counsel was present, in excess of its jurisdiction, and contrary to the rule of court regarding the notice to be given when the court calendar will be taken up. *Held*, that the petition was insufficient.

Department 2.

Petition for writ of review. The petitioner, Merrick, claimed that in an action brought by one Stiles against him, commenced in a justice's court, and appealed to the superior court of San Francisco, the judge of the superior court rendered judgment against him without his counsel or himself being present in court, in excess of its jurisdiction, and contrary to a rule of said court regarding the giving of notice when the court calendar will be taken up, etc.

John J. Coffey, for petitioner.

BY THE COURT. The petition is insufficient, and the application for the writ of review must be denied. Ordered accordingly.

(2 Cal. Unrep. 808)

ROSS v. WILLIAMS. (No. 11,848.)

(*Supreme Court of California.* September 19, 1887.)

DEED—MISTAKE IN DESCRIPTION—RIGHTS OF PARTIES—REFORMATION.

A settler on public lands gave a wrong description of the land in his application for a patent, owing to a mistake of the government surveyor in marking the stakes, and a patent for the land issued containing such wrong description. The property, after several conveyances, was conveyed to plaintiff, but the original patentee remained in possession under an agreement with plaintiff by which he was to have the privilege to repurchase the land by a certain time. After the mistake in the description was discovered, plaintiff conveyed the land to the government, and received a patent in the name of the original patentee for the land as actually settled by the patentee. *Held*, that plaintiff was entitled to a reformation of the deeds from his grantor, and to the possession of the land taken in by the reformation.¹

Commissioners' decision. Department 1.

Appeal from superior court, Larson county; **M. MARSTELLER**, Judge.

This is an action brought by **A. E. Ross**, plaintiff, against **Joseph Williams**, **Michael Coffey**, and **D. M. Gloster**, defendants, to reform certain conveyances, and to recover from defendant Williams the possession of the land put in by such reformation, with damages for its detention. The defendant Williams, as a pre-emptor, settled upon and improved "lots numbered 2, 3, and 4, and the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 12, in township 24 N., of range 17 E., of Mount Diablo base and meridian, containing one hundred and forty-three 95-100 acres;" but in proceeding to obtain a patent therefor, and in issuing the patent therefor, the land was by mistake described as "lots numbered 2, 3, and 4, and the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 13." He also, under the homestead laws, settled upon and improved the "N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, and the W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 12, and the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 1;" but in his proceedings to obtain a patent therefor, and in

¹A mistake in the description of land intended to be conveyed, resulting from an error as to its identity, is a mistake of fact against which equity will relieve, *McCasland v. Insurance Co.*, (Ind.) 9 N. E. Rep. 119; *Baker v. Pyeatt*, Id. 112; *Conrad v. Schwainb*, (Wis.) 10 N. W. Rep. 395; *James v. Cutler*, Id. 147; and such relief will be granted in favor of the administrator of the grantee. *Citizens' Nat. Bank v. Dayton*, (Ill.) 4 N. E. Rep. 492.

issuing the patent, the tract was described by mistake as the "W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 13, and the W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 12."

The defendant Williams sold the land to the defendant Coffee, who sold to defendant Gloster, intending to convey the land actually settled on by Williams, but followed the description found in the patent from the United States.

In January, 1882, Williams being in possession of all the land under an agreement with Gloster, by which he had the right to purchase all of it from Gloster, but the time in which he was to make such purchase being about to expire, he requested plaintiff to buy the land, and thereafter give him (Williams) an extension of time, upon such terms as Williams and the plaintiff might agree, in which to purchase and pay for it. The plaintiff purchased all of the land from Gloster, who on January 20, 1882, executed and delivered to plaintiff a warranty deed, by which he intended to convey to plaintiff the land which Williams had settled upon and improved, and which was intended to be conveyed to him by the government; but Gloster followed the description as made in the deed to him, as conveyed to Williams by the United States.

It appeared that in making the government survey the surveyors made a mistake in marking some of the stakes, which misled the defendant and others in describing the land in their applications, and the error thus made continued through all the writings. This mistake was discovered in 1882, and, the attention of the land department of the government being called to it, was corrected before this suit was commenced, as to patents, by plaintiff's deeding the property conveyed to him by Gloster to the United States, and receiving a patent in the name of Williams for the land settled on by Williams. Plaintiff bought the land from Gloster for \$1,309. He then gave to defendant, Williams, a contract of sale whereby he agreed to convey the land to defendant at any time within five years, upon payment of the purchase price above stated, interest, taxes, and other advances, such interest to be paid annually. This agreement was made the sixteenth day of February, 1882, and it provided that, if defendant failed in any part of his agreement, he would deliver possession of premises to plaintiff. Defendant failed to comply with the agreement as to payment of interest, and before commencement of this action he surrendered the agreement, and notified plaintiff that he could not comply with it. After it was learned that a mistake had been made in the description of land, defendant claimed that he was on public land, and refused to surrender possession to plaintiff. Plaintiff had judgment. Defendant, Williams, appeals.

E. V. Spencer, for appellant. *J. D. Goodwin*, for respondent.

FOOTE, C. This is an action brought for the purpose of reforming certain conveyances, and to recover certain lands which should have been properly described, but which by mistake were erroneously set out, therein. The plaintiff had judgment against all the parties defendant, but only one of them, Williams, appeals therefrom, and from an order denying him a new trial.

The points made by the appellant are that the findings are not supported by the evidence, and that the court erred in its rulings upon the admission and exclusion of evidence. To us the findings appear to be fully sustained by the evidence. We have examined with care the various rulings of the court as to the exclusion or admission of proffered evidence, and find that tribunal either to have been right in its action, or that its rulings did not and could not have had the least effect upon the decision in the cause. The effort of Williams to retain the land, and the money for which he had sold it, and his refusal to convey it by the description which it was originally intended to have, appears to have been inspired by a supposition he seems to have entertained that in some way unexplained by the record he could keep the plaintiff out of his just rights.

There is no merit in the appeal, and the judgment and order should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(73 Cal. 415)

ANSON v. TOWNSEND. (No. 12,062.)

(*Supreme Court of California*. September 20, 1887.)

1. FRAUDS, STATUTE OF—PAROL GIFT OF LAND.

A parol gift of real estate to one who had entered into possession of the premises before the gift was made, and who made no improvements thereon, and expended no money by reason of the gift, nor gave any other valuable consideration therefor, is void under the statute of frauds, and will not prevail against one holding the legal title.¹

2. PARTIES—REAL PARTY IN INTEREST—TRUSTEE WITH LEGAL TITLE.

In an action to recover real estate, the fact that the plaintiff holds the legal title makes him, so far as the defendant is concerned, the real party in interest, and entitles him, under the Code, to maintain the action, and it is immaterial that such legal title is held in trust for a third person.

Commissioners' decision. Department 2.

Appeal from superior court, Tehama county; CHARLES P. BRAYNARD, Judge.

Chipman & Garter and *J. F. Ellison*, for appellant. *Jas. T. Matlock* and *R. B. Snelling*, for respondent.

BELCHER, C. C. The principal questions involved in this case relate to the validity of an alleged parol gift of real property. The property in question consists of certain lots in the town of Red Bluff, which, in June, 1882, were owned by Abraham Townsend, and on which there was then a small dwelling-house. The defendant claims that Abraham Townsend made her a parol gift of the lots on the eighth of June, 1882, and that she thereby acquired a right to them which a court of equity will protect as against the legal title.

The facts upon which this claim is based may be briefly stated as follows: The defendant was the wife of Wilbur Townsend, and he was the son of Abraham Townsend. Wilbur had deserted defendant, leaving her with a young child, named Grace, and with no means to support herself and child except her own labor. Defendant was in the house, living there, when, on the eighth of June, 1882, and upon the premises, as she testifies, "he [Abraham Townsend] told me he gave me the property; it was mine if I would take good care of Gracie, and educate her and bring her up right. * * * He gave me the key to the front part of the house, and told me it was mine; the house was mine." Mollie Kennedy was a witness for defendant, and testified that she "heard a conversation between A. Townsend and the defendant, relative to the property in dispute. It was on June 8, 1882, I heard A. Townsend tell her that she could have the home, and it was hers; and for her always to take good care of Gracie, and that the home was hers. He gave her a key to the house. She said: 'Mr. Townsend, can I plant some vines out in front? I

¹Previous possession will not take a parol conveyance out of the statute of frauds. Possession must be taken in pursuance of the sale. *Birbeck v. Kelly*, (Pa.) 9 Atl. Rep. 313; *Green v. Groves*, (Ind.) 10 N. E. Rep. 401. Equity protects a parol gift of land, equally with a parol agreement to sell it, if accompanied by possession, and the donee, induced by the promise, makes valuable improvements on the land. *Dowson v. McFaddin*, (Neb.) 34 N. W. Rep. —. In general, as to the part performance that will take a contract out of the statute of frauds, see *Martin v. Patterson*, (S. C.) 23 E. Rep. 359, and note.

want to make a shade.' He said: 'Yes; you can do whatever you want to with the house; the house is yours; I give you this house; it is yours.' He said for her always to take good care of Gracie, and give her a good education, and Gracie came around, and kissed him, and says: 'Gran'pa, you aint going to throw me out in the street?' and he says: 'No; I never intended to.' Thereafter the defendant continued to occupy the house until some time in the spring of 1883, when it was burned down. The lots were then vacant and unoccupied until the fall of 1884. Early in June, 1883, Abraham Townsend died. Administration was had upon his estate, and in September, 1884, the lots in question were distributed to Mrs. Etteville Townsend, the widow of deceased. After the distribution Mrs. Townsend erected a new house on the lots. In reference to this new house and her possession of it defendant testified: "Mrs. E. Townsend put it there, and after the death of A. Townsend, I did not object to her building on the place. I was living in town at the time it was built. I did not pay for any part of the house that is now on the property. I moved into it about a week after it was completed. The widow Townsend did not give me a key to it. I went in at the back door; it was unlocked. The front door was locked, and the key was on the inside of the door. It was dusk when I moved in. I did not get Mrs. Townsend's consent before I went in."

The foregoing is substantially all of the testimony on which defendant rests her case; and the question is, does it show such a gift of the lots as a court of equity will enforce? It is, of course, settled law that courts will compel the specific performance of parol contracts for the sale of real property when there has been a part performance of the contracts. And parol gifts will be enforced under like circumstances and conditions as parol sales. *Freeman v. Freeman*, 51 Barb. 306, and 43 N. Y. 34; *Manly v. Howlett*, 55 Cal. 94; *Bakersfield Ass'n. v. Chester*, Id. 102. But it is not always easy to determine what acts will constitute a sufficient part performance to remove a case from the operation of the statute of frauds. The general rule is that nothing will be considered a part performance which does not put the purchaser or donee in a situation which is a fraud upon him unless the agreement is fully performed. *Fry*, Spec. Perf. § 388; *Edwards v. Estell*, 48 Cal. 196. And before any acts otherwise sufficient can be treated as a sufficient part performance, it must appear that they were done in pursuance or fulfillment of the parol agreement, or in just reliance thereon. They must be done with a view to the agreement, and be referable exclusively thereto. *Story*, Eq. Jur. §§ 762-764; *Miller v. Ball*, 64 N. Y. 286; *Jervis v. Smith*, 1 Hoff. Ch. 470. Moreover, equity will not enforce the specific performance of a contract where the party asking its enforcement cannot be compelled to perform it specifically on his part. "The contract must be just and equal in its provisions, and the subject-matter must be such that equity can take jurisdiction of it, and compel performance by both of the parties. The remedy must be mutual as well as the obligation, and where the contract is of such a nature that it cannot be specifically enforced as to one of the parties, equity will not enforce it against the other." *Cooper v. Pena*, 21 Cal. 403.

Now, looking at the case made by the defendant, how can it be said that a refusal to enforce the alleged gift will operate as a fraud upon her? She entered into the possession of the property, not under or in pursuance of the gift, but in advance of its being made. She made no improvements upon the property, but simply occupied the house till it was burned down. She stood by while Mrs. Townsend, the distributee of the lots, erected a new house thereon, making, so far as appears, no claim to them, and, when the house was completed, surreptitiously took possession of it. She paid nothing, and did nothing, except to support her little girl, which she was legally bound to do in any event. The grandfather of the child was not legally bound to support and educate her, and his promise to do so, if made, could not have been

enforced. *Mills v. Wyman*, 3 Pick. 207. In our opinion, the gift, if made as claimed to have been, was within the statute of frauds and void.

The point was made at the trial that the plaintiff was not the real party in interest, but was suing for and in the interest of Mrs. Etteville Townsend, who had conveyed the property to him by deed. Upon this point the court, of its own motion, instructed the jury as follows: "Under the Code of Civil Procedure every action must be brought in the name of the real party in interest, and it is the province of the jury to say from the evidence who that party is; whether it is Mrs. Abraham Townsend or the plaintiff. Should the jury find from the evidence that the plaintiff in this action is not the real party in interest, but that the real party in interest is Mrs. Abraham Townsend, then their verdict should be for the defendant." The instruction was clearly erroneous for two reasons: *First*, we find nothing in the evidence to justify such an instruction; and, *second*, as the plaintiff had the legal title, it did not concern the defendant whether he held it in trust for Mrs. Townsend or not. So far as concerned the defendant, he was the real party in interest, and might sue in his own name. *Walker v. McCusker*, 12 Pac. Rep. 724.

The judgment and order should be reversed, and the cause remanded for a new trial.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed and cause remanded for new trial.

(73 Cal. 425)

STOCKTON v. KNOCK, Adm'r, etc. (No. 11,867.)

(*Supreme Court of California*. September 22, 1887.)

1. HUSBAND AND WIFE—COMMUNITY PROPERTY—WAIVER—EVIDENCE OF, UNDER GENERAL ISSUE.

Plaintiff, by stipulation in an action for a divorce, waived all claim to community property; and the decree, granting her a divorce, directed such property to be set apart to the husband. In ejectment brought against the husband's administrator for a homestead which was community property, *held*, that such decree and stipulation, and the will of decedent, were admissible in evidence under the general issue.

2. SAME—EXAMINING PLEADINGS TO EXPLAIN DECREE.

In a petition for divorce, plaintiff described a certain homestead, alleging it to be community property; and the decree, granting her a divorce, awarded in general terms all community property to the husband. *Held*, in an action of ejectment brought by her against the husband's administrator to recover as homestead a portion of such community property, that the petition in the divorce suit might be considered in determining what property was awarded to the husband by the decree, and that the homestead was included in such award.

3. SAME—DIVORCE GRANTED WIFE FOR CRUELTY—COURT MAY AWARD COMMUNITY PROPERTY TO HUSBAND.

Where the wife, in an action for divorce, by stipulation waives all claim to community property, the court has power, under Civil Code Cal. § 146, subd. 3, in a decree granting her a divorce for extreme cruelty, to award all such community property, including homestead, to the husband.

Commissioners' decision. Department 1.

Appeal from superior court, Lassen county; W. T. MARSTELLER, Judge.

E. V. Spencer and *J. E. Raker*, for appellant. *Goodwin & Davis*, for respondent.

FOOTE, C. The plaintiff brought an action of ejectment against the defendant, the administrator of her divorced husband's estate. The land sued for was a homestead, duly declared such by the husband, from community property, during the life-time of both the parties and the continuance of their

marriage. The trial court gave judgment for the defendant; and from that, and an order refusing to grant her a new trial, the plaintiff has appealed.

In her complaint she claims the right to enter, take possession, and hold the land in dispute, and that the defendant wrongfully withholds the possession thereof from her, which allegations he by his answer denies. It would therefore appear as if, under the general issue thus pleaded, the defendant had a right to introduce in evidence the judgment roll showing the divorce proceedings had between the parties in another action, which tended to show as a matter of fact that the plaintiff did not have the right, as she claimed, to enter upon the land in dispute at the time of the commencement of her action. *Semple v. Cook*, 50 Cal. 26. There was nothing in the answer which confessed the plaintiff's right of entry, and pleaded the judgment in the divorce proceedings by way of estoppel, as an avoidance of such right of entry. Therefore the case of *Young v. Wright*, 52 Cal. 407, cited to us by the appellant, is not in point. We hold, against the appellant's contention, that the judgment roll, the stipulation of counsel as to the disposition of the property mentioned in the petition for a divorce, and the will of said H. C. Stockton, deceased, were admissible in evidence.

It is next to be considered what effect, if any, the decree of divorce had upon the plaintiff's claim to a right of entry and possession as against the administrator of the estate of the deceased, H. C. Stockton, her divorced husband. The petition for a divorce contains this averment: "Plaintiff further says that defendant owns a tract of land of 320 acres, the homestead of plaintiff and defendant, situate on Susan river, about seven miles north-west of Susanville, in this county, known as 'Stockton Mill;' that he also owns horses, cattle, sheep, and hogs, the number of which is unknown to plaintiff, and other personal property; that all said property is common property, and was acquired since the marriage of plaintiff and defendant, and was not acquired by gift, devise, or descent." The part of the decree of divorce pertinent to the matter in hand is as follows: "And it further satisfactorily appearing to the court that the community property is of little value, and that the defendant is considerably in debt, and he having undertaken the care and education of the said four boys, the children of plaintiff and defendant, and the plaintiff having voluntarily relinquished all claim to the property, it is further ordered and adjudged that the whole of the community property be set apart to the defendant." The stipulation filed in the cause reads thus: "It is hereby stipulated and agreed that if the court should be of opinion that the plaintiff is entitled to a divorce, then the plaintiff waives all claim to the property, or any of it; and the parties mutually agree that if the court be of the opinion that the interests of the children will be protected, that the plaintiff shall have the custody of the three girls, and the defendant of the four boys, and consent to a decree so awarding the custody, if the court is of the opinion that the plaintiff is entitled to a decree at all." By his will the decedent, H. C. Stockton, left all his property, real and personal, to his four boys, and directed further "that a certain saw-mill known as the 'Stockton Saw-Mill,' situated near the town of Susanville, in Lassen county, state of California, and now owned by me, and also the ranch connected therewith, shall be kept until the youngest boy shall become of lawful age," then the property to be divided, etc.

From this documentary evidence it is plain that the court granting the divorce intended to and did assign the homestead and community property of the parties to the husband. The complaint identifies a certain "Stockton Mill" as a tract of 320 acres of land, the homestead of the parties, and declares that it and all the personal property described therein is community property; thus definitely including in the community property, as a part of it, the homestead known as "Stockton Mill." The decree, following the complaint, assigns all the community property, as set out in that pleading, to the husband, and, as the greater includes the less, the Stockton mill homestead, as

described in the complaint in the action, passed to H. C. Stockton by the decree rendered therein; for the decree can be made certain as to the description of the property it meant to assign to the husband, by reference to the complaint, which contained sufficient description of it. *Certum est quod certum reddi potest.*

The land described in the declaration of homestead is that sued for in the present action, and it is plain to us, from all the facts and circumstances disclosed in the record here, that the only homestead the parties ever had while they lived as husband and wife, was the one involved in this controversy, and decreed to H. C. Stockton, by the court trying the action of divorce, together with other property belonging to the community. But the plaintiff contends that the court which granted the divorce did not have the power to make the decree which it rendered in the premises, from the fact, as she alleges, that the husband was found guilty by that tribunal of "extreme cruelty" towards her, which was a bar to the assignment to him of a homestead taken from community property, as he was not an "innocent party." As a conclusive answer to that, it may be said that, as the plaintiff of her own motion stipulated that the court should assign the whole of the property set out in her complaint to her husband, and as the language of Civil Code, subd. 3, § 146, leaves it entirely discretionary with the court to assign or not the homestead, either absolutely or for a limited period, to the innocent party, *subject to the future disposition* of that tribunal, it would seem as if the trial court had full power and authority to make the decree which it did. The other points made do not require notice.

It is evident that the plaintiff could not, in an action of ejectment, recover from one in possession property to which she had no right of entry. The judgment and order should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(73 Cal. 430)

NATIONAL BANK OF D. O. MILLS & Co. v. PORTER BROS. (No. 11,036.)

(Supreme Court of California. September 24, 1887.)

PRINCIPAL AND AGENT—FACTOR'S LIEN—ASSIGNEE OF BILL OF LADING.
Affirming *National Bank v. Porter*, 11 Pac. Rep. 693.

Commissioners' decision. In bank.

Appeal from superior court, Sacramento county; T. B. McFARLAND, Judge.

Hart & White, for appellant. *Freeman & Bates*, for respondent.

BELCHER, C. C. When this case was before department 1 of this court, it was, in our opinion, rightly decided. 11 Pac. Rep. 693. The law applicable to the facts appearing in the record was correctly stated, and little more need now be added.

It is urged for the appellants that the facts as stated in the opinion are at variance with those stated in the complaint, and that by not looking at the complaint the court was led into error. The allegation in the complaint which is referred to is to the effect that Brewer & Co., being the owners of the carload of grapes in question, on the third day of October, 1883, shipped the same by railroad from Sacramento to Chicago, to be there sold by the defendants as commission merchants, and the proceeds to be accounted for to the owners of the fruit; that Brewer & Co. then and there received from the rail-

road company a bill of lading, and on the same day assigned the grapes to Cook & Son, by writing on the bill of lading an assignment, which is set out, and by delivering such bill of lading to Cook & Son. It is claimed that under this averment there can be no question that Brewer & Co. owned the grapes when they were shipped, and that if there was an agreement between the parties, either express or to be implied from their acts and course of dealing, that the consignees should have a lien upon the grapes for any general balance due them, then their lien attached the moment the grapes were delivered to the railroad company to be shipped, and that lien could not afterwards be divested by any act of the consignors. In support of this position the principal cases relied upon are *Valle v. Cerre's Adm'r*, 36 Mo. 588, and *Bailey v. Railroad Co.*, 49 N. Y. 75, 76.

In the first-named case it is said: "Whether or not the given consignment is to be considered as made to cover a general balance of account, will depend upon the special arrangements, agreements, and understanding of the parties; but where such an agreement exists, and the consignment is made in pursuance of it, and there is nothing else in the case which is inconsistent with the hypothesis, the case would be governed by the same principle, and a delivery to the carrier will be considered as a constructive delivery to the consignee. *Russ. Fact.* 203; *Clark v. Mauran*, 3 Paige, 373; *Bryans v. Nix*, 4 Mees. & W. 791; *Desha v. Pope*, 6 Ala. 690; 3 Pars. Cont. 261, and note *w*. In such case the shipment and delivery of the goods to the carrier, under the bill of lading, amounts to a specific appropriation of the property, with an intention that it shall be a security or a payment to the consignee for the advances he has made."

In the New York case, the court said: "It must appear that the delivery was made with intent to transfer the property. Until this is done the parol agreement is executory, the title remains in the consignor, and he has the power to transfer the property to whomsoever he pleases. * * * If A. has property upon which he has received an advance from B., upon an agreement that he will ship it to B. to pay the advance, or to pay any indebtedness, he may or he may not comply with his contract. He may ship it to C., or he may ship it to B., upon conditions. As owner he can dispose of it as he pleases. But if he actually ships it to B. in pursuance of his contract, the title vests in B. upon the shipment. The highest evidence that he has done so is the consignment and unconditional delivery to B. of the bill of lading. If the consignor procures an advance upon the bill of lading from a third person, or delivers or indorses the bill of lading to a third person for a consideration, it furnishes equally satisfactory evidence that the property was not delivered to the consignee, for the simple reason that it was delivered to some one else. * * * As against the consignor, the delivery of the property to the carrier, with intent to comply with his contract, vests the title in the consignee. It is largely a question of intention."

We fail to see how it can be said that these cases support the contention of appellants, and none which go further in that direction have been called to our attention. Here it does not appear that the car-load of grapes in question was shipped by Brewer & Co. in pursuance of their alleged agreement with defendants, nor that the delivery was made with the intent to transfer the property to them. On the contrary, it is clearly shown by uncontradicted evidence that it was understood in advance that the shipment was to be made for and on account of Cook & Son, to whom the bill of lading was assigned, and delivered immediately upon its issuance. The shipment and assignment of the bill of lading were parts of one transaction, and were wholly inconsistent with the hypothesis upon which the appellants base their claim.

As the case was presented, we see no error in the rulings of the court below, and the judgment and order should therefore be affirmed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(73 Cal. 437)

MILLER v. THOMAS and others. (No. 9,933.)

(*Supreme Court of California.* September 24, 1887.)

APPEAL—MODIFICATION OF JUDGMENT—RIGHTS OF PARTIES NOT SERVED WITH NOTICE.

Upon appeal from an interlocutory judgment, where it appears from the record that the portions appealed from could not be modified without disturbing the whole judgment, and prejudicially affecting the rights of parties not served with notice of the appeal, the appeal should be dismissed. MCKINSTRY, J., dissenting.

For opinion on former appeal, see 12 Pac. Rep. 432.

In bank. Appeal from superior court, Santa Clara county; D. BELDEN, Judge.

Partition by Henry Miller, Thomas Rea, and Johanna Fitzgerald against Massey Thomas and some 1,200 other defendants. The land in question is the Rancho Las Animas, Santa Clara county, California. The *rancho* was a Spanish grant to one Mariaud Castro, who died in 1828, leaving a wife and eight children surviving him. Maria Lugardo Castro de Doak, one of his daughters, became the owner, by inheritance, of an undivided one-sixteenth of the *rancho*. The respective interests of the parties to this appeal are confined to this tract.

Page & Elks, A. W. Crandall, and F. P. Bull, for appellants. Houghton & Reynolds, for respondent.

BY THE COURT. A motion was made to dismiss the appeal herein, which was denied. In deciding the motion this court said: "So far as appears to us from the transcript, the judgment might be modified, if necessary or proper, without affecting the right of any party not served" with notice of appeal. "If, however, it should appear on the final hearing that the necessary parties are not before the court on this appeal, the appeal will be held ineffectual." 12 Pac. Rep. 432. The cause has since been argued, and, upon full examination of the record in the light of the argument, we are of opinion that this court has no jurisdiction to entertain the appeal, for the reason that there can be no just or appropriate modification of the portions of the interlocutory judgment appealed from, without disturbing the whole judgment, and prejudicially affecting the rights of parties not served with notice of this appeal. Appeal dismissed.

THORNTON, J., did not participate in the decision.

MCKINSTRY, J., dissents.

MILLER v. REA. (No. 9,847.)

(*Supreme Court of California.* September 24, 1887.)

In bank.

BY THE COURT. On the authority of *Miller v. Thomas*, *supra*, filed this day, appeal dismissed.

(73 Cal. 428)

In re Estate of CONNOLLY, Deceased. (No. 11,033.)

(Supreme Court of California. September 21, 1887.)

EXECUTORS AND ADMINISTRATORS—LIABILITY FOR WASTE.

The bondsmen of an administrator charged with wasting the assets cannot defend on the ground that the succeeding administrator was negligent in first seeking to recover the assets in the hands of third parties to whom they had been wrongfully transferred.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

John F. Burris and P. G. Murphy, for appellants. *M. L. G. O'Brien and W. C. Burnett*, for respondents.

SEARLS, C. J. This is an appeal from an order and judgment of the superior court in probate in favor of Patrick Callahan, administrator of the estate of John Connolly, deceased, and against Daniel Connolly, former administrator of the same estate, settling the account of such former administrator at \$671.50, and ordering the same paid over to his successor. It appears from the report of the referee appointed to take and state the account of the former administrator that the latter received money and property of the estate of the value of \$1,133; that he paid out certain moneys on account of the estate, leaving a balance of \$671.50 in his hands due the estate, and that his services were of no value to the estate. The report was approved by the court, and the order entered thereupon, from which this appeal is taken.

Turning to the testimony, and it appears that Daniel Connolly, the former administrator, treated the assets of the estate as though they were his own property; probably proceeding upon the theory that he was the sole heir at law of the deceased. Of the moneys belonging to the estate, he confided \$450 to one Reynolds, with a view of its being used in business for their joint account. Of this sum \$200 was lost to the estate; the residue having been collected by the successor of Connolly.

The exceptions to the report of the referee are taken, not by Connolly, the administrator, but by Michael H. Gaffney, and S. A. Hussey, his bondsmen. Conceding that they can be heard in this connection, and the most that they claim in favor of their position is that their principal squandered the estate most palpably, and that the security afterwards obtained from Reynolds, by which a portion of it might have been recovered, was lost by the negligence of the attorney of the estate. This is to put the case much stronger than the facts will warrant; but assuming such to be the fact, and we still think the action of the court below correct. The successor of Connolly was under no obligation to look beyond him and his bondsmen for the assets of the estate. His doing so was a voluntary act, without any privity with or authority from Connolly; and if, in seeking to recover from Reynolds a mere debt which the latter owed to Connolly, he was guilty of negligence, it does not lie with Connolly or his bondsmen to find fault. Again, the evidence tends to show that the negligence and wrong, if any, by which the failure to collect the money due from Reynolds occurred, was occasioned by the conduct of Swartz, who was the agent of the bondsmen, and that of Koen, who acted under him.

The judgment appealed from is affirmed.

We concur: MCKINSTRY, J.; TEMPLE, J.

(78 Cal. 28)

RANKIN v. C. P. R. Co. and another. (No. 12,074.)*(Supreme Court of California. July 7, 1887.)***APPEAL—BY PARTY NOT AGGRIEVED — SUCCESSFUL DEFENDANT NOT AFFECTED BY NEW TRIAL TO CO-DEFENDANT.**

In an action brought by the plaintiff against two defendants, judgment was rendered in favor of one, and against the other. The latter moved for a new trial, and the court ordered that the judgment be "set aside, and that a new trial be granted the moving party." From this order the other defendant appealed. *Held* that, as the order did not affect the judgment in favor of the other defendant, an appeal therefrom was unauthorized, and should be dismissed, because not taken by the "party aggrieved." Code Civil Proc. Cal. § 938.

In bank.

BY THE COURT. The appeal of the S. P. C. R. Co. from the order of the court below granting a new trial is unauthorized, and must be dismissed, because not taken by "a party aggrieved." Section 938, Code Civil Proc. The order in express terms grants a new trial only to the moving party, *i. e.*, the C. P. R. Co. For the purpose of determining the scope and effect of an order granting a new trial, we look at the moving papers, as well as the language of the order. In this case, appellant had judgment in its favor against plaintiff, and plaintiff recovered judgment against appellant's co-defendant, the C. P. R. Co. The latter moved for a new trial, which motion was granted in an order of which the following is a copy: "It is hereby ordered that the verdict and judgment heretofore rendered and entered herein be, and the same are hereby, vacated and set aside, and that a new trial be granted the moving party herein, upon its payment to plaintiff of his costs of the former trial." This order of the court, granting a new trial, did not, and could not, affect the judgment in favor of the S. P. C. R. Co.

Appeal dismissed.

(73 Cal. 96)

RANKIN v. C. P. R. Co. and another. (No. 12,191.)*(Supreme Court of California. July 7, 1887.)***VERDICT—AGAINST ONE OF TWO DEFENDANTS—SILENT AS TO THE OTHER.**

In an action brought against two defendants, C. and S., for injuries resulting from their joint negligence, C. and S. answering separately, the jury rendered a verdict against C., but was silent as to S., and the clerk entered judgment against the plaintiff for the costs of S. *Held*, that this was not a verdict upon the issue raised by the answer of S., and that the judgment should therefore be reversed.

In bank.

PATERSON, J. Plaintiff commenced this action against the C. P. R. Co. and the S. P. C. R. Co. to recover for injuries charged in the complaint to have resulted from the joint negligence of both defendants. Each defendant answered separately, denying the negligence imputed to it, and each charging the other with negligence at the junction of their tracks where the accident occurred. The verdict rendered was in favor of the plaintiff against the C. P. R. Co. for \$50,000, but was silent as to the S. P. C. R. Co. Upon this verdict the clerk entered up judgment in favor of plaintiff against the defendant the C. P. R. Co. for the sum of \$50,000 and costs, and against plaintiff in favor of the defendant the S. P. C. R. Co. for costs of the latter. Unless we are prepared to overrule the case of *Benjamin v. Stewart*, 61 Cal. 605, we think the decision therein conclusive upon the question raised here. As we understand that case, it was held that such a verdict was not a decision upon the issue of fact raised by the answer of the defendant not named in the verdict.

The verdict of the jury, like the finding of the court, must pass upon all the issues, and be free from ambiguity and uncertainty. And where there

is a party plaintiff or defendant in whose favor, or against whom, judgment may be entered, regardless of the rights of those with whom he is joined, the verdict should expressly declare in favor of or against such party. The intent of the jury should not be left to inference or presumption. *Jenkins v. Parkhill*, 25 Ind. 473; *Settle v. Alison*, 8 Ga. 208. Of course, where the plaintiff takes a judgment against some of the defendants, his action amounts to a dismissal of the case against the other defendants sued as joint tort-feasors, and the judgment debtors cannot complain, there being no contribution; but in this case it is the plaintiff who complains that a judgment has been entered in favor of one of the defendants, against his wishes, and without a finding of the jury to support it. The case went to the jury with instructions which show that plaintiff was demanding an adjudication of all the issues as to both parties, and there is nothing subsequent to show consent to anything less on the part of plaintiff, or from which such consent or a waiver may be fairly presumed.

The verdict in this case is not simply informal or defective in matters that the plaintiff was bound to have corrected at the trial or waive the defect. It is no verdict at all upon the issue raised by the answer of the defendant S. P. C. R. Co., and the failure of plaintiff to call for a correction of the verdict does not raise a presumption that the issue had been abandoned by him on the trial.

Judgment reversed.

We concur: SEARLS, C. J.; MCFARLAND, J.; MCKINSTRY, J.; TEMPLE, J.; THORNTON, J.

(73 Cal. 464)

HONIG v. PACIFIC BANK. (No. 11,758.)

(*Supreme Court of California.* September 27, 1887.)

1. BANKS AND BANKING—CERTIFICATE OF DEPOSIT—UNAUTHORIZED PAYMENT TO AGENT.

PEYSER, a collector in the employ of Honig, deposited in a bank, without the latter's knowledge, certain sums of money, and, in designating to whose order the same was to be payable, wrote in the bank register, "N. Honig, by S. A. Peyser." Thereupon the bank issued and delivered to Peyser certificates of deposit payable to the order of "N. Honig," which were afterwards paid by the bank upon the indorsement by Peyser of "N. Honig, by S. A. PEYSER." Subsequently, Honig, learning of the transaction, ratified the act of Peyser in depositing the money, and sued the bank upon the certificates so paid. *Held*, there was no contract, express or implied, that the certificates were payable only when indorsed according to the signature in the register; and that Honig was entitled to recover. MCFARLAND and PATERSON, JJ., dissenting.

2. SAME—DEPOSIT BY AGENT—FICTITIOUS PRINCIPAL.

A bank assuming that a depositor, who designates himself as agent, represents a fictitious principal, does so at its peril.

3. SAME—DELIVERY TO AGENT—ACTION ON, BY PAYEE—UNAUTHORIZED PAYMENT TO AGENT.

The fact that a certificate of deposit was in the possession of defendant bank (from which it was issued) at the time of commencing the action, and was never actually delivered to the payee named, is no defense to an action thereon by such payee, when it appears that there had been a constructive delivery to the payee through his agent, and that the possession of the defendant had been obtained by paying the certificate on the agent's unauthorized indorsement of the payee's name.

4. SAME—RATIFICATION OF DEPOSIT BY AGENT—PAYMENT TO AGENT NOT BINDING ON PRINCIPAL.

Upon a ratification of the unauthorized acts of an agent in depositing in a bank certain sums of money, a recovery may be had by the principal of the full amount deposited, as evidenced by certificates of deposit issued by the bank, and wrongfully paid to the agent, without showing the amount actually received by the bank, and although the money drawn by the agent on the first certificate may have been used to purchase the second. MCFARLAND and PATERSON, JJ., dissenting.

In bank. Appeal from superior court, San Francisco; J. F. SULLIVAN, Judge.

Chas. J. Swift, for appellant. *Crittenden Thornton* and *F. H. Merzbach*, for respondent.

TEMPLE, J. This action is brought upon six certificates of deposit, made, executed, and delivered to the plaintiff, by the defendant. They are all in the same words, except as to date and amount. The following is a copy of the first issued:

"\$250.

No. 3,289.

"PACIFIC BANK, N. W. cor. Sansome and Pine Streets—Series B.

"SAN FRANCISCO, January 19, 1885.

"N. Honig has deposited in this bank two hundred and fifty dollars in gold coin, payable to self or order on the return of this certificate, properly indorsed.

M. W. UPTON, Teller.

"S. G. MURPHY, Cashier."

The deposits were in fact made by one S. A. Peyser, who was the clerk of the plaintiff, and the certificates were delivered to him. When he made the deposits Peyser demanded certificates, and wrote in the register of certificates of deposit, under the head of "To Whose Order," "N. Honig, by S. A. Peyser," and the money was paid to him on each and all of the certificates. Honig had for many years been a well-known business man in San Francisco, but he had never had dealings with the defendant other than to collect money on checks on the bank; and it does not appear, otherwise than by the register and the issuance of the certificates, that the officers of the bank ever knew of his existence.

Peyser was in the employ of Honig, and was intrusted with the collection of moneys, but Honig did not authorize him to make these or any deposits with the bank; did not, in fact, know of the deposits, or that any certificates had been issued, until long after the certificates had been paid to Peyser, as before stated. Of course, Peyser had no authority from Honig to indorse the certificates, or to obtain the money upon them. Some time after their payment, Honig discovered the fact, and brought this suit upon the certificates, although they had been so paid, and had in fact been surrendered by Peyser to the bank, and were still in possession of the bank.

As to the register of signatures, the cashier testified as follows: "The register book of certificates of deposits is a signature book, or book of identification, which is placed before a person making a deposit in this way, and in which he writes his name then and there; and opposite to that man's name is the amount that the certificate is issued for and the number; and, on the return of that certificate to the bank, the paying teller is required to examine and compare the signature of the indorsement with the signature of the party depositing the money; and if that signature is not genuine, and has not the appearance of being genuine, and written by the party who deposits the money, payment is refused upon it."

It is contended that a certificate of deposit is a form of deposit by one with whom the bank has not a regular account; that the depositor, on leaving his money, leaves also his signature, thereby designating upon what indorsement the money may be withdrawn; that the contract really is to pay upon the surrender of the certificate indorsed by the same person, and in the same way, that the register is made in the certificate of deposit book. But the trouble with this contention is that the certificate is a negotiable instrument. On their face, the certificates sued on are payable to N. Honig or order. The register is a private book, kept by the bank for its own convenience and protection. It forms no part of the negotiable instrument issued by the bank. If an indorsement is required, the character of it is indicated on the face of the paper itself, which is expressly made payable to Honig or order.

The exigencies of the defendant's case would require us to hold that: (1) Had Honig presented in person the instrument which is expressly made pay-

able to him or order, the bank could have properly refused payment, and that upon such refusal no action would lie on the part of Honig against the bank. (2) That, had Honig assigned the certificate for a valuable consideration, the assignee could not have obtained the money, although by law it is negotiable, and is expressly made payable to Honig's order. (3) That Peyser could have indorsed Honig's name, and demanded the money, although the defendant knew he was no longer in the employ of Honig, and that Honig expressly protested against his authority to indorse his name, or to receive the money for him. That is, that Peyser was able without Honig's knowledge or consent to constitute himself Honig's agent, and that the agency was irrevocable. And (4) in case of Honig's death, his administrator could not get the money, but Peyser could still obtain it; and, in case of his death, his administrator, too, could have drawn the money.

If I send my messenger boy to make a deposit for me, and he discloses his principal, and the certificate is issued payable in terms to me, the contention is that I cannot collect the money until I cause my own name to be indorsed on the certificate by the boy, who at the time may be in Hong-Kong. This cannot be so. If the bank keeps a certificate book for its protection, its officers must see to it that they get the right signature in the book. It cannot, by taking the wrong signature, prevent the true owner from getting his money on demand.

There is no contract, express or implied, that the certificate was payable only when indorsed according to the signature in the register. The certificate of deposit register is evidently a mere private book, whose contents cannot concern the holder of a negotiable certificate; but, if it were otherwise, it is difficult to discover how it could help the defendant. For, after all, this book only shows the number of the certificate, the amount for which it was drawn, and to whose order it was made payable, which in this case was Honig. The cashier is presumed to know that no act of his could authorize Peyser to act as Honig's agent; and that, if Peyser had then been the agent of Honig, it was competent for Honig to withdraw the agency at any time.

It is said that a person may deposit in a fictitious name, or may give any name he chooses at the bank; so he may represent himself as the agent of a fictitious principal, and in such case he can draw the money in the name in which the deposit was made. Let this be admitted. It does not cover this case. Here, the principal was not fictitious. The bank cannot assume that a named principal is a fictitious person, or, if it does so, it will be at its peril. *Morgan v. Bank*, 1 Duer, 434. The fact that the certificates were in the possession of the defendant is immaterial. They had been executed and duly delivered to the plaintiff through his agent. The defendant came into possession of them wrongfully, and without having paid them to plaintiff or his order.

It is said that plaintiff cannot recover the full amount of all the certificates, for he has not shown that defendant received more than \$300 altogether. This is upon the theory that Peyser may have drawn the money on the first certificate and redeposited it, or some of it, to purchase the second certificate, and so on. This would perhaps have been a tenable position if Honig had sued for money had and received, ignoring the certificate on the ground that the deposit was not authorized by him. But there can be no doubt of the proposition that plaintiff was at liberty to ratify the unauthorized act of his agent, and sue on the certificates, and that he could do this without authorizing Peyser to indorse his name upon the certificates. They were entirely distinct transactions. The action, then, was brought upon several negotiable instruments, each of them reciting the exact amount of money received from Honig, and promising to pay the same to Honig or his order. None of them have been paid to plaintiff or his order, or to his agent. When plaintiff proved the execution and delivery of the instruments, and that they had

not been paid, he made out his case. All that appears in answer to this is that, under the peculiar circumstances of this case, it is possible that only \$300 of Honig's money was received by the bank. We cannot disturb the finding of fact of the trial court on the ground that upon the evidence it is possible that the defendant did not receive so much of the plaintiff's money. The burden of proof was clearly shifted to defendant.

The defendant having possession of the certificates, the plaintiff was not required to produce and surrender them; but, if that were necessary, it was done when the defendant was compelled to produce them and submit them to the court. Having come into the possession of them unlawfully, defendant held them for the plaintiff.

The judgment and order should be affirmed, and it is so ordered.

We concur: SEARLS, C. J.; MCKINSTRY, J.; SHARPSTEIN, J.

McFARLAND, J. I dissent. This is an appeal by defendant from a judgment in favor of plaintiff, and from an order denying a motion for a new trial. The complaint contains six counts. The first avers that on January 19, 1885, defendant "made and executed unto the plaintiff its certain paper writing whereby it promised to pay unto plaintiff, or his order, the sum of two hundred and fifty [\$250] dollars," and that afterwards plaintiff demanded payment of the same, and defendant has not paid the same, nor any part thereof. There is no averment of the specific character of the "paper writing," or that it was ever delivered to plaintiff, or that he ever had possession of it, or that he was ever the owner or holder of it, or that he ever presented it at the bank of defendant for payment. The other five counts are similar to the first, except that in each count a "paper writing" of a different date and for a different amount is averred. The largest amount named in either count is \$300; and the latest date, the second day of March, 1885. The aggregate amount of all the paper writings was \$1,250, for which sum, with interest, judgment was rendered.

At the trial, plaintiff, to prove the averments of his complaint, procured from the custody of defendant six paper writings, each marked "Paid" on its face, and introduced them in evidence, against the objections and exceptions of defendant. They proved to be paper writings in the form of certificates of deposit, in which plaintiff was named as depositor. The one first in date—and the others were the same, *mutatis mutandis*—was as follows: "N. Honig has deposited in this bank \$250 in gold coin, payable to self or order on return of this certificate, *properly indorsed*." It was properly signed by the officers of the bank, and was indorsed, "N. HONIG, by S. A. PEYSER." Across its face it was marked with a blue stamp: "Paid 23 Paying Teller."

The undisputed facts of the transaction are these: On the said nineteenth of January—the date of first certificate—one S. A. Peyser went into the bank of defendant and deposited \$250, and took for it a certificate of deposit. It is the custom of the bank, when a man wants a certificate of deposit, to request him to write his name in a signature book, or book of identification. Opposite his signature is written the number of the certificate issued him, with date, amount, etc., so that, when it is presented for payment, the paying teller, by comparing the signature by which it is indorsed with the signature previously written in the book, may see that they are the same, and that, therefore, the certificate is "properly indorsed." In accordance with this requirement, Peyser wrote in the signature book "N. Honig, by S. A. Peyser," under the heading, "To Whose Order," and the certificate was issued and delivered to him with "N. Honig" named as depositor. In a few days Peyser returned with the certificate indorsed just as written in the signature book,— "N. HONIG, by S. A. PEYSER,"—was paid the money, and delivered up the certificate to the bank for cancellation. Shortly afterwards he made

another deposit, and received another certificate, in the same way, which, in a few days, was paid to him in like manner; and so on, until the six certificates had been thus issued and paid, except that one of them was payable to "N. Honig, per S. A. Peyser," and another was also indorsed by a firm called "Davis & Co.," and seems to have passed through the clearing-house. Each time, Peyser wrote in the signature book, "N. Honig, by S. A. Peyser," and the certificate was thus indorsed before payment. Each certificate was paid before its successor was issued, so that the greatest amount which Peyser ever had at the bank at any one time was \$300.

While these transactions were taking place, the plaintiff, Honig, knew nothing whatever about them. He had never authorized Peyser to deposit any of *his* money at that bank, and did not know that Peyser had made any deposits there, of any character. Honig had never been a customer of the bank, had no account there of any kind, and had never himself received from it any certificate of deposit; and he was entirely unknown to the bank. But, after the transactions were concluded, and all the certificates had been paid and taken up by the bank, the said Peyser died; and, a few months after his death, plaintiff, having then learned of these transactions, demanded of the defendant that it should pay all of said certificates over again to him; and, the demand being refused, this action was commenced. He made no proof at the trial that any of the money deposited by Peyser belonged to him, (plaintiff,) but he relied entirely on the mere fact that his name was in the certificates as depositor.

Upon these facts I do not think that plaintiff was entitled to judgment; and therefore I do not deem it necessary to discuss at length appellant's two points, that the complaint was not sufficient, and that the certificates were not admissible in evidence. I do not see how the principles of law applicable to the peculiar qualities of negotiable paper can be invoked in this case. Those principles apply, ordinarily, when the rights of sureties, indorsees, guarantors, and third persons generally, intervene. If the certificates invoked in this case had not contained the words "or order," or any equivalent words, the claim of plaintiff would not have been of any less legal value. If it be shown that a negotiable instrument, made by A. to B., was without consideration, B. cannot maintain an action upon it against A. Between the original parties there is not often any difference whether a bailment or debt be evidenced by a simple receipt or a negotiable promise, except that, in the latter case, a consideration is presumed. If the money deposited by Peyser with defendant was not the money of plaintiff, upon what principle can he recover in this action? If he had obtained possession of the certificates before payment, and then had demanded payment, or had indorsed them to third parties, different questions might have arisen. The only parties to the contract were the bank and Peyser; part of that contract was that the certificates should have the indorsement which had been written in the book of identification; they were returned with that indorsement; the money was paid, and the instruments were taken up and canceled; and thus the contract was executed and ended before there was any assertion of the claim—real or pretended—of plaintiff.

The only position having any strength which plaintiff could take, is that the certificates, being in form negotiable, import a consideration; that is, make a *prima facie* case of ownership of the money by plaintiff. Plaintiff, however, in his testimony, entirely repudiates the agency of Peyser in every part of the transaction. He says that he knew nothing about the certificates until after Peyser's death. But, if Peyser was not plaintiff's agent in receiving the certificates, then the insertion of plaintiff's name therein goes for naught, and he can base no right thereon. On the other hand, if, notwithstanding his testimony, he seeks now to adopt and ratify the agency of Peyser, he must adopt the whole of that agency, or none. Story, Ag. § 250. But suppose it be assumed that the money belonged to plaintiff, and was in the

possession of Peyser, as his agent, how would the case stand then? It has been held in some cases that an original bailor may maintain detinue against a second bailee; but never, we apprehend, where the second bailee has safely redelivered the thing bailed, according to his contract, to the first bailee, before notice and demand by the original bailor. Story, Bailm. §§ 105-107. If B., having the custody of money of A., intrusts it to C., for temporary safe-keeping, and C. returns it to B. before any notice or demand by A., then A. has no action, either *ex contractu* or *ex delicto*, against C., because C. has neither broken a contract, nor done a wrong.

However, I think that no case can be found where an action has been successfully maintained directly upon a negotiable instrument, not lost or destroyed before cancellation, when the plaintiff had never been in possession of the instrument, and had never known of its existence until after its existence had ended. Here, the appellant was in possession of the instruments sued on at the time the action was commenced, claiming to own them as canceled obligations. And it has been directly held in *Crandall v. Schroepfel*, 1 Hun. 557, that a party claiming to own a promissory note in the possession of another, who also claims to own it, cannot maintain action on it, and that the title to the note cannot be settled in such an action. Of course, this case differs widely from the common case where a man opens a general account with a bank, and a *contract relation* between the parties exists from the start. There the original party alone has the right to draw against the account, no matter by whom he may send deposits. It no doubt would have been more regular and safer if appellant had required Peyser to take the certificates in his own name, and dangerous complications might have arisen; but, under the facts here, in my opinion, there is no phase of justice, and no rule of law, which compels appellant to repay these dead and canceled instruments.

PATERSON, J. I dissent. The bank and Peyser had the right to enter into an agreement that the former should pay the money deposited by the latter to the order of "N. Honig, by S. A. Peyser," and this agreement was binding, unless the rights of innocent parties intervened. The instrument never was delivered to Honig. The fact that it is negotiable in form is immaterial. If plaintiff's right to recover depends upon the agency of Peyser, it is sufficient to say that the plaintiff must ratify or repudiate all of his acts. He cannot ratify the deposit, and repudiate the indorsement. There is nothing to show that plaintiff owned the money deposited by Peyser. At most, the plaintiff ought not to recover more than \$300.

(73 Cal. 475)

PENDERGRASS, Adm'r, etc., v. CROSS, Judge, etc. (No. 12,243.)

(Supreme Court of California. September 27, 1887.)

NEW TRIAL—MOTION FOR AMENDED STATEMENT—PRESENTING WITHIN REASONABLE TIME. Code Civil Proc. Cal. § 659, prescribing the time within which an amended statement, in motion for a new trial, must be presented for settlement, does not apply when the amendments are adopted by the moving party, and in such case the statement so amended may be presented within a reasonable time, (Id. subd. 3;) and, the trial judge having decided that the time of presentment was reasonable, it is his duty to settle and certify the statement.

In bank. Petition for writ of mandate to superior court, Tulare county; W. W. Cross, Judge.
Sidney V. Smith, for petitioner.

BY THE COURT. A judgment for defendant was entered in an action wherein the petitioner herein was plaintiff, and one Burris was defendant. The plaintiff in that action gave notice of intention to move for a new trial, and

served on defendant's attorney a draft statement of the case. Within statutory time the defendant served amendments to the statement, which were adopted by the plaintiff. We say the amendments were adopted, because the plaintiff did not indicate his non-adoption of them by serving notice that the statement and amendments would be presented to the judge for settlement, as prescribed in Code Civil Proc. § 659. The plaintiff, having adopted the amendments, delivered the statement as amended to the clerk, for the judge, to be settled, (the judge being absent from the county,) after the expiration of the time within which the statement and amendments must (upon notice) have been presented to the judge for settlement, or delivered to the clerk for him, had the amendments not been adopted by the plaintiff. The petitioner now prays that the judge be ordered by mandate to settle and certify the statement; the judge having refused to settle it.

Code Civil Proc. subd 3, § 659, does not limit the time within which a statement as amended—when the amendments are adopted by the moving party—shall be presented to the judge, or delivered to the clerk for settlement. It may be done in a reasonable time. The superior judge, as appears from his answer herein, decided that the time was reasonable, provided the law permits a statement as amended, where the amendments are adopted, to be presented for settlement, or to be delivered to the clerk, for the judge, after the time within which the statement and amendments must be presented to the judge, or delivered to the clerk, in cases where the amendments are not agreed to; but that the moving party had neglected "to pursue the proper steps to have said statement settled within the time required by law." The judge having so held that the statement was delivered to the clerk within a reasonable time, it was his duty to settle and certify the statement.

Let the writ issue.

McKINSTRY, J., expressing no opinion.

(73 Cal. 459)

BOWDEN v. PIERCE. (No. 11,004.)

(*Supreme Court of California.* September 27, 1887.)

1. EXECUTORS AND ADMINISTRATORS—EXECUTOR DE SON TORT—CALIFORNIA PROBATE PRACTICE.

There is no such officer as executor *de son tort* recognized under the California probate practice.

2. SAME—EXECUTOR DE SON TORT—REFUSAL TO ACT.

The fact that one who was named in a will as executor applied for letters, which the court granted, does not make him a trustee of the estate, when he refused or neglected to qualify; and contracts made by him with the executrix, if fair and just, are not void, although they redounded to his benefit.

In bank. For the opinion rendered in department 1, see 14 Pac. Rep. 302.

By THE COURT. For the reasons given in the opinion rendered in department 1, order affirmed.

THORNTON, J., expressed no opinion.

BOWDEN v. PIERCE. (No. 9,588.)

(*Supreme Court of California.* September 27, 1887.)

In bank.

By THE COURT. This is an appeal from the judgment, and, no error appearing in the judgment roll, the judgment is affirmed.

THORNTON, J., expressed no opinion.

(5 Utah, 243)

WASATCH MIN. CO. v. JENNINGS and others.

(Supreme Court of Utah. September 2, 1887.)

1. CORPORATIONS—ADVANCES BY DIRECTORS—REDEMPTION FROM EXECUTION SALE.

A mining corporation, whose property had been sold on execution, made an oral agreement with two of its directors, one of whom was its president, by which they agreed to advance the money for the redemption of the property from the execution sale, and the corporation agreed that the money so advanced should be a preferred debt, and that the assignment of the certificate of sale and the marshal's deed should be taken in the name of the president and director, and held by them as security for its payment. The president and the director paid the redemption money to the marshal, and took his deed in their own names. *Held*, that the amount so paid to redeem should be regarded as a debt due from the corporation to the president and the director, and that the marshal's deed should be regarded as a mortgage, and not as an absolute conveyance.

2. SAME—LIEN OF DIRECTORS FOR ADVANCES.

A mining corporation, seeking to have a marshal's deed conveying its property to J. and C. declared a mortgage, alleged in its complaint that the summonses issued in the cases that resulted in the judgments and sales under which defendant claimed title were improperly served; but alleged, further, that after the sale and before the time for redemption had expired, said J. and C., through whom defendants claimed title, agreed to advance the money necessary for redemption, to protect the rights of the corporation, and to take the assignment of the certificate of sale and the marshal's deed in their own names, as security until their advances had been refunded to them. *Held*, that such allegations of the complaint showed an equitable claim on the property in the defendants until their advances were paid.

3. SAME—REDEMPTION BY DIRECTORS—CONSTRUCTIVE TRUST.

Two directors of a mining corporation whose property had been sold on execution, one of whom was the president of the corporation, agreed to pay the money necessary to redeem the property from the sale, and to take the assignment of the certificate of sale and the marshal's deed of the property in their own name. *Held*, that a constructive trust should be imposed upon them for the purpose of remedy, although the consideration advanced was not a loan to the company, and the deed was not obtained by actual fraud.

4. SAME—REIMBURSEMENT FOR EXPENDITURES ON PROPERTY REDEEMED.

Mining property belonging to the plaintiff, a mining corporation, was sold on execution in 1877, and, as the corporation refused to raise the amount necessary to redeem, two of its directors advanced the amount, and took the assignment of the certificates of sale and the marshal's deed in their own name, at the request of the company. The evidence was conflicting as to the time within which the corporation was to refund the amount; but after the directors had held the deed a year, without any payment by the company, they took actual possession of the mine, and made valuable improvements. They leased the mine in 1879, and after that worked it until in 1883, when the plaintiff brought suit to have the marshal's deed declared a mortgage, and for an account of profits and expenditures. *Held*, that the defendants should be allowed their reasonable expenditures in developing and improving the property, so far as its value was increased by such development and improvement, in addition to the expenditures directly contributing to the extraction of the ore.

5. MORTGAGE—PAROL EVIDENCE TO PROVE ABSOLUTE CONVEYANCE A MORTGAGE.

Under Comp. Laws Utah 1876, § 1011, which provides that the statute of frauds relating to agreements for the conveyance of real estate shall not be construed to prevent any trust from arising or being extinguished by implication of law, parol evidence is admissible to show that an absolute conveyance is a mortgage, by proving that the consideration on which it depends is a loan.¹

Appeal from Third district court; J. S. BOREMAN, Judge.

Sutherland & McBride, for respondent. *Sheeks & Rawlins* and *P. L. Williams*, for appellants.

¹ Parol evidence is admissible to show that an absolute deed was intended as a mortgage. *Nesbitt v. Cavender*, (S. C.) 2 S. E. Rep. 702, and note; *Darst v. Murphy*, (Ill.) 9 N. E. Rep. 887, and note.

ZANE, C. J. This is an appeal from the Third district court of Utah. The plaintiff, a mining corporation, alleged in its complaint that on the second day of January, 1877, it was the owner in fee, and was in possession of, the Walker & Walker extension and the Buckey mines, and also of a portion of the Pinyon mine, described therein; and that these mines were of the value of \$300,000; that on the second day of January, 1877, Gust. Norquist, Swan Oleson, and John Danielson obtained judgments against plaintiff aggregating \$787.81; that executions were issued, in pursuance of which the mines were sold to the plaintiffs in those actions for the amount of such judgments and costs; that William Jennings, a stockholder and president of the corporation, and John Clark, also a stockholder, at a meeting of the stockholders agreed with the company to redeem the property from the sale, and to advance the moneys therefor; that it was agreed that such advance should be treated as a preferred debt; that as security for this advance the said Jennings and Clark should buy the certificates of sale, and should take the marshal's deed in their own names, and should hold the title until their advances, and interest thereon, should be refunded; that, in pursuance of such agreement, Jennings and Clark purchased the certificates, and took the marshal's deed in their own names; that on the fifth day of September, 1879, Clark conveyed his interest to Joseph A. Jennings, son of William Jennings, who at the time of the conveyance was informed of the facts; that William Jennings took possession of the mines, and, during the years 1878 and 1879, either alone or in concert with one or both of the other defendants, received rents and profits therefrom more than sufficient to reimburse the amount paid for such certificates, and the interest thereon, and since the last-named date has worked the mines, and converted to his or their own use large sums of money, amounting to \$125,000; that William Jennings executed to his son, Isaac Jennings, one of the defendants herein, a deed purporting to convey 459-500 of William's half interest in the Buckey mine; that this conveyance was without consideration, and with notice of all the facts affecting the title; that in 1880, and since that time, William and Joseph Jennings were requested, on behalf of the corporation, to account for the rents received and ores taken from the mines, and, after deducting the amounts due them for advances in buying in said property, to pay the residue, and convey the title acquired by the marshal's deed. This they refused to do. And plaintiff also alleges a readiness at all times to pay the amount due for such advances; and, if such payments had not been made out of the rents and profits, an offer to pay is alleged. The plaintiff prayed that defendants be required to account for all moneys received for rent and for ores, and to pay the same to plaintiff, less advances and proper charges, and that they be decreed to convey and release to plaintiff all their right and title through the marshal's deed, and surrender possession of the mines; and plaintiffs prayed for other relief as might be equitable.

The defendants answered, admitting that plaintiff was the owner of the mines prior to the sale, but denying the other allegations of the complaint. Defendants alleged, in their answer, that the stockholders, at the meeting mentioned in the complaint, refused to be assessed to raise the amount necessary to redeem the property from the sale mentioned, and that William Jennings then offered to advance the necessary sum, if Clark would join with him, and to make the redemption, if the corporation would agree to refund the same within three months, but the company refused to make such agreement; that no other meeting was held, and the stockholders wholly abandoned and forfeited its property and corporate franchise. The statute of limitations is also set up as a defense. Defendants also allege, in their answer, that, during the period they owned and were in possession of the mines and mining property, they expended large sums of money in the development and im-

provement thereof, which amount was largely in excess of all the receipts from the ore extracted from said mines, and disposed of by them, or any of them; that, as defendants were informed and believed, and alleged the facts to be, such expenditure exceeded the receipts by a sum not less than \$40,000; that the expenditures were made in good faith by defendants as the owners of the property, and thereby the same was greatly improved and benefited, and its value enhanced; that the work upon and improvement of the property, and expenditure thereon, was made with the full knowledge of each and all of the stockholders and officers of the company; that neither the stockholders nor officers, notwithstanding their knowledge, had ever objected to the said work, development, or improvement of the property, or to such expenditure thereon, but at all times had acquiesced therein. Defendants further alleged that they had held the title and possession of the property in their own right, and still so hold it.

On the trial the defendants objected to the admission of any evidence, on the grounds that the complaint stated no cause of action. The court overruled the objection. The defendants excepted, and assign such ruling as error.

It was alleged in the complaint that the summonses issued in the cases that resulted in the judgments and sales under which defendants claim title to the property were served on Samuel W. Riter, and that he was not a proper person upon whom to make service. If defendants' right depended upon such a service alone, the complaint would present no equitable cause of action. But it further appears, from the allegations of the complaint, that after the sale, and before the time of redemption had expired, the plaintiff agreed that, if Jennings and Clark would redeem the property, and protect the interest of the company, and advance the money necessary therefor, such advance should be held by them and treated by the company as a preferred debt; that, as security for the money advanced, Jennings and Clark should buy the certificates, and take the marshal's deed in their own names, and should hold the title so derived until their advances had been refunded to them. The complaint contained the further allegations (with others) that Jennings and Clark made the advance to protect the rights of the company, and took the marshal's deed in their own names as security. In view of such allegations, it cannot be said that the defendants had no equitable claim on the property until their advances were paid, unless the transaction is within the statute of frauds. And the allegation of payment in rents and profits rendered a statement of an account necessary.

A further objection was made to the introduction of evidence on the ground that the statute of frauds rendered oral evidence inadmissible. That objection was also overruled, and exception taken. That ruling is assigned here as error.

The defendants claim that, because of the statute of frauds, the evidence offered was inadmissible to show that the marshal's deed, absolute in form, should be regarded as an equitable mortgage, or that it was subject to a trust in favor of plaintiff. It does not appear from the complaint that an instrument of writing was subscribed by the parties, and the agreement set up in the complaint is denied in the answer. Section 1010, Comp. Laws Utah 1876, declares "that no estate or interest in lands other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing." *Id.* § 1011: "The foregoing provision shall not be construed to prevent any trust from arising or being extinguished by implication or op-

eration of law; nor to abridge the powers of courts to compel the specific performance of agreements in case of part performance thereof." Trusts arising by implication or operation of law are expressly excluded from the effects of the statute; and a deed of conveyance, though absolute in form, if given to secure a debt, is in equity treated as a mortgage,—a trust by operation of law. "To prevent oppression in such cases," courts of equity hold "that no restraint on the right of redemption should be tolerated," and that every man should possess the capacity to waive a right introduced for his own benefit. "The better view seems to be that an absolute conveyance can only be shown to be a mortgage by proving that it was obtained or is vitiated by fraud, mistake, or undue influence, or that the consideration on which it depends is a loan, and the whole transaction consequently defeasible; and if so, the whole doctrine may be referred to the law of implied and resulting trusts." 2 Lead. Cas. Eq. 677. "The form of the transaction, and the circumstances attending it, are the means of finding out the intention. If it was a mortgage in the beginning, it remains so." 1 Jones, Mortg. § 263. "But if the indebtedness be not cancelled, equity will regard the conveyance as a mortgage, whether the grantee so regard it or not. He cannot at the same time hold the land absolutely, and retain the right to enforce payment of the debt on account of which the conveyance was made. The test, therefore, in cases of this sort, by which to determine whether the conveyance is a sale or mortgage, is to be found in the question whether the debt was discharged or not by the conveyance." Id. § 267.

Tested by these rules, was the deed to Jennings and Clark an absolute conveyance to them, or should it be treated as a mortgage to secure the amount advanced to obtain it, and the interest which might accrue? The form of the deed was absolute, but the circumstances, under which it was executed may also be considered in finding out the intentions of the parties. The character of the transaction is determined from its form and its circumstances. If the \$787.81 paid to redeem from the marshal's sale and to obtain the deed, should be regarded as a loan to the plaintiff, and the deed as security for the loan, then the deed must be considered a mortgage. On the contrary, if the deed should be regarded as a purchase by Jennings and Clark, with a promise on their part to convey to the plaintiff on payment of the amount advanced, then the deed must be held to be absolute.

The allegation of the complaint is that Jennings and Clark agreed with the company that they would redeem the property for, and protect the interest of, the company, and advance the money necessary therefor,—such advance to be held by them and treated by the company as a preferred debt; that, as security, they should buy in the certificates of sale in their name, and take the marshal's deed thereon, and hold the title so derived until their advances to save the property should be paid. The allegation, in effect, is that Jennings and Clark agreed with the plaintiff that the money advanced by them to redeem the property should be a preferred debt, and that the deed should be held by them as security for its payment. If the money had been actually paid to the plaintiff by Jennings and Clark, and the plaintiff had paid it to the marshal, it would have constituted a valid debt of the plaintiff to Jennings and Clark beyond all question. But if, in the absence of a waiver, such payment had been made, the parties could waive the actual deliveries of the money, and could regard the delivery as having been made. If, at plaintiff's request, Jennings and Clark actually paid the redemption money to the marshal to redeem the property, the payment was for plaintiff's use, and the amount so paid became a valid demand, which they might have recovered from the company. At the time of the transaction the plaintiff had the right to redeem; this was a right with respect to the property which the company gave up, and promised to pay the amount advanced to redeem back to Jennings and Clark,

if they would make the advance, and consider it a debt against the plaintiff, and hold the deed as security until the debt was paid. We are of the opinion that under the allegation, the amount paid to redeem should be regarded in this case as a debt due Jennings and Clark from the plaintiff, and that the marshal's deed should be regarded as a mortgage to secure that debt.

The case of *Sandfoss v. Jones*, 35 Cal. 481, is analogous in principle to the one under consideration. In that case the court said: "If, however, we consider the averments of the complaint in the light which is most favorable to the defendants, we have a verbal agreement on their part with an execution debtor, whose land is about to be sold by the sheriff, to purchase it with their own funds, and hold it for his benefit. Such an agreement is equivalent to a loan of the money, and a taking of the title as a security for its repayment, or an agreement by one person to purchase land for the benefit of another, under such circumstances as would amount to a fraud upon the latter if the former was allowed to repudiate his promise, and therefore not within the statute of frauds."

Still we are of the opinion that the breach of an agreement to purchase real estate, and to convey it to another whenever he should pay to the purchaser the price advanced, would not make the purchaser a trustee *ex maleficio*. "There must have been an original misrepresentation by means of which the legal title was obtained." The original transaction must have been tainted with fraud. "A promise to purchase real estate at a sheriff's sale, and to convey it to the defendant in the execution, whenever he should repay to the purchasers their advances to him, does not raise a resulting trust in favor of the defendant." *Wheeler v. Reynolds*, 66 N. Y. 227; *Browne, St. Frauds*, (3d Ed.) 86. The law is well settled that if an absolute deed is taken in the name of one, and the consideration is paid by another, a trust results to the latter. The payment of the consideration raises the trust.

In this case, and in this transaction, two elements appear that do not appear in a simple case where a person advances his own money to buy land in which another has no interest, upon a promise to convey to such party when the advance has been refunded. In the first place, the plaintiff had the right to redeem the property, which right it lost by relying on the promise of Jennings and Clark; and, in the second place, it appears from the averments of the complaint, and the evidence, that Jennings and Clark were both stockholders and directors of the corporation; that the former was its president, and that both were present at and participated in the meeting at which the understanding was reached by which they took the deed in their own names. This understanding was between themselves as individuals, and as officers of the company. It may be said that regard for self, and regard for the welfare of others, are natural to civilized people. But experience and observation indicate that the influence of the man as individual is often stronger than the influence of the man as the representative of another, in business matters. And, further, corporations are obliged to rely upon their officers to transact their business; to that extent they must repose confidence in them. The relation of Jennings and Clark to the corporation implied trust and confidence,—the relation was fiduciary. The probabilities are that such confidence had its influence on the transaction. If, then, the title in them should be regarded as absolute, they would be permitted to retain an advantage that their relations with the corporation aided them in securing. "When two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached, if no such confiden-

tial relation had existed. Courts of equity have carefully refrained from defining the particular instances of fiduciary relations in such a manner that other and perhaps new cases might be excluded. It is settled by an overwhelming weight of authority that the principle extends to every possible case in which there is confidence reposed on one side, and the resulting superiority and influence on the other. The relations and the duties involved in it need not be legal; it may be moral, social, domestic, or merely personal." 2 Pom. Eq. Jur. § 956.

In view, therefore, of the relations of Jennings and Clark to the corporation, and of the circumstances under which they obtained the legal title, as alleged in the complaint, we are of the opinion that a constructive trust should be imposed upon them for the purpose of remedy, though it were conceded that the consideration advanced was not a loan to the company, and the deed was not obtained by means of actual fraud. Such being the construction placed upon this transaction, we see no error in overruling the objection to the introduction of the testimony, on the ground of the statute of frauds.

On July 20, 1885, the district court held that Jennings and Clark were in possession of the property as mortgagees, or trustees for the plaintiff, and that the appointment of a referee was necessary. The purpose of the reference was stated in the order as follows: "To ascertain the amount due to the plaintiff company from the defendants for the rents and the issues of said property, and for the purpose of ascertaining the amount paid out by Wm. Jennings and John Clark, as mortgagees, with respect to said property." The amount paid by William Jennings and the other two defendants should have been included also. The referee so treated his authority, however, and included the last-named payments. Among the conclusions of law upon which this order was based is the following: "Said defendants should account, for the benefit of said plaintiff, for all moneys received by them, or any or either of them, from said property, either by way of rents or royalties for ores taken out of the same, or for ores extracted by themselves or either of them. And they may show their expenditures in extracting said ore, and in development work and improvements. How much should be credited said defendants for such expenditures against the moneys is reserved until such accounting is reported by referee to this court."

In pursuance of the above order the referee stated the account embodied in the following findings: "(1) William Jennings and John Clark, the predecessors in interest of defendants, and mortgagees and trustees of the property involved in this action, in September, 1877, paid for said property the sum of \$864.05. (2) Defendants, and their predecessors in interest in the said mortgage and trust, between September, 1877, and the beginning of this action, received for ores extracted from said property mortgaged and held in trust, and by them sold, rents and royalties included, the sum of seventy-eight thousand and seventy-seven 23-100 dollars, (\$78,077.23;) and the same was so received in the years following, to-wit: In 1879, \$1,086.50; in 1880, \$497.77; in 1881, \$12,164.34; in 1882, \$56,089.78; in 1883, \$8,256.76. All said receipts for 1879 were royalties received under a lease. (3) Defendants, and their said predecessors in interest, over and above the amounts stated in the first finding, between September, 1877, and the beginning of this action, expended in and about the working, improving, and developing said mortgaged property, and in extracting, freighting, and selling ores therefrom, the sum of \$93,510.-36. And such expenditures were made in the years, and are classified and apportioned, as follows:

Years.	Labor.	Sampling and Assaying.	Freight and Hauling.	All other, Including Supplies.	Totals.
1878.....				\$ 97 81	\$ 97 81
1879.....				191 18	191 18
1880.....	\$ 2,955 60	\$ 11 00	\$ 153 10	2,875 64	5,995 34
1881.....	15,292 48	592 03	2,272 33	7,047 53	25,204 37
1882.....	20,504 37	4,046 86	17,619 52	11,244 14	53,414 89
1883.....	4,350 11	978 86	2,001 10	1,276 70	8,606 77
	\$43,102 56	\$5,628 75	\$22,046 05	\$22,733 00	\$93,510 36

—No work upon the property other than resetting the stakes thereof, and taking care of it, was done by defendants, until 1880. (4) The total number of tons of ore extracted by defendants, and their said predecessors in interest, is 3,215. The expenditure which directly contributed to the extraction of said ore, and which, if the location of ore bodies had been known in advance of the development work, would have sufficed to extract and raise said ore to the surface, and with the aforesaid expenditure for hauling freights, sampling, and assaying to convert the same into the moneys received therefor as aforesaid, is \$8 per ton, and for said 3,215 tons, \$25,720. (5) Not included in the foregoing, Joseph A. Jennings, one of the defendants, rendered services as superintendent, and in assaying in the working and developing said property, from December 1, 1879, to October 1, 1880, 10 months; and from October 15, 1882, to May 1, 1883, 6½ months,—in all 16½ months; and said services were worth \$200 per month,—making, in the aggregate, \$3,300. Isaac Jennings, another defendant, rendered service as superintendent in same business from January 1, 1881, to October 15, 1882, 21½ months; and said services were worth \$150 per month,—aggregating \$3,225. (6) The expenditure not connected with the extraction of ore was made principally in an endeavor to trace all ore or vein connection from said property into adjoining mining claims, the Climax and Rebellion. All the work done was reasonably adapted to the development of the property, and to the probable enhancement of its value."

So much of the decree of the court below as it is necessary to quote, is as follows: "First. It appearing that the mortgage debt has been fully paid, that said defendants, within thirty days after the notice of this decree, make, execute, acknowledge, and deliver to plaintiff a deed of conveyance in proper and sufficient form, conveying to said plaintiff the property in question. Second. That said plaintiff do have and recover of and from said defendants the sum of thirty-three thousand one hundred and three and seventy-nine one hundredths dollars, for proceeds of ores extracted by William Jennings (now deceased) in his life-time, jointly with the said Joseph A. Jennings and Isaac Jennings, from the said mining claims, while in possession and holding the same as mortgagees and trustees, over and above the amount necessary to pay the mortgage debt and interest of said plaintiff to said defendants, and all expenditures in the extraction and sale of said ores, together with the costs of this action, taxed at the sum of \$301.15, and that said plaintiff have execution therefor."

For extracting the ore the defendants were allowed by the decree only such expenditure as directly contributed to its extraction,—just that expenditure which, had the location of ore bodies been known, would have been sufficient to extract the ore and raise it to the surface. The defendants would thus be required to work at their own peril; to know the end from the beginning; to understand precisely the position of the ore bodies before that position was determined. If the miner could see through all obstacles, error would be un-

necessary, and experiments should not be made. He should then be required to work always in the right place, and in the right direction. He could then be held to have seen the end from the beginning. Then it would be right to test the miner's conduct and his rights by an infallible standard. But as a miner is compelled to pursue his search for hidden ore by the uncertain light of inference from appearances and experience, it appears illiberal to test his conduct and his rights by such an absolute and infallible standard. The referee found that \$43,102.56 were expended for labor; all of which was reasonably adapted to the development of the property, and to the probable enhancement of its value. But the decree allowed only \$25,720 of this to the defendants, and disallowed \$17,382.56, and also expenses incurred, including those for supplies in work, improving and developing the property, amounting to \$22,733.09. According to the findings upon which the decree was entered, the defendants, and their predecessors in interest, while in possession of the property under the deed, expended in working, improving, and developing the mine, and in extracting, freighting, and selling the ores, \$15,423.13 more than they received for ores extracted, and for rents and royalties; yet a decree was rendered against the defendants for the sum of \$33,103.79. If the defendants shall be required to pay this amount, they will have paid, in addition to giving their own time, the sum of \$49,400.97 merely for the privilege of developing and improving the mine, without receiving any consideration whatever.

It appears from the findings and the evidence in the record, that in September, 1877, the property in dispute had been sold on execution against the plaintiff; that the time of redemption was about to expire, and that \$864.05 were required to redeem; that the corporation refused to raise the amount; that Jennings and Clark made the advance, and took the assignment of the certificate of sale and the marshal's deed in their own names, at the request of the company. According to the understanding of William Jennings, the agreement with the corporation was to refund within three months. Clark testified that he heard three months mentioned, but understood it to refer to the time within which claims against the company should be presented; but he was not clear in his recollection. It also appears from the evidence that after Jennings and Clark had held the deed about a year, without any payment or offer to pay by the company, they took actual possession of the mine, and made valuable improvements, before they leased it. Joseph Jennings testified that the cost of this improvement was about \$1,500; but this estimate, in the light of the evidence, is probably too high. They then leased the mine until the end of the year 1879. About that time Clark sold his interest to Joseph A. Jennings, and the defendants worked the mine until some time during the year 1883, when this suit was brought. During all this time the plaintiff had notice, by its officers and stockholders, of such possession, leasing, and working, and made no protest or objection, nor instituted any action to test its rights. In fact, Jennings and Clark were obliged to take actual possession of the mine, in order to reimburse themselves for the money paid out to redeem. And it appears from the findings that the income from the property, in excess of the expenditures upon it, at no time equaled the advances made by them. As to whether there was an understanding that Jennings and Clark were to be paid their advances, to redeem within three months, or no time was fixed, the evidence is conflicting. As the deed has been construed to be a mortgage, it must be regarded as continuing to remain such. But the understanding by defendants that repayment was to be made within three months would have some bearing upon the good faith of the defendants in claiming that the absolute title was in themselves, when the claim of the plaintiff to the property was made.

In view of the deed to Jennings and Clark, the payment by them to obtain it, the verbal understanding at the time, the failure of the plaintiff to refund,

or even to pay interest, the acquiescence of the plaintiff in defendants' continued possession, with a knowledge that they were working and developing the property, in view of the laches of the plaintiff in not offering to refund, and in not demanding an account, and in not instituting an action for a period of seven years, with the further consideration that the defendants were not trustees *ex maleficio*,—we are of the opinion that the rule applied to defendants' claim was too narrow and illiberal.

Jones, in his work on Mortgages, says: "A grantee in possession under a deed absolute in form, but given by way of security merely, is said not to stand exactly in the same position, in reference to accounting, as an ordinary mortgagee in possession, inasmuch as he is the agent of the mortgagor as well as the mortgagee, and is chargeable for any failure to obtain the full rental value of the premises, only on the same ground that an agent would be. If the grantee has good reason to consider himself possessed of an absolute estate in the land, and he consequently makes permanent improvements, he will be entitled to allowance for these, when a mortgagee generally would not be entitled to such allowance." 2 Jones, Mortg. (3d Ed.) 1117 To this effect is the case of *Barnard v. Jennison*, 27 Mich. 231. These authorities say that grantees in possession under a deed absolute in form, but given by way of security, do not stand in the same position, in reference to an accounting, as ordinary mortgagees who take possession in order to enforce their security; they are regarded as agents of the grantors as well as of the mortgagees. As such agents, they are justified in making such permanent and beneficial repairs and improvements as a prudent owner would deem it to the interest of the property to make.

The case of *Mickles v. Dillaye*, 17 N. Y. 80, was that of a mortgagee in possession, under circumstances which induced him to believe that he had the legal title. The court said: "The judgment of the supreme court should be reversed as respects the accounts stated by the referee, and there should be a reference in that court to take an account between the plaintiff and the defendant Dillayo, in which the latter should be allowed the enhanced value of the premises, on account of the improvements made by the defendant." Also *Bacon v. Cottrell*, 13 Minn. 194, (Gil. 183.)

In *Harper's Appeal*, 64 Pa. St. 315, it appeared that Harper was in possession under a deed absolute in form, but held to be a mortgage. And a claim for costly and permanent improvements, made without the consent of the mortgagor, was put forward. The court in that case said: "The mortgagor was *sui juris*, competent to contract and manage his own business, and agreed that he [the mortgagee] should take the estate as absolute owner. It is only upon the ground of a general policy, for the protection of needy debtors from the oppressive demands of their greedy creditors, that the principle has been established that such a transaction shall be regarded in equity as a mortgage; and once a mortgage, always a mortgage. Will it be equitable, under such circumstances, to decree a reconveyance of the property, increased in value by substantial and valuable improvements and repairs, at a large expenditure of money, in the most perfect good faith, without any allowance therefor? Such a result would, in our judgment, be in the highest degree inequitable, and not in accordance with the liberal principles upon which courts of equity proceed in analogous cases."

Numerous other cases are referred to in briefs of counsel, but we do not regard them as analogous to the case in hand. In some of the cases a mortgagee under an ordinary mortgage had taken possession, and made costly improvements, without the consent of the mortgagor. In such cases the mortgagee will not be permitted to place such impediments in the way of redemption. He cannot prevent redemption, or render it more difficult, by requiring the mortgagor to pay for costly improvements. In other cases the trustee was chargeable with fraud,—held to be a trustee *ex maleficio*.

But in this case the defendants were in under a deed absolute in form, with the knowledge and consent of the plaintiff, and were obliged to occupy and work the mine themselves, or by their tenants, in order to reimburse themselves for their advances; the plaintiff failing to do so. As a general rule, the value of a mine is made manifest by large expenditure of money. Should such work be regarded as an improvement when it brings to view valuable ore bodies? The development work upon this mine brought its value to light, and then the plaintiff became anxious to repossess it. A decree giving to the plaintiff the property, and the market value of the ore, after allowing the cost of its extraction, raising to the surface, and transportation, and the expenditures for developing and improving the property, to the extent that the value was enhanced thereby, would appear to be just to both parties. If the plaintiff has been paid any portion of the money it now claims through the enhancement of the value of the property, would it be equitable to require the defendants to pay again? Nor would it be just, under the circumstances in evidence, to assess damages against the defendants as punishment.

We are of the opinion that the decree should have allowed to the defendants their reasonable expenditures, in developing and improving the property so far as its value was increased by such development improvement, in addition to the expenditure directly contributing to the extraction of the ore. The other errors assigned are overruled, and the final decree of the court below is reversed, and the cause is remanded to that court, with directions to further find whether the property was benefited by the expenditures of the defendants, and their predecessors in interest, for work and improvements on the property not directly contributing to the extraction of the ore; and, if the court finds that such expenditures did benefit the property, further to find how much such benefits enhanced the value of the property; and to that end to take additional testimony, if necessary, and to make such further orders, and to render such decree, not inconsistent with this opinion, as may be equitable.

HENDERSON, J., concurs. BOREMAN, J., dissents.

(73 Cal. 482)

AMADOR QUEEN MIN. CO. v. DEWITT. (No. 12,030)

(*Supreme Court of California.* September 28, 1887.)

EMINENT DOMAIN—CONDEMNATION OF MINING PROPERTY BY PRIVATE CORPORATION.

Plaintiff, a private corporation, owned two mining claims, and between them was located a mining claim owned by defendant, through which he had constructed a tunnel for his private use. This tunnel the plaintiff sought to condemn, for the purpose of enabling it to work its mines. *Held* that, plaintiff being a private corporation, the action could not be maintained under Code Civil Proc. Cal. § 1238, sub. 5,—which authorizes the condemnation of "roads, tunnels, ditches, flumes, pipes, and dumping places for working mines; also outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse-matter from mines,"—so as to appropriate the property of the defendant to the private use of the plaintiff.¹

Commissioners' decision. Department 1.

Appeal from superior court, Amador county; C. B. ARMSTRONG, Judge.

Stewart & Herrin and *John A. Eaton*, for appellant. *Geil & Morehouse*, for respondent.

BELCHER, C. C. This is an action to condemn a right of way through a tunnel under defendant's mining claim. The facts of the case as they appear in the complaint may be briefly stated as follows:

¹ That the state has no right to take private property for any but a public use, and as to what are such public uses as will justify the exercise of the right of eminent domain, see *Johnston's Appeal*, (Pa.) 7 Atl. Rep. 167; *Heick v. Voight*, (Ind.) 11 N. E. Rep. 306, and note; *Sholl v. Coal Co.*, (Ill.) 10 N. E. Rep. 199; *In re Railroad Co.*, (N. Y.) 8 N. E. Rep. 548, and note.

The plaintiff owns two mining claims in Amador county, one situated in a ravine known as "Hunt's Gulch," and the other in a ravine known as "Murphy's Gulch." Between these two claims is a high ridge of land, which is also a mining claim, and is owned by defendant. On its claim in Hunt's gulch plaintiff has a quartz-mill, and in its claim in Murphy's gulch is a large amount of valuable gold-bearing ore. There is a tunnel, constructed by plaintiff and defendant, which extends from a point near plaintiff's quartz-mill, through and under defendant's claim to Murphy's gulch. Plaintiff is working its mine in Murphy's gulch, and is transporting the ore taken therefrom through the tunnel to its mill, and without a right of way through the tunnel for the purpose of so transporting the ore, it cannot continue to work or develop its said mine. The defendant, in May, 1882, obtained a patent from the United States for his mining claim, which contained, among other things, the following condition of sale: "That in the absence of necessary legislation by congress, the legislature of California may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete development." This condition of sale was inserted in the patent in pursuance of the provisions of section 2338, Rev. St. U. S., which reads as follows: "As a condition of sale, in the absence of necessary legislation by congress, the local legislature of any state or territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development; and these conditions shall be fully expressed in the patent."

The prayer is that "the damages which defendant will sustain by reason of a right of way granted to plaintiff through said tunnel, for the purpose of working plaintiff's said mine in Murphy's gulch, be assessed, and that on the payment of the damages so assessed by this honorable court to the defendant, a right of way for working and developing plaintiff's said mine in Murphy's gulch, through said tunnel, may be condemned by this honorable court," etc.

The defendant filed a general demurrer to the complaint, which was sustained, and thereupon, the plaintiff declining to amend, judgment was entered in favor of defendant.

It is admitted that there was and is no legislation by congress providing rules for working mines, and none by the state except section 1238, Code Civil Proc. That section, in subdivision 5, authorizes the condemnation of "roads, tunnels, ditches, flumes, pipes, and dumping places for working mines; also outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse-matter from mines."

It is contended, on behalf of appellant, that, under the above quoted section of the Revised Statutes, a right of way through the defendant's mine was reserved by the United States, and that this right of way may be taken and used by any other miner, whenever it becomes necessary to use it in working his mine, upon such terms and conditions as the state legislature may have prescribed. It is further contended that the provisions of section 1238, Code Civil Proc., constitute sufficient legislation by the state to meet the requirements of the case, and to justify the plaintiff in demanding the relief asked for. But was there any such reservation? We are unable to see how the language used can be construed to have such a meaning, and evidently the department of the interior did not so understand it when it issued the patent to the defendant. However this may be, we are satisfied that, under the provisions of the Code of Civil Procedure referred to, the plaintiff cannot have a right of way through defendant's mine condemned for its use in working its own mine. The mine of defendant is his private property, and it is clear that the plaintiff asks for the condemnation in order that it may appropriate a way through that property for its private use. This cannot be done. It was held in *Channel Co. v. Railroad Co.*, 51 Cal. 269, that mining, like the plaintiff's, is a private industry, and that private property cannot be condemned for such

a use. We think that case decisive of this, and the judgment should therefore be affirmed.

I concur: HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

(73 Cal. 438)

Ex parte YOUNG AH GOW, on *Habeas Corpus*. (No. 20,296.)

(*Supreme Court of California*. September 26, 1887.)

LARCENY — SECOND OFFENSE — COURT MAY IMPOSE PUNISHMENT FOR, UPON VERDICT OF "GUILTY OF PETIT LARCENY."

Under Pen. Code Cal. § 667, providing a more severe punishment on conviction for a second offense of petit larceny, the court may, on a verdict of "guilty of petit larceny," impose a sentence for petit larceny, second offense; the previous conviction being charged in the information, and confessed by the defendant. McKINSTRY, J., dissenting.

In bank. Petition for a writ of *habeas corpus* to superior court, San Francisco; T. K. WILSON, Judge.

E. B. Stonehill, Dist. Atty., (*D. W. Knox*, of counsel,) for the People. *Henry I. Kowalsky* and *Lyman I. Mowry*, for petitioner.

THORNTON, J. The return shows that the petitioner for the writ was imprisoned on a commitment issued out of the superior court of the city and county of San Francisco, of which the following is a copy:

"COMMITMENT.

"In the Superior Court, City and County of San Francisco, State of California, Department Five.

"TUESDAY, March 29, 1887 Present: Hon. JOHN HUNT, Judge.

"*The People of the State of California vs. Young Ah Gow*.

"Convicted of Petit Larceny—Second Offense.

"The district attorney, with the defendant and his counsel, Mr. L. J. Mowry, came into court. The defendant was duly informed by the court of the information duly presented and filed on the seventeenth day of February, 1887, by the district attorney of the city and county of San Francisco, charging said defendant with the crime of petit larceny, second offense; of his arraignment and plea of 'not guilty, as charged in said information;' of his trial and the verdict of the jury, on the sixteenth day of March, 1887, 'Guilty as charged.' And defendant's motion for a new trial herein having been denied by the court, defendant by his counsel excepting thereto, the defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which defendant replied he had none. And no sufficient cause being shown or appearing to the court, thereupon the court renders its judgment: That whereas, the said Young Ah Gow having been duly convicted in this court of the crime of petit larceny, second offense, it is therefore ordered, adjudged, and decreed that the said Young Ah Gow be punished by imprisonment in the state prison of the state of California, at San Quentin, for the term of five (5) years. The defendant was then remanded to the custody of the sheriff of the said city and county, to be by him delivered into the custody of the proper officers of said state prison at San Quentin.

"OFFICE OF THE COUNTY CLERK OF THE CITY AND COUNTY OF SAN FRANCISCO.

"I, William J. Ruddick, county clerk of the city and county of San Francisco, and *ex officio* clerk of said superior court thereof, do hereby certify

the foregoing to be a true and correct copy of the judgment entered on the minutes of said court in and for the city and county of San Francisco, state of California, in the above-entitled cause, as appears of record in my office.

"Attest my hand and the seal of the said superior court this twenty-ninth day of March, A. D. 1887.

"WM. J. RUDDICK, Clerk.

[Seal:]

"By BEVL. McNULTY, Deputy-Clerk."

From the record in the cause of *People v. Young Ah Gow* (the petitioner) it appears that the defendant was charged by information with the crime of petty larceny, and previous convictions for crimes committed before the petty larceny charged in the information, as follows: Five several convictions of petty larceny, one of burglary, and another of burglary in the second degree. On his arraignment the information was read to him, and he pleaded not guilty of the offense charged in the information, and voluntarily confessed every prior conviction set forth therein.

The plea exhibits a rare aggregation of crime, and a clear confession. We subjoin it: "I am not guilty of the offense charged in the information; and I confess and admit that I was, before the alleged commission of said offense, convicted of the crime of petit larceny in the police judge's court of the city and county of San Francisco, state of California, on or about the fifth day of October, 1880, as set forth in the information. I confess that I was, before the alleged commission of said offense, convicted of the crime of burglary in the municipal criminal court of the city and county of San Francisco, state of California, on or about the thirtieth day of December, 1873, as set forth in the information. I confess and admit that I was, before the alleged commission of said offense, convicted of the crime of petit larceny in the police judge's court of the city and county of San Francisco, state of California, on or about the sixth day of August, 1877, as set forth in the information. I confess and admit that I was, before the alleged commission of said offense, convicted of petit larceny in the police judge's court of the city and county of San Francisco, state of California, on or about the third day of January, 1879, as set forth in the information. I confess and admit that I was, before the alleged commission of said offense, convicted of the crime of petit larceny in the police judge's court of the city and county of San Francisco, state of California, on or about the fifth day of October, 1880, as set forth in the information. I confess and admit that I was, before the alleged commission of said offense, convicted of the crime of petit larceny in the superior court, department No. eleven, of the city and county of San Francisco, state of California, on or about the thirteenth day of November, 1880, as set forth in the information. I confess and admit that I was, before the alleged commission of said offense, convicted of the crime of burglary, second degree, in the superior court of the county of Sacramento, state of California, on or about the twentieth day of November, 1881, as set forth in the information."

The cause was tried before a jury. The defendant introduced no testimony. The plea of not guilty was alone submitted to the jury, who, after hearing the testimony, without leaving their seats, rendered the following verdict: "We, the jury, find the defendant guilty of petit larceny." Thereupon the court proceeded to render its judgment, adjudging the defendant guilty of *petit larceny, second offense*, and to imprisonment in the state prison for the term of five years. (The return above quoted is a copy of the judgment.)

We are asked on this showing to discharge the petitioner from custody, on the ground of excess of jurisdiction by the court in the sentence pronounced. That the court had jurisdiction of the petit larceny, and of the prior convictions, is not denied. But the point is deliberately made here that the conviction was only for petty larceny, and that the court had no authority to sen-

tence petitioner to an imprisonment in the state prison upon such conviction. But the judgment in the record shows plainly that the sentence was for petit larceny, second offense. In other words, the sentence was for the petit larceny charged in the information, and a previous conviction of the same offense. Pen. Code, § 1207; *In re King*, 28 Cal. 247; *Ex parte Murray*, 43 Cal. 457. And under such circumstances the court can pronounce such a sentence as the one here imposed. See Pen. Code, § 667, first clause of the section, and subdivision 3. The court is by these clauses clearly invested with authority to impose such sentence. The judgment follows the verdict and confession of defendant, and is in all respects regular. There were other matters, referred to on the argument, which relate merely to the exercise of jurisdiction, and do not go to the jurisdiction of the court. They merely relate to the procedure on the trial, and are not *per se jurisdictional*. If they showed error committed in the trial court, they could only be reviewed on regular proceedings in an appeal court. We will add here, however, that we find no error in the record. The trial was according to the rule, and no right of the defendant was trenching upon. The court followed on the trial the rulings of this court in regard to arraignment, plea, submission to jury, and verdict, in *People v. Lewis*, 64 Cal. 401, 1 Pac. Rep. 490, and *People v. Brooks*, 65 Cal. 296, 4 Pac. Rep. 7, and contravened nothing said in *People v. King*, 64 Cal. 338.

On the argument, some remarks were made on the decisions of this court in the cases just above cited. They were spoken of as inharmonious and contradictory. A careful examination of the opinions in the causes will show that this is not so. We will consider the cases in their order.

People v. King was first decided, the opinion having been filed on the twenty-sixth of November, 1883. King was convicted of petit larceny on an information charging him with the commission of grand larceny, and also with having suffered a previous conviction for felony. The error on which the cause was reversed was as to the sentence pronounced on the verdict. The point is discussed in the opinion, and the points herein noticed were made. On his arraignment King was asked by the court whether he had suffered the previous conviction charged in the information. He pleaded not guilty to the specific offense charged, and admitted the previous conviction. This court said the arraignment was had on a section of the Penal Code (1025) which had been repealed, and that the question asked by the court as to the prior conviction was illegal. Further on in the opinion the court said: "No person accused of a public offense can be required by an unauthorized question asked him at his arraignment to criminate himself;" citing Pen. Code, § 688. The question being illegal, King "was not bound to answer it, and his answer could not be read against him, as equivalent to the verdict of guilty, upon which, on conviction, with a verdict of petit larceny, he could be adjudged guilty and punished." The opinion proceeds on the idea that King had been arraigned in a mode unauthorized by law; that the plea of *not guilty* should be considered as extending to the whole information, as denying all its allegations, both as to the specific offense charged, and the prior conviction, and therefore he had a right to have the jury pass on them; that the jury did pass on them, and found a verdict of guilty of petit larceny. This was regarded by the court as a finding that the previous conviction was not true. We therefore held that the punishment on the verdict could only be for petit larceny, under Pen. Code, § 490, and that confinement in the state prison was not the punishment allowed by law.

The only point really decided was that the sentence was illegal. The observations in the opinion were made in discussing this point, and were made to enforce the conclusion that the sentence to the state prison was not authorized by the law. The starting point in the reasoning was the illegality of the arraignment, which, it is stated, was had under a repealed statute, (section

1025 of the Penal Code.) The illegal part of the plea was there rejected, and it was held to be a plea of not guilty to the *whole information*. In this view the jury must pass on all the issues. It was held that it did so, in finding the verdict; affirming guilt only as to petit larceny. The verdict was construed as negating the existence of the previous conviction, holding it not to be true. On this construction of the verdict it was held the judgment or sentence could only pronounce the punishment appropriate to petit larceny, which was not imprisonment in the state prison.

People v. Lewis was heard and decided in the month following that in which the judgment was rendered in *People v. King*, viz., on December 29, 1883. In *Lewis' Case* the indictment was for grand larceny and previous conviction of a like offense. On his arraignment Lewis pleaded not guilty to the offense charged in the indictment. The court below held this plea as extending to all the averments of the indictment,—to the larceny charged, as well as the previous conviction. Lewis, on the trial, offered to plead guilty to the previous conviction. This the court refused to allow. Construing the plea as above stated, that the previous conviction was denied, the court directed the jury as to the form of the verdict, in accordance with section 1158 of the Penal Code, and the jury found the following verdict: "We, the jury, find the defendant guilty of grand larceny, and we find the charge of previous conviction true." The above was sustained by this court, and the action of the trial court approved and affirmed. In *Lewis' Case* the trial court did what this court said in *King's Case* would have been correct. The defendant was allowed to plead, according to the usual and lawful mode, to the whole indictment. This he did in his plea of *not guilty*. No question was asked on the arraignment as to the previous conviction. The arraignment was had under the section of the Code relating to arraignments in criminal actions generally. Sections 988, 1017. He was not arraigned under the repealed section, (1025,) as King was. We think it clear that if King had been arraigned as Lewis was, and the verdict in his case found as in *Lewis' Case*, the court would, on the views expressed in the opinion in *King's Case*, have held that the judgment in *King's Case* was without error. In fine, the elements in *Lewis' Case* were what the court, speaking by MCKEE, J., said were lacking in *King's Case*. *Lewis' Case* had the requisite elements, and was affirmed. *King's Case* lacked them, and was disapproved.

People v. Brooks was decided May 29, 1884. Brooks was charged on an information with the offense of an assault with intent to commit robbery, and a previous conviction of grand larceny. The defendant was arraigned under section 988 of the Penal Code, as Lewis was, and as this court said should have been done in *King's Case*. This court said, in *Brooks' Case*, in regard to this arraignment, that the special mode of arraignment prescribed by section 1025 no longer existing, as that section had been repealed, the trial court had to resort to section 988, which prescribed the mode of arraignment in all cases. And it will be here observed, this was the only mode then left for arraignment. If the arraignment was not had under section 988, there was no mode of arraignment provided by statute. Of necessity, the court below was compelled to resort to section 988 as its only guide for arraigning a person charged with a criminal offense. If this mode did not exist, there was no other, unless the court could resort to the common-law mode. On Brooks' arraignment he pleaded not guilty of the offense charged, and "confesses and admits that he was before the alleged commission of the offense convicted of the crime of grand larceny, as set forth in the information." In this case (Brooks') the only question asked was, "Guilty or not guilty?" The question held to be illegal was not put to him. It was further held in *Brooks' Case* that the voluntary confession was legal. Such voluntary confession is allowed by law. A party may confess his guilt as well in court as out of court. The verdict was held to be proper, and that it was not necessary after the voluntary con-

fession that the jury should find as to the previous conviction. This is in accordance with section 1158 of the Penal Code, which we here insert:

"Sec. 1158. Whenever the fact of a previous conviction of another offense is charged in an indictment or information, the jury, if they find a verdict of guilty of the offense with which he is charged, must also, unless the answer of the defendant admits the charge, find whether or not he has suffered such previous conviction. The verdict of the jury upon a charge of previous conviction may be: 'We find the charge of previous conviction true,' or, 'We find the charge of previous conviction not true;' as they find that the defendant has or has not suffered such conviction."

And this court further held, in the *Case of Brooks*, that the court might well render judgment on the verdict and the confession under section 1158. The court further held that the confession of the previous conviction is the answer of section 1158. That answer meant that, or it meant nothing. We see no other meaning that can be attributed to the word "answer." We must either give it that meaning or elide it from the statute, which we are not allowed to do. We further held that the first subdivision of section 1093 of the Penal Code allows such confession, and quoted this portion of section 1093 to which reference was made. It was further said that, when confession is made under section 1093, that portion of the information is not read to the jury on the trial, and in fact does not go to the jury, (section 1158,) and the jury, therefore, are not allowed to pass on it. We insert here the repealed sections, and that portion of section 1093 above referred to:

"Sec. 969. In charging in an indictment the fact of a previous conviction of a felony, or of an attempt to commit an offense which, if perpetrated, would have been a felony, or of petty larceny, it is sufficient to state that the defendant, before the commission of the offense charged in this indictment, was, in [giving the title of the court in which the conviction was had] convicted of a felony, [or attempt, etc., or of petty larceny.] If more than one previous conviction be charged in the indictment, the date of the judgment upon each conviction shall be stated, and not more than two previous convictions shall be charged in any one indictment."

"Sec. 1025. When a defendant, who is charged in the indictment with having suffered a previous conviction, pleads either guilty or not guilty of the offense for which he is indicted, he must be asked whether he has suffered such previous conviction. If he answers that he has, his answer shall be entered by the clerk in the minutes of the court, and shall, unless withdrawn by consent of the court, be conclusive of the fact of his having suffered such previous conviction in all subsequent proceedings. If he answers that he has not, his answer shall be entered by the clerk in the minutes of the court; and the question whether or not he has suffered such previous conviction shall be tried by the jury which tries the issues upon the plea of 'not guilty,' or, in case of a plea of 'guilty,' by a jury impaneled for that purpose. The refusal of the defendant to answer is equivalent to a denial that he has suffered such previous conviction. In case the defendant pleads 'not guilty,' and answers that he has suffered the previous conviction, the charge of the previous conviction shall not be read to the jury, nor alluded to on the trial."

"Sec. 1093. The jury having been impaneled and sworn, the trial must proceed in the following order, unless otherwise directed by the court: (1) If the indictment or information be for felony, the clerk must read it, and state the plea of the defendant to the jury; and in cases where it charges a previous conviction, and the defendant has confessed the same, the clerk, in reading it, shall omit therefrom all that relates to such previous convictions. In all other cases this formality may be dispensed with."

Now, considering the opinions in the cases together, where is the inharmony or contradiction in the judgments rendered? In construing the opinion in *People v. King*, attention must be given to its peculiar features, and the

language used therein in regard to them. In *Cohens v. Virginia*, 6 Wheat. 399, MARSHALL, C. J., speaking, for the court, of some *dicta* of that court in *Marbury v. Madison*, 1 Cranch, 137, observed as follows: "It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles, which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." In *Richardson v. Mellish*, 2 Bing. 248, BEST, chief justice of the common pleas, used this language with reference to an opinion cited on the argument: "There are expressions used by the chief justice in that case which seem to bear on the present; but the expressions of every judge must be taken with reference to the case on which he decides, otherwise the law will get into extreme confusion. That is what we are to look at in all cases. The manner in which he is arguing is not the thing; it is the principle he is deciding. If ever I could have imagined it could have been extended to such a case as this, I would have protested against, though I could not have prevented, the decision. I would, in my place, have protested against it, for I should have seen the injustice and confusion to which such a doctrine would have been liable to be extended. I am quite satisfied that not one of the learned judges who decided that case ever conceived that its authority could be pressed to the extent to which it has been pressed in this case."

We take it to be a sound rule that the expressions of a judge in an opinion must be taken with reference to the case on which he decides; and if expressions there used go beyond the case, they may be respected, but "ought not to control the judgment in a subsequent case when the very point is presented for decision." The case (King's) before the court was one in which it was first held that the arraignment was had in a mode which was illegal. It was illegal in that a question was asked which was not allowed, since section 1025, which allowed it, had been repealed. The court regarded the plea of not guilty as alone before the court on which the trial was to be had; and the answer was, for the reasons above given, rejected as not in the plea. It was in reference to this state of the case that the court said that "the jury must, by their verdict, find the charge of a previous conviction true or not true." Upon the construction of the plea put upon it by the court, that it was only "not guilty," all the allegations of the information were put in issue, and all must be passed on by the jury. It was in this view that the court said that both charges must be proved, and both must be found upon by the jury. That the defendant must plead to both charges, all the three cases referred to above hold. This was done in all the cases,—in the first case by "not guilty;" and the other cases by "not guilty," and not guilty and a confession of the previous convictions.

In commenting on section 1158, the court did say, in *King's Case*, that the exception in section 1158, in relation to the rule requiring an issue of fact to be tried as prescribed in that section, being swept away by the repeal of the section of the Code which required an answer to be made, (the reference here was to section 1025,) the defendant stood for trial on his plea of "not guilty." But it had been clearly held in the preceding part of the opinion that the plea of "*not guilty*" was the only plea before the court. There was no necessity for saying that this was in consequence of the law requiring the answer having been swept away by the repeal of section 1025, which allowed it to be made. This part of the opinion was entirely *obiter*,—outside of the case. The court must have overlooked section 1093, which refers to such answer by the words "and the defendant has confessed the same," in connection with sec-

tion 1158, where the answer of defendant in regard to the previous conviction is referred to, neither of which sections quoted above in full (1093 or 1158) had been repealed, and still held their place for the guidance of courts in such cases as those of King, Lewis, and Brooks. The observations of this court in *King's Case* in regard to section 1158 were made in a cause where the facts were different from the one before us; they relate to a point not necessary to be decided in *King's Case*, and, though they should be respected, "ought not to control the judgment in a subsequent suit where the very point is presented for decision." This very point was presented for decision in *Brooks' Case*.

We will observe here, in relation to the sections above referred to, that 969 was modified in 1874 (see amendments to Codes 1873-74, p. 438) so as to read as it did when repealed April 9, 1880. Section 1025, not in the original Code, was inserted in 1874. See amendments above cited, p. 439. The form of section 1158 in the Code as first adopted was changed in 1874. By the act of April 9, 1880, sections 969 and 1025 were repealed. See amendments to Codes for 1880, part relating to Pen. Code, p. 15, § 30, and Id. p. 19, § 56. In 1874, § 1093 was amended. See amendments of 1874, *supra*, p. 444. By the act of 1880, (April 9th,) sections 1158 and 1093 were again amended so as to read as they did when the cases above discussed were decided. See amendments of 1880 to Pen. Code, § 64, p. 21, and section 62, p. 24. So it will be perceived that on the same day, and by the same act, sections 969 and 1025 were repealed, and 1093 and 1158 were amended. In so framing the Code, the legislature doubtless came to the conclusion that 1093 and 1158, as they were then framed, furnished a complete system. The above history of the legislation shows that, in the construction put on these sections in *Brooks' Case*, this court acted in accordance with the legislative intent.

We cannot perceive any lack of jurisdiction in the court in pronouncing the sentence in the case of the petitioner here, and he is therefore remanded to the custody of the proper officer, to be dealt with according to law. Ordered accordingly.

We concur: SEARLS, C. J.; MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.

McKINSTRY, J., dissenting.

(73 Cal. 452)

HUTCHINSON v. AINSWORTH and another. (No. 9,603.)

(*Supreme Court of California*. September 27, 1887.)

1. MORTGAGE—FORECLOSURE—DEFECTIVE CERTIFICATE—REFORMATION—LIMITATION OF ACTION.

A mortgage was executed September 3, 1878, and foreclosure was commenced March 25, 1880. On August 19, 1880, plaintiff asked leave to amend her complaint so as to obtain a reformation of the certificate of acknowledgment of the mortgage. The court denied plaintiff's request, but its judgment was reversed March 28, 1883, and, subsequently, such amended complaint was filed. *Held*, that whether the right to a reformation is or is not barred in three years from the date of the mistake, the amended complaint should be treated as having been filed at the date of the application, and therefore the statute of limitations would not prevent such reformation.

2. SAME—DEFECTIVE CERTIFICATE—RECORDING—SUBSEQUENT PURCHASER WITH NOTICE.

A mortgage properly executed and acknowledged, although the certificate of acknowledgment is defective, is valid against a subsequent purchaser having knowledge of it as recorded, though not of its proper acknowledgment, where he parted with no value, and incurred no liability, except a contingent liability which never became fixed.

3. SAME—REFORMATION—MISTAKE—CONFLICT OF EVIDENCE NOT FATAL TO RELIEF.

While, in actions for reformation of written instruments, the mistake must be established in a clear and convincing manner to the entire satisfaction of the court, relief will not be denied simply because there is a conflict in the evidence upon the question of a mistake.

4. SAME—DECREE.

In an action to reform a defective certificate of acknowledgment of a mortgage, the notary who took the acknowledgment testified explicitly to the observance of all the requisites to a valid acknowledgment, and to the mistake in attaching the defective certificate. *Held* sufficient to sustain a decree of reformation.¹

5. SAME—NOTARY NOT NECESSARY PARTY DEFENDANT.

In a suit for reformation of a certificate of acknowledgment, the notary who took the acknowledgment is not a necessary party defendant.

6. SAME—PLEADING—FORECLOSURE AND REFORMATION SINGLE CAUSE OF ACTION.

A complaint which, in addition to the necessary averments and demand for relief in mortgage foreclosure, contains also the proper allegations and demand for reformation of the certificate of acknowledgment of the mortgage sought to be foreclosed, states but one cause of action.

In bank. Appeal from superior court, Alameda county; A. M. CRANE, Judge.

W. B. Tyler, for appellants. *William Reade* and *W. C. Belcher*, for respondent.

SEARLS, C. J. This cause was here on a former appeal, the decision on which is reported in 63 Cal. 286. In 1878, the defendants, Anna Ainsworth and A. G. Ainsworth, made their promissory note to Margaret M. Hutchinson for \$3,500, payable on the third day of September, 1879, with interest at 10 per cent. per annum. The note was given for money loaned to said defendant by plaintiff, who is a married woman, and was her separate property. To secure the payment of the promissory note, Anna Hutchinson executed the mortgage to foreclose which this action is brought. The property mortgaged was the separate property of Anna Ainsworth, who is a married woman. The acknowledgment made by said Anna Ainsworth is found to have been properly taken; but the notary, in certifying thereto, failed to specify that he made her acquainted with the contents of the instrument, separately from, and without the hearing of, her husband. A copy of the certificate is set out in the report of the case on the former appeal. In that appeal this court reversed the judgment and order of the court below, upon the ground of error in refusing plaintiff's application to amend her complaint so as to show that the acknowledgment was actually taken in compliance with the statute, with a view to a judgment correcting the certificate, as provided by section 1202 of the Civil Code.

The action was brought March 25, 1880. Upon the return of the cause to the court below, and on the eleventh day of May, 1883, the complaint was amended, averring the acknowledgment to have been properly taken, and asking that the certificate be reformed and corrected. To this amended complaint defendant demurred, upon the grounds, among others: (1) That there is a non-joinder of parties defendant, in that Will. H. Burrill, the notary who took the acknowledgment, should have been made a defendant; (2) that two causes of action are joined in the complaint without being separately stated; (3) that the cause of action is barred by Code Civil Proc. subd. 4, § 338. The demurrer was overruled, and this action is assigned as error.

The demurrer was properly overruled. The notary was not a necessary party defendant to the reformation of his certificate. The reformation, if made at all, could only be so made by the judgment of the court. *Wedel v. Herman*, 59 Cal. 515.

The objection of the demurrer is not that two causes of action are improperly united, but that they are contained in the complaint, and are not sepa-

¹As to the mistakes against which equity will relieve, and the proof necessary to obtain a reformation of a written instrument, see *Benson v. Markoe*, (Minn.) 33 N. W. Rep. 38; *Guilmartin v. Urquhart*, (Ala.) 1 South. Rep. 897, and note; *Griffith v. County of Sebastian*, (Ark.) 3 S. W. Rep. 886, and note; *Bailey v. Insurance Co.*, 13 Fed. Rep. 250, 256.

rately stated. Waiving the question whether or not a proper uniting of two causes of action in the same complaint, without stating them separately, is a cause for demurrer, we are of opinion the complaint states but one cause of action. "An action is an ordinary proceeding in a court of justice by which one party prosecutes another, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." Code Civil Proc. § 22. The facts upon which the plaintiff's right to sue is based, and upon which the defendant's duty has arisen, coupled with the facts which constitute the latter's wrong, make up *the cause of action*. If these facts, taken together, give a unity of right, they constitute but one cause of action.

In equity the relief or the enforcement of a single right may be varied, and the facts essential to such relief may be set out without objection, as auxiliary to the right to be enforced. In the case at bar the object of the action is to collect a single debt, and to enforce a single lien, to redress a single wrong. To accomplish this object dual relief is sought, but this circumstance, so frequent in equity, does not constitute two causes of action. Pomeroy, at section 459 of his work on Remedies, in discussing this question, uses the following language: "Actions brought to reform instruments in writing, such as policies of insurance and other contracts, mortgages, deeds of conveyance, and the like, and to enforce the same as reformed by judgments for the recovery of the money due on the contracts, or for the foreclosure of the mortgages, or for the recovery of possession of the land conveyed by the deed, fall within the same general principle. One cause of action only is stated in such cases, however various may be the reliefs demanded and granted." *Meyer v. Van Collem*, 7 Abb. Pr. 222; *McClurg v. Phillips*, 49 Mo. 315.

Is the cause of action barred by the statute of limitations? To repeat: The note and mortgage were executed September 3, 1878, and fell due September 3, 1879. Suit brought March 25, 1880. Leave to amend the complaint was asked and refused by the court at the first trial on the nineteenth day of August, 1880. Judgment reversed, March 28, 1883. Amended complaint filed May 11, 1883. It will be observed that three years had not elapsed from September 3, 1878, the date of the mistake in the certificate, when plaintiff asked and was denied the privilege of amending her complaint so as to have such mistake corrected. Under such circumstances, the plaintiff having a legal right to file her amended pleading, and having been prevented from so doing by the act of defendants, and through the error of the court below, it should, by application of the doctrine of relation, be deemed and treated as having been filed as of the date of the application and refusal. If A. has a right to answer a complaint filed against him, which right is denied by the *nisi prius* court, after an appeal and reversal of the order denying such right, he cannot be met with the answer that his time to answer has expired under the statute. This doctrine is quite different from that which prevents a party from taking advantage of a disability, unless it existed in his favor at the time that the statute began to run. A disability to sue may be a misfortune, but, as it cannot be attributed to the acts of others, it must be borne by the party upon whom it rests, except so far as relieved against by statute.

Plaintiffs were under no disability. They asked to exercise a right which was refused by the court, and, as they might well do, they procured a correction of the error by appeal, whereupon they were entitled to stand in the position they would have occupied had the right been granted them in the first instance. Any other rule would render a successful appeal fruitless in a variety of cases. This reasoning proceeds upon the theory that the application to reform the certificate was a cause of action which would be barred within three years from the date of the mistake sought to be corrected, or, if not then known, within three years after its discovery; but it may well be doubted

whether the right to reform the certificate of acknowledgment was not a mere incident to the right to recover upon the note and mortgage, which would stand or fall with its principal.

Had we confined ourselves to the statements of the complaint, we might have disposed of the demurrer thereto more briefly, but, as the same question is presented upon a broader field by the findings, we have discussed it in its latter aspect, and are of opinion the demurrer was properly overruled, and that the findings against the plea of the statute of limitations are fully warranted.

We are asked to review the evidence upon the question of a mistake by the notary in certifying to the acknowledgment, and to set aside the finding of the court upon the ground that it is not supported by the evidence; and in this connection are referred to a number of cases in which it is held that to authorize the correction of mistakes by reforming written instruments, the alleged mistake must be clearly made out by proofs entirely satisfactory, and that nothing short of a clear and convincing state of facts showing the mistake will warrant the court to interfere with and reform the instrument. As was said in *Lestrade v. Barth*, 19 Cal. 660: "The evidence, it is true, must be clear and convincing, making out the mistake to the entire satisfaction of the court, and not loose, equivocal, or contradictory, leaving the mistake open to doubt." The conclusion from the sum of all the authorities on the subject is not that relief must necessarily be denied, because there is a conflict of testimony, for that would result in a denial of justice in some of the plainest cases calling for such relief; but that upon all the proofs, taking the facts as they appear to the court, after eliminating testimony unworthy of credence, or based upon mistake or uncertainty, as in other cases, the mistake must be established in a clear and convincing manner, and to the entire satisfaction of the court. Viewed in this light, we cannot say the court was unauthorized by the testimony in the conclusion it reached.

The testimony of the notary, Burrill, is clear and explicit to the facts that he went to the house of the mortgagor; that her husband retired from the room; that he then and there made her acquainted with the contents of the instrument, and that she acknowledged it, etc., all without the presence or hearing of her husband; and that upon returning to his office he inadvertently attached a printed certificate which would have been valid under the statute as it formerly existed, but which failed to certify that he made the mortgagor acquainted with the contents of the instrument, without the presence and hearing of her husband, as required by the present law. This was a mistake which might well have happened; and upon such testimony, if believed to be true, the court below was fully warranted in the conclusion it reached.

The conveyance, then, having been properly executed and acknowledged, (though not properly certified,) was valid as between the parties to it, and all the world, except subsequent *bona fide* purchasers, for a valuable consideration, without notice.

The court found that the defendant Tyler had notice of the mortgage as recorded, but no notice in fact that it had been properly acknowledged; that he gave no money or thing of value therefor, and incurred no liability on account thereof, except the contingent liability that, if the rents of the property which was covered by the mortgage did not amount to \$500, he would pay his grantor that amount; and that the rents paid said sum, and he never became liable therefor. The testimony supports this finding, and, had the court found a fuller and more complete notice in Tyler, we do not see that such finding could have been disturbed by this court.

The judgment and order appealed from are affirmed.

We concur: SHARPSTEIN, J.; TEMPLE, J.; PATERSON, J.; MCKINSTRY, J.; MCFARLAND, J.; THORNTON, J.

(73 Cal. 243)

PEOPLE v. SUTTON. (No. 20,605.)

(Supreme Court of California. August 29, 1887.)

1. CRIMINAL PRACTICE—CROSS-EXAMINATION—SCOPE.

On cross-examination in a criminal trial, where answers of defendant to questions objected to added nothing material to what he had previously voluntarily stated without objection, and only tended to make more clear some of the statements previously made by him, there was no violation of Pen. Code Cal. § 1323, limiting cross-examination of a defendant in criminal actions to matters as to which he was examined in chief.¹

2. SAME—MEDICAL EXPERT—OPINION AS TO MERITS OF TEXT-BOOK.

A medical expert, testifying in a criminal trial, was asked whether "Maudsley's Responsibility in Mental Diseases" was a standard work. The question was asked for the purpose of showing the familiarity of witness with authors upon that subject. *Held*, that the question was properly excluded, on the ground that the opinion of the witness as to the merits and standing of the work would not tend to prove such familiarity.

3. SAME—HYPOTHETICAL QUESTIONS—CROSS-EXAMINATION.

A medical expert, on cross-examination, may be asked hypothetical questions bearing upon the sanity of defendant, and based on a portion of the evidence, for the purpose of testing his competency as an expert.

4. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—DILIGENCE.

"To entitle a party to a new trial on the ground of newly-discovered evidence, it must appear that the evidence, and not merely its materiality, be newly discovered; that the evidence is not cumulative merely; that it is such as to render a different result probable on a retrial of the cause; that the party could not with reasonable diligence have discovered and produced it at the trial; and that these facts be shown by the best evidence which the case admits."

5. SAME—DISCRETION OF COURT—PRESUMPTION.

Applications for new trial on the ground of newly-discovered evidence are addressed to the discretion of the court, and its action will not be disturbed except for an abuse of discretion; the presumption being that the discretion was properly exercised.

In bank. Appeal from superior court, Alameda county; E. M. GIBSON, Judge.

Wells Whitmore and *M. C. Chapman*, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

SHARPSTEIN, J. On the trial the defendant testified on his own behalf, and on his cross-examination stated. "I did not see Martin's [deceased's] cattle on my place but once after I got my gun, and it was too much trouble to get the gun and shoot them. I never thought of shooting them at all. I saw some of Martin's cattle on my said place two years ago, but I did not shoot any of them. The next time that I saw any of them was on September 15, 1886, [the date of the homicide.] There were two bands, 15 in one and 8 in another. When I first saw them I was about a quarter of a mile away, at work at my barn, and when I saw them I went into my house and got my gun to shoot the cattle, but I did not shoot them. I went up onto the hill and saw the band of cattle and Martin [deceased] standing on the top. The cattle were going east." The question that elicited this statement is omitted in the record, and it does not appear that any objection was interposed to it. But at the conclusion of the above statement the district attorney asked this question: "Then the cattle were going toward Martin's place?" The defendant's attorney objected, on the ground that it was not cross-examination. The objection was overruled, and the ruling excepted to. The question was

¹ Respecting the latitude permissible in a cross-examination of the defendant in a criminal prosecution, where he offers himself as witness, see *Disque v. State*, (N. J.) 8 Atl. Rep. 281, and note; *Spies v. People*, (Ill.) 12 N. E. Rep. 865, and note; *State v. Saunders*, (Or.) 12 Pac. Rep. 442; *State v. Johnson*, (Iowa,) 34 N. W. Rep. 177; *State v. Robertson*, (S. C.) 1 S. E. Rep. 443; *Tickell v. Railroad Co.*, (Mo.) 2 S. W. Rep. 407; *State v. Brooks*, (Mo.) 5 S. W. Rep. 257.

not answered, and the district attorney said: "That was towards the coal mines?" To which the defendant answered: "Yes, sir." The district attorney then said: "The coal mine is not on your premises, is it?" Defendant answered: "No, sir." The district attorney then asked: "Was anybody driving them [the cattle] that way?" Defendant's counsel objected, on the ground that it was not cross-examination. Objection overruled, and ruling excepted to. *Answer.* "No, sir. There was no one behind the cattle. Martin [deceased] was staying up on the hill to drive the cattle off, I suppose." On his examination in chief the defendant stated that he had been much annoyed by cattle trespassing on his premises; but he did not narrate the facts which he narrated on his cross-examination, without objection, and, so far as the record shows, without being interrogated in relation thereto. If he had testified to the same facts on his examination in chief, the right to ask him the questions objected to on cross-examination would be perfectly clear. And we think the questions objected to, and the answers to them, only tended to make more clear some of the statements previously made by the defendant without objection on his cross-examination.

We fail to see that the answers to the questions objected to add anything material to what the defendant had previously voluntarily stated. So viewing it, we think the rulings of the court correct, under the provision of the Code which limits the cross-examination in such a case to the matters about which the defendant was examined in chief. Pen. Code, § 1323. The cross-examination in this case was quite as clearly within the rule as was that held to be so by this court in *People v. Russell*, 46 Cal. 121.

The next alleged error relied on by the appellant was the ruling of the court sustaining an objection interposed by the district attorney to a question asked Dr. Buck by appellant's counsel. Dr. Buck, called by the defendant, testified that he was familiar with "Maudsley's Responsibility in Mental Diseases." Defendant's counsel then asked him if he knew whether it was a standard work. The district attorney objected, and the court sustained the objection, to which defendant excepted. It is now insisted that the court erred, because an affirmative answer of the witness would tend to show his great familiarity with authors upon the subject upon which he was called to give expert testimony. But he had testified that he was familiar with the treatise in question, and we think his opinion of it would not tend to prove his great familiarity with authors upon that subject. His competency to testify as an expert does not appear to have been questioned. *People v. Donovan*, 43 Cal. 162, cited by defendant's counsel, has no bearing on this question.

On cross-examination by the district attorney, Dr. Buck was asked: "Would you say that in a case where a man had had a grievance against another man of long standing, and who, seeing that grievance being repeated, should go and get a rifle, walk from a quarter of a mile to a half mile to where the man committing the grievance was, and who should shoot that man,—would you say that that was a case of transitory mania or homicidal mania?" The defendant objected, on the ground "that it was not cross-examination, and evidently an hypothetical question, based upon a portion of the evidence introduced in this case, and not correctly stated, and omitting a large portion of the evidence in the case." The objection was overruled. The defendant excepted, and the witness answered: "As stated by the district attorney, there is nothing in the statement that would indicate any insanity whatever." The witness was then asked this question: "Would you say that a man who is very prompt and careful in the paying of his debts,—would you consider that a matter of insanity, indicating the insane temperament?" Defendant's counsel objected, on substantially the same ground on which he objected to the preceding question. The objection was overruled, and the ruling excepted to. The witness answered: "I should think that was no indication of insanity in any one. I should hope not, I am sure."

We think the rulings of the court upon the objections of the defendant were not erroneous. The witness was being cross-examined, and we think it was proper to ask him such questions as these, for the purpose of testing his competency as an expert. If he had testified that the hypothetical facts embraced in either question indicated insanity, we think the jury would have doubted his sanity. We think the defendant's counsel could not have relied upon those facts as tending to prove insanity. It seems to be well settled that experts of all classes may be asked as to an hypothetical case, and if the facts on which the hypothesis is based fall, the answer falls also.

One of the grounds upon which defendant based his motion for a new trial was newly-discovered evidence, which he could not with reasonable diligence have discovered and produced at the trial. At the hearing of the motion the defendant produced the affidavits of the witnesses by whom he expected such evidence to be given. To entitle a party to a new trial, on the ground of newly-discovered evidence, it must appear—"First, that the evidence, and not merely its materiality, be newly discovered; second, that the evidence is not cumulative merely; third, that it is such as to render a different result probable on a retrial of the cause; fourth, that the party could not with reasonable diligence have discovered and produced it at the trial; and, fifth, that these facts be shown by the best evidence which the case admits." 1 Hayne, New Trial & App. § 83. "Applications on this ground are addressed to the discretion of the court below, and the action of the court will not be disturbed, except for an abuse of discretion; the presumption being that the discretion was properly exercised." Id. § 87.

The affidavits produced in this case do not make it clear to our comprehension that the court below, in denying the motion for a new trial, abused its discretion. It is by no means clear that the defendant could not with reasonable diligence have discovered and produced the evidence claimed to be newly discovered at the trial, nor are we prepared to say that it is such as to render a different result probable on a retrial. Of that the court below was in a much better position to judge than we are. And this court has laid down the rule that applications on this ground are to be regarded with distrust and disfavor. *Baker v. Joseph*, 16 Cal. 180; *O'Brien v. Brady*, 23 Cal. 243; *Jones v. Singleton*, 45 Cal. 94; *Bartlett v. Hogden*, 3 Cal. 58; *Hobler v. Cole*, 49 Cal. 250; *Arnold v. Skaggs*, 35 Cal. 684. It not appearing to us that there was any abuse of discretion by the court below, we cannot disturb the order on that ground.

The statement in defendant's brief that "the court, in its instructions to the jury, assumed that the killing was admitted as proved," is not borne out by the record, as far as we can discover. All the instructions which defendant's counsel requested to be given were given.

Judgment and order affirmed.

We concur: SEARLS, C. J.; MCFARLAND, J.; PATERSON, J.; MCKINSTRY, J.; TEMPLE, J.; THORNTON, J.

(73 Cal. 520)

MORGAN and another v. TILLOTSON and another. (No. 11,916.)

(Supreme Court of California. September 29, 1887.)

1. EJECTMENT—PLEADING—DENIAL OF PLAINTIFF'S TITLE.

In an action of ejectment, it is sufficient to deny the ownership and title to possession of plaintiff. Averments as to the ownership of plaintiff's grantors are immaterial, and need not be denied.

2. MINING CLAIMS—PLACER MINES—ANNUAL EXPENDITURE—RELOCATION.

A failure to comply with the provisions of Rev. St. U. S. § 2324, which requires an annual expenditure of \$100 by the locator of a placer mining claim, renders the claim subject to relocation.

Department 2. Appeal from superior court, Placer county; B. F. MYRES, Judge.

C. A. & F. P. Tuttle, for appellants. *Hall & Craig*, for respondents.

THORNTON, J. Action of ejectment to recover mining ground constituting a placer claim. The question of title was put in issue by the answers. The material averment of plaintiffs' ownership and title to the possession was denied. The averment in the complaint in relation to the ownership of plaintiffs' grantors and predecessors in interest was entirely immaterial, and need not have been denied. *Coryell v. Cain*, 16 Cal. 567.

The question whether the provision of the Revised Statutes of the United States (section 2324) which requires an annual expenditure of a certain amount for labor and materials on each mining claim until the patent is issued, a failure to comply with which provision renders the claim subject to relocation, we regard as settled in the affirmative by the case of *Russell v. Brosseau*, 65 Cal. 605, 4 Pac. Rep. 643, in this court; and *Jackson v. Roby*, 109 U. S. 440, 3 Sup. Ct. Rep. 301, in the supreme court of the United States. These cases show clearly that judgment should have been rendered for defendants on the evidence, the whole of which was comprised in an agreed statement of facts. Under such circumstances, we consider it unnecessary and unjust to put the defendants to the toil and expense of a new trial.

The judgment and order are therefore reversed, and the cause remanded to the court below, with directions to enter judgment for defendants for the land in controversy. Ordered accordingly.

We concur: SHARPSTEIN, J.; MCFARLAND, J.

(73 Cal. 526)

BARNHART v. FULKERTH and another. (No. 11,849.)

(*Supreme Court of California*. September 30, 1887.)

1. PLEDGE—LEVY ON PROPERTY PLEDGED—PLEDGEE CANNOT SET UP TITLE ADVERSE TO PLEDGEOR.

A pledgee, in an action against a sheriff who has levied on the pledge as the property of the pledgeor, cannot set up a title, adverse to the pledgeor, acquired subsequent to the levy of the execution.

2. SAME—TENDER TO PLEDGE—WAIVER OF CONDITIONS.

A pledgee who admits the sufficiency, so far as the amount is concerned, of a tender of what is due him from the pledgeor, made by a sheriff in execution, thereby waives his right to object to a condition annexed that he surrender the note secured by, or the warehouse receipt for, the pledge.

Department 2. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

W. E. Turner, for appellant. *J. H. Budd*, for respondent.

THORNTON, J. This action was brought to recover possession of 4,255 bags of wheat, or their value, in case a delivery cannot be had, and for \$2,000 damages, etc. The material allegations of the complaint were denied by the answer, and defendant Fulkert justified under a levy on the wheat sued for, made by him as sheriff of the county of Stanislaus, of a writ of attachment issued in the action brought in the district court for the county just named by *H. O. Matthews et al.* against *J. T. Davis*, and further under a levy on the same property of a writ of execution issued upon a judgment recovered in the above-entitled action.

At the trial it appears that on or about the seventh day of November, 1878, the plaintiff lent Davis the sum of \$2,500, and received the wheat in question in pledge as security for its repayment to him. These facts are established by uncontroverted evidence. At the time of this loan the wheat was stored in a

warehouse at Turlock. It had been stored at Turlock before plaintiff made the loan to Davis, having been placed there by Davis in the September preceding. For this wheat a receipt was given by the warehouseman, defendant Perley, of which the following is a copy:

"TURLOCK, CAL., September 16, 1878.

"Received in good order and well-conditioned, from E. C. Vancel, five thousand and fifty-five (5,055) bags wheat, weighing six hundred and fifty-four thousand three hundred and eighty-nine pounds, (654,389 lbs.,) which I hereby agree to deliver in like order and condition, (the danger from fire excepted,) upon return of this receipt and payment of storage at the rate of 50 cents per ton for the first month, commencing August 26, 1878, and 25 cents per ton per month thereafter. Total storage not to exceed one dollar (\$1) per ton for the season ending June 1, 1879.

"Stored in the grain warehouse at Turlock, known as 'Chas. Dallas' Warehouse.' GEORGE PERLEY."

This receipt was delivered to the plaintiff by Davis on the seventh of November, 1878, with the following indorsements on it:

"To dispose of for me to the best advantage, I assign the within to John T. Davis. E. C. VANCEL."

"NOVEMBER 5, 1878. Received on the within receipt 800 bags wheat; estimated weight, one hundred and four thousand pounds.

"J. T. DAVIS."

"I assign the within receipt to H. Barnhart to secure to him the payment of \$2,500. J. T. DAVIS."

The last indorsement of Davis was made at the time of the loan of \$2,500. This pledge was a bailment by Davis to the plaintiff. Davis and the plaintiff sustained to each other the relation of pledgeor and pledgee. Plaintiff's transaction was with Davis only. He lent Davis the money, and took his note for it. When the money lent should be paid back by Davis, the plaintiff was bound to return him the wheat pledged.

It is contended on the part of plaintiff that this wheat was the property of one Vancel. Can the plaintiff be allowed to show this? It does not appear that any transactions took place between Vancel and plaintiff until after this action was commenced. Barnhart testified that he lent money to Vancel on this wheat and other property in April, 1879. This action was brought on the seventeenth of February, 1879. Barnhart must recover on his title as it was when the action was commenced. If Barnhart cannot call in aid the title of Vancel when the suit was commenced, it will not avail him to recover in this action. He may show that the money—\$2,500—that he paid over to Davis in November, 1878, and for which Davis executed to him his note, was merely a loan to Vancel through Davis, as agent of the latter, and that Vancel, and not Davis, was the pledgeor; that the transaction was one, not with Davis, but with Vancel through Davis as the agent of the former. If the loan was to Davis as principal, and the pledge was made by Davis on his individual account, and the wheat belonged to Vancel, and Barnhart had, before this action was brought, turned over the wheat to Vancel as owner, and received it back from him as his (Vancel's) custodian, he might have relied on Vancel's title. *Palmtag v. Doutrick*, 59 Cal. 154. Nor does it appear that Barnhart ever lent any money to Vancel until after he had brought suit. He and Davis both testify that the money was lent by the plaintiff to Davis, and that Davis pledged the wheat to him. The plaintiff received the wheat from Davis on a loan made to him, and to him only. It does not appear that Vancel's name was ever mentioned in the transaction at all. Vancel does not appear in the case until after the wheat had been attached by the plaintiffs in the suit of *Matthews et al. v. Davis*, and a tender, admitted by Barnhart to have been sufficient, of the amount due him by Davis, had been made to him, and refused. The interposition of Vancel as owner, by Barnhart,

seems to have been an afterthought resorted to to ward off and defeat the defense herein set up.

We are of opinion that Barnhart showed no right in this case to rely on the title of Vancel to defeat the defense relied on. His right to invoke such title did not arise until after he had begun his suit; and, inasmuch as he could only recover on the title which he had when his action was instituted, a right or title afterwards acquired could not be here available to him. Barnhart testified that he told Hewel (the agent of the sheriff to make the tender) that so far as the amount was concerned, and the sufficiency of the tender, he admitted it. Having made this admission, Barnhart should not be permitted afterwards to allege that the tender was not good by reason of the fact that Hewel said to him, when the tender was made, that he wanted Davis' note from him and the warehouse receipt. If the above should be construed as annexing conditions to the tender, Barnhart waived all right to object to them by admitting the sufficiency of the tender. Civil Code, § 1501.

We do not think that there should be a reversal because the court refused to permit a question to be put to the witness, Davis, on his cross-examination by counsel for defendants, whether, since the seventh or eighth of November, 1878, he had paid the loan of \$2,500, or any part of it. We are not clear that it was allowable on cross-examination, and that the court erred in ruling it out for that reason. We are the less disposed to reverse, on account of this ruling, for the reason that the defendants might have made Davis their own witness as to the matter inquired about.

Having held that Barnhart was estopped, by reason of his relation to Davis, to avail himself of the title of Vancel, there is but slight necessity to pass on another point of estoppel urged by defendants, based on the statements made by Barnhart, prior to the levy of the attachment, to the attaching creditor (Matthews) and the sheriff, that the wheat was the property of Davis. We do not think this estoppel made out, for the reason that it does not appear that the levy was made in sole reliance upon the statements made by Barnhart.

We see no error in the court's refusing to sign the findings presented by counsel for defendants, for the reasons given in *Miller v. Steen*, 30 Cal. 402, and *Porter v. Woodward*, 57 Cal. 538.

It follows from the foregoing that the judgment and order denying a new trial must be reversed, and the cause remanded, that a new trial may be had. So ordered.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

(73 Cal. 518)

WALDEN v. PURVIS. (No. 11,957.)

(*Supreme Court of California.* September 29, 1887.)

EVIDENCE—ADMISSIONS OF DONOR—FRAUD IN GIFT.

In an action against a sheriff, for wrongfully taking cattle donated to plaintiff by his father, a statement alleged to have been made by the father after he had parted with the possession of the cattle is inadmissible, either to prove the fraudulent character of the gift, or for any other purpose.

Commissioners' decision. Department 2.

Appeal from superior court, Stanislaus county; WM. O. MINOR, Judge.

Wright & Hazen, for appellant. *Schell & Bond*, for respondent.

HAYNE, C. Action against the sheriff for taking 111 head of cattle, alleged to have been the property of the plaintiff, under attachment against plaintiff's father. The plaintiff claimed 80 of the cattle under a sale from his father. Whatever errors may have been committed by the court in admitting or re-

jecting evidence in relation to these 80 cattle cannot be considered, because the court held the sale of those cattle to have been fraudulent and void, and so far as they are concerned the judgment was in favor of the appellant.

The balance of the cattle, viz., 31 head, were claimed by the plaintiff before the sale above mentioned. His account of these cattle is as follows: "I know the cattle in controversy. Part of them I bought from my father, and some were my original cattle; thirty or forty, or possibly fifty, head,—what I called my original stock; some of them I got from my father. Farmers would leave some cattle for ranch fees, and he would give them to me, and I also got some by taking the calves of stray cows on the ranch, or a cow would get drowned, or mired in the mud, and the calf was mine. Have had cattle for a number of years; some of them for ten years. Could not say how many I have had for one, nor how many for two, years. Owned them since they were calves. They range from one to seven or eight years."

This being the general position of the parties, the counsel for defendant then asked that the witness be allowed to state what Miner Walden [the father] said at that time while in possession of the cattle in controversy. The plaintiff objected to the testimony, and the court sustained the objection, and refused to allow the testimony; to which ruling the defendant then and there excepted." So far as "the cattle in controversy" included the 80 head, it makes no difference whether there was error or not; because, as above stated, the court held in appellant's favor that that sale was void. So far as it relates to the 31 head for which the plaintiff had judgment, the declaration sought to be proven was a declaration of the donor after he had parted with the property, and was inadmissible either to prove fraud or otherwise. *Cohn v. Mulford*, 15 Cal. 52; *Jones v. Morse*, 36 Cal. 207.

The other points made do not, in our opinion, materially affect the judgment for the 31 head. We therefore advise that the judgment, and order denying a new trial, be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

PEOPLE *ex rel.* SEDGWICK *v.* SHEAR. (No. 10,000.)

(*Supreme Court of California.* September 24, 1887.)

1. OFFICE AND OFFICERS—REMOVAL.

Where the duration or time of holding an office is not prescribed by law or by the constitution, the appointing power may remove the incumbent of the office at its pleasure.

2. SAME.

California act of March 31, 1876, providing for the appointment of a superintendent for the house of correction of San Francisco by the board of supervisors, and "that said superintendent shall only be removed for just and sufficient legal cause after a fair and impartial investigation of his case by said supervisors," does not restrain or limit the power of removal to the manner indicated in the act, and the board of supervisors have power to remove the superintendent at their pleasure; following *People v. Hill*, 7 Cal. 97; *Smith v. Brown*, 59 Cal. 672.

In bank. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Action to try the title to the office of superintendent for the house of correction of the city and county of San Francisco, brought by the people, upon the relation of respondent, against the appellant. Appellant, Samuel Shear, on January 29, 1883, was appointed, by the board of supervisors of the city and county of San Francisco, superintendent for the house of correction of said city and county, under "An act to utilize the prison labor, and govern

the house of correction of the city and county of San Francisco," approved March 31, 1876, which reads as follows: "They [the board of supervisors] shall appoint a competent superintendent for the house of correction of said city and county. * * * Said superintendent shall only be removed for just and sufficient legal cause, after a fair and impartial investigation of his case by said supervisors." Appellant duly qualified and entered upon his duties as such. On January 12, 1885, said board declared the office vacant on and after January 15, 1885, and then, immediately after, appointed said John Sedgwick such superintendent, to fill the vacancy caused by the removal of Shear. Sedgwick, on January 12, 1885, accepted said office and qualified according to law. Shear refused to surrender the office, under the claim that such superintendent can only be removed for just and sufficient legal cause, after a fair and impartial investigation of the case by said supervisors, as provided in section 4 of said act, and that the board, in declaring said office vacant, assigned no cause, and that there had been no such investigation as provided by that section, and Sedgwick, on January 15, 1885, instituted this action. It was admitted that prior to this action there had been no such investigation, and no cause assigned. After the institution of this action, the said board again, on January 26, 1887, declared the office vacant, assigning a cause after investigation, and again appointed Sedgwick, etc.; but Sedgwick, having already qualified under the former action of the board, did nothing under the latter action. The superior court rendered judgment in favor of Sedgwick, and Shear appealed.

Thos. J. Chunie, for appellant. *Davis Louderback*, for respondent.

BY THE COURT. On the authority of *Smith v. Brown*, 59 Cal. 672, and *People v. Hill*, 7 Cal. 97, the judgment and order appealed from are affirmed.

(73 Cal. 541)

GARTHE v. HART and others. (No. 11,701.)

(*Supreme Court of California*. October 6, 1887.)

1. MINES AND MINING—LOCATION.

Where the first location of a mining claim is valid, and the parties have kept it so by doing what is required by the mining laws of California, a subsequent location, however regular in form, is of no effect.

2. SAME—LOCATION—INSTRUCTIONS.

In an action of ejectment for a mining claim, where the evidence showed a location by defendant prior to that of plaintiff, and possession by plaintiff, the court instructed the jury that one mode of making a valid location of a mining claim was by taking possession of it, and clearly defining its boundaries; but failed to state the distinction between the right of such locator as against a mere intruder, and as against one who has complied with the mining laws. *Held*, that the instruction was misleading, and the error was not cured by a subsequent instruction that if the defendant's location was prior to that of plaintiff, and conformed to the mining law, the plaintiff acquired no right under the subsequent location.

3. SAME—BOUNDARIES—PAROL AGREEMENT.

In an action of ejectment for a mining claim, where there is evidence tending to show an adjustment of boundaries between the parties by oral agreement, an instruction that if, under the oral agreement, improvements were made by one of the parties, this would work an estoppel, is erroneous, when there is no evidence that any such improvements had been made.

4. SAME—TRANSFER OF CLAIM—PAROL.

Under Civil Code Cal. § 1091, a writing is required to transfer a mining claim, and an oral agreement cannot operate as a transfer.

Commissioners' decision. Department 1.

Appeal from superior court, Nevada county; J. M. WALLING, Judge.

Cross & Simonds, for appellants. *Alfred D. Mason*, for respondent.

HAYNE, C. Action of ejectment for a mining claim. Verdict and judgment for plaintiff. Defendants appeal.

1. The plaintiff gave evidence tending to show a location in 1881, and a subsequent location in 1884, the marking of the boundaries under these locations, and the recording of both claims. The statement does not show that \$100 worth of work was done each year as required by the act of 1872; but this defect in the evidence is not referred to in the specifications. The defendants gave evidence tending to show a valid location in 1880, the recording of the claim as required by a local regulation, the marking of sufficient boundaries, and the performance of the requisite amount of work each year. There is no evidence in contradiction of this. And if it be assumed that the plaintiff's proceedings were regular in all respects, it is manifest that the defendants had the earlier and better right. Where the first location is valid, and the parties have kept it so by doing what is required by the mining laws, a subsequent location, however regular in form, is of no effect. *Belk v. Meagher*, 104 U. S. 284; *Rose v. Richmond Co.*, 17 Nev. 56, 57. The verdict is therefore unsupported by the evidence.

2. The plaintiff gave evidence of an attempted location in 1879, and of acts tending to show a possession within the rule laid down in several cases. See *English v. Johnson*, 17 Cal. 109; *Table Mountain Co. v. Stranahan*, 20 Cal. 209; *Hess v. Winder*, 30 Cal. 355. The court "struck out all evidence of this first location, for the reason that it appeared that the same had not been made in compliance with law." It does not clearly appear whether this order was in reference to the "location" merely, or whether it extended to the possession also. But we think the order was in reference to the location, because the non-compliance with the mining law would not be a reason for striking out evidence of the possession.

Without saying whether the acts done were sufficient to constitute a possession, we think the court erred in its charge to the jury with reference to it. The charge was as follows: "In order to make a *valid location* of mining claims, the locator may adopt one of two courses. He may determine to locate his claim in accordance with law and customs. In order to get a title—a possessory title—in this way, he must conform to the requirements of law. * * * As I said, there is still another way by which a miner in this state may acquire a right to the possession of a piece of mining ground. It is *by taking possession of it, and clearly defining the boundaries so that they may be readily traced, and holding such possession,—keeping such possession.*"

In the hurry of the trial the learned judge evidently overlooked the distinction between the right of a party in possession as against mere intruders, and his right as against one who has complied with the mining laws. Possession is good against mere intruders, (*Attwood v. Fricot*, 17 Cal. 43; *English v. Johnson*, Id. 115; *Hess v. Winder*, 30 Cal. 355; *Golden Fleece Co. v. Cable Co.*, 12 Nev. 321, 322;) but it is not good as against one who has complied with the mining laws, (*Du Prat v. James*, 65 Cal. 556, 557, 4 Pac. Rep. 562.) We do not see that the error was cured by other portions of the charge. What is claimed as curing the error is the following: "Another question presents itself in this case which I will speak of shortly. Plaintiffs' claim in this case, so far as they are concerned, depends upon a location made by Mr. Penders and son in the year 1881, and a subsequent location made by Wiseman and others in 1884. Of course, if the location of defendants, to which I have already referred, was prior to that of plaintiffs, and they have complied with the requirements of the law since the date of that location, and the location itself was sufficient, no rights could be acquired by plaintiff *under the subsequent location.*" This instruction points to the first ground of plaintiff's right of which the court had spoken. It tells the jury, in substance, that if the defendants' location was prior to that of the plaintiff, and conformed to the requirements of the mining law, the plaintiff acquired no right "under the subsequent location." But it does not say that the defendants' location would prevail over the plaintiff's prior *possession*, which the court had al-

ready told the jury was one way in which the plaintiff could acquire a right to the premises in controversy. At most, the charge was misleading; and we think the jury must have been misled by it.

3. There was evidence tending to show an adjustment of boundaries between the parties by oral agreement. With reference to this the court instructed the jury, at defendants' request, as follows: "The jury is instructed that no estate or interest in real property, (except a lease for not more than one year,) nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance or other instrument in writing subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing." This was undoubtedly correct. Before 1860 a verbal transfer was held to be good when accompanied with a change of possession. *Table Mountain Co. v. Stranahan*, 20 Cal. 208; *King v. Randlett*, 33 Cal. 321. In 1860 an act was passed with reference to gold mines, (Laws 1860, p. 175,) and afterwards extended to all mines, (Laws 1863, p. 98,) which was construed to do away with oral transfers. See *Patterson v. Mining Co.*, 30 Cal. 363; *Goller v. Fett*, Id. 484, 485; *Felger v. Coward*, 35 Cal. 652. Section 1091 of the Civil Code has been held to require a writing for the transfer of mining claims. *Melton v. Lambard*, 51 Cal. 259, 260.

The oral agreement, therefore, could not operate as a transfer. It seems to have been supposed, however, that what took place could have some effect by way of estoppel, and in this regard the court instructed the jury "that if they believe from the evidence in this case that the location of John W. Hart and others was the first location, which was good according to law; that afterwards said Hart, Englebright, and their lessees, and J. W. Penders and his grantees, had a dispute as to the boundary line of the claim of each, and that it was finally understood and agreed by all parties that the line claimed by Penders should be treated and considered as the true boundary line between the two mining claims, and that thereupon the grantees of said Penders went in good faith to work upon the land before in dispute, and made improvements thereon under such agreement and understanding,—then I charge you that, in determining the true boundary line between the parties, you may consider such conversation and agreements, if any there was, for the purpose of determining the true boundary line between the mining claims of each party."

This was improper; if for no other reason, because there was no evidence of any improvement made "under such agreement and understanding," or otherwise, and nothing which would give rise to an estoppel. We therefore advise that the judgment and order be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

(73 Cal. 548)

PEOPLE v. MEYER. (No. 20,273.)

(Supreme Court of California. October 6, 1887.)

CRIMINAL PRACTICE—FORMER CONVICTION—READING INDICTMENT TO JURY.

On trial of an indictment charging the defendant with petit larceny, and four former convictions of the same offense, the defendant pleaded not guilty to the first charge, but confessed the former convictions, and pleaded guilty thereto. Held, that it was error to permit the reading before the jury of that part of the indictment relating to the former convictions, the same being expressly prohibited by Pen. Code Cal. § 1093; and that under Id. § 1158, it was error to instruct or to permit any evidence to go to the jury in regard to the second charge.

In bank. Appeal from superior court, city and county of San Francisco: D. J. MURPHY, Judge.

Information for petit larceny.

John D'Arcy, for appellant. Geo. A. Johnson, Atty. Gen., for respondent.

THORNTON, J. The defendant is accused by information of petit larceny, and four previous convictions of petit larceny. On his arraignment he pleaded not guilty of the petit larceny charged in the information, and confessed and pleaded guilty to the prior convictions.

The bill of exceptions recites: "At said trial, the clerk of the court, after having read the first part of the information which charged the crime of petit larceny, as herein stated, was proceeding to read the second part, which charged the prior conviction as above stated and set forth, when defendant's counsel interposed an objection, on the ground that the reading of anything relative to the prior conviction was prohibited by section 1093 of the Penal Code. The court overruled said objection, and defendant's counsel duly excepted. The clerk then read to the jury that part of the information which charged the defendant with having suffered the prior conviction aforesaid, and as herein set forth. The prosecution was proceeding to present to the jury evidence that defendant had suffered said prior conviction, when defendant's counsel objected, on the ground that such evidence was irrelevant, immaterial, and incompetent. The court overruled said objection, and defendant's counsel duly excepted. A witness then testified that defendant had suffered said prior conviction. The prosecution then offered in evidence the record of defendant's said prior conviction, when defendant's counsel objected, on the ground that said evidence was irrelevant, immaterial, and incompetent. The court overruled said objection, and defendant's counsel duly excepted. The record of defendant's said prior conviction was then read to the jury."

Each of the foregoing rulings was error. *People v. Carlton*, 57 Cal. 559; *People v. Brooks*, 65 Cal. 295, 4 Pac. Rep. 7; *Ex parte Young Ah Gow*, ante, 76, (filed September 26, 1887.) The defendant having confessed the previous conviction, the reading to the jury of that part of the information which related to the previous conviction is directly contrary to law. It is inhibited in section 1093 of the Penal Code. See, also, section 1158, Pen. Code. When the previous conviction is confessed, the jury has nothing to do with it. It is error then to offer any evidence to the jury in relation to it. Pen. Code, § 1158, and cases above cited.

The court also erred in telling the jury that they must find whether the defendant had suffered a previous conviction. This is contrary to the statute. Section 1158, *supra*. This is only to be done by the jury when the previous conviction is denied. Sections 1093, 1158.

That the defendant was prejudiced by the above rulings of the court we can entertain no doubt.

For these errors the judgment and order are reversed, and cause remanded for a new trial.

We concur: SEARLS, C. J.; MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.

(73 Cal. 531)

PEOPLE v. WILLIAMS. (No. 20,326.)

(Supreme Court of California. September 30, 1887.)

CRIMINAL PRACTICE—INSTRUCTIONS—MURDER IN FIRST DEGREE.

Upon the trial of an indictment for murder, where the trial judge instructs the jury that if, from the evidence, they believe certain facts and circumstances under which the state claimed the homicide to have been committed, and that defendant, "without further cause or provocation," then killed the deceased, he was guilty of murder in the first degree; and such instruction is erroneous because it omits the essential elements of intent and premeditation,—it is prejudicial error, which is not cured by the fact that a full and correct definition of the offense had previously been given. SEARLS, C. J., and McFARLAND, J., dissenting.

In bank. Appeal from superior court, Napa county; R. CROUCH, Judge. Indictment for murder in the first degree.

F. E. Johnston, A. J. Hull, and H. C. Gesford, for appellant. Geo. A. Johnson, Atty. Gen., for the People.

TEMPLE, J. The defendant was convicted of murder in the first degree, and now appeals from the judgment, and from an order denying his motion for a new trial.

The only point raised on the appeal which I deem it necessary to consider arises on instruction 20, given at the request of the prosecution. It is as follows:

"If the jury believe, from the evidence, that, on the day of the homicide, Clark came to the town of Monticello, and that Williams, seeing or meeting him on the street, spoke to Clark, and said he wanted to see him, and requested Clark to go to the shade on the north side of Fowler's saloon, and if, when they had reached the shade, Williams informed Clark of what he had heard that Clark had said about Williams mistreating his wife, or poisoning his wife, and asked Clark to retract it or take it back, or words to that effect, and that Clark refused to retract or take back what he had said, and that then Williams, without further cause or provocation, shot and killed Clark, then Williams committed murder of the first degree, and you should so find."

This instruction seems to omit the element of premeditation and deliberation in defining murder in the first degree. Before giving this instruction, the court had fully and in various forms defined murder in the first degree, and murder in the second degree.

The first contention on the part of the people is that under such circumstances the instruction, though erroneous, could not have misled the jury to the injury of the appellant. But it is plain that this position cannot be maintained. If a trial judge, in his charge to the jury, recites certain alleged facts which there is some evidence tending to prove, and then tells the jury that, if such facts are proven beyond a reasonable doubt, they must find the defendant guilty of murder in the first degree; and such charge is erroneous because the alleged facts do not, as matter of law, constitute murder in the first degree,—it is prejudicial error, which is not cured by the fact that a full and correct definition of the offense had previously been given. Under this instruction, the jury, having found that the recited facts existed, were bound to find the defendant guilty of murder in the first degree, and they had no further use for a definition of the offense. They were expressly told that all the elements of the crime were there, and they must find the defendant guilty.

Conceding that the instruction is thus erroneous, I cannot understand how it can be said not to have prejudiced the rights of the defendant, except upon the theory that we assume his guilt, and also that his defense is a wrongful attempt to evade the demands of justice. But, whatever we may think of the evidence, he is entitled to his "due process," and to a fair trial according to the rules of law. Until found guilty upon such a trial, he stands clothed with

the presumption of innocence. With this most important element omitted, the defendant has not had his day in court,—has not been tried and convicted by a jury of the crime with which he was charged, and of which he has been adjudged guilty.

It is also suggested, although we find no such claim in the brief filed for the plaintiff, that the instruction does, in fact, contain the elements of deliberation and premeditation. The plain answer to this is the language of the instruction itself. But the instruction plainly omits an essential element of murder in the first degree, to-wit, premeditation and deliberation; and, even if we could adopt the theory of the prosecution, that the facts recited plainly imply deliberation, the instruction is still erroneous. It invades the province of the jury, and finds for them a conclusion from the evidence, which must always be left for the jury.

In *People v. Doyell*, 48 Cal. 85, this court attempted to define the degrees of murder, and stated the elements constituting each. It is there said: "To constitute a crime, there must be a joint operation of act and intention. But the common law measures an act which is *malum in se* substantially by the result produced; holding the doer of the act guilty of the thing done in the same measure as if it were specifically intended." But this guilty intent which the law thus implies from the fact that an unlawful act has been committed, would not, in a case of homicide, raise the offense to the grade of murder in the first degree. It would be, at the most, but murder in the second degree. To raise the offense to murder in the first degree, there must be added the element of deliberation,—not implied, but made manifest by the evidence; but, since no appreciable space of time need elapse between the intent and the act, it is only necessary that the evidence should show, and the jury should find, that, before the act of killing, the specific intent to take life was formed. In each case the intent to take life existed as matter of law. In the one case, however, it need not be proven, and may not, in fact, exist; it is implied from the fact of an unlawful killing. In the other, the evidence must show that there was a deliberate intent to take life. Of course, it is not necessary to show this by express or direct proof of an intent; but the evidence in some way must make it manifest, and the jury must be able to find it from the testimony. To illustrate: Nothing else appearing except that a homicide has been committed by the defendant, the law implies malice; and, as the burden of showing justification or excuse is on the defendant, it would be murder, but not murder in the first degree, because the specific intent to take life is not proven. This last is a most essential fact, and is always an inference from the facts proven, and cannot be taken from the jury, however clear, or even inevitable, the conclusion may be. *People v. Walden*, 51 Cal. 588; *People v. Carrillo*, 54 Cal. 63.

Suppose, in this case, the instruction had been: "If you believe from the evidence, beyond a reasonable doubt, that defendant had announced that he would take the life of deceased as soon as opportunity occurred, and thereupon, meeting Clark, asked him to go with him into the shade, and then, without any provocation or hostile demonstration on the part of deceased, shot and killed him, it is murder in the first degree." The conclusion that there was the specific intent to take life would be very obvious, and the jury would not be justified on such facts in finding any other verdict than murder in the first degree. And yet the instruction would be plainly erroneous. It would take from the jury the very question of guilt, so far as this grade of the offense is concerned. The verdict would be the finding of the court, and not of the jury. The case, as to the grade of the offense, was taken from the jury, and there was no jury trial. On such theory the court might in every case recite all the other facts, omitting intentions and motives, which are essential to constitute the offense, and tell the jury, if the dry facts are so, they must find the defendant guilty. It would be but one step further to enter judg-

ment without trial, when the guilt is obvious, and then say there was no injury, because the verdict could have been but one way. This degree of refinement—if it be such, and it is only that of the statute—is not necessary in this case, where the recited facts do not necessarily involve deliberation. I have gone into the matter thus fully to show how dangerous such instructions must always be.

It is not necessary to allude to the other instructions which are objected to. Some of them, if standing by themselves, would undoubtedly need qualification; but, on the whole, we think they are not inconsistent, and fairly and correctly place the law before the jury. Many of them are taken from the charge approved in *People v. Iams*, 57 Cal. 118. Although the whole charge is there approved, but a small part of it was really involved in the exceptions taken in that case, and as to the rest it was *obiter*. As a whole, the charge was undoubtedly an able *resume* of the law upon the subject, but, like the instructions just alluded to in this case, some portions, if isolated, would require qualification.

The judgment and order should be reversed, and the case remanded for a new trial; and it is so ordered.

We concur: MCKINSTRY, J.; PATERSON, J.; THORNTON, J.; SHARPSTEIN, J.

McFARLAND, J. I dissent. Instruction No. 20—the only one about which there can be any serious question—tells the jury that if, from the evidence, they believe certain facts and circumstances, (enumerating them,) under which the prosecution claimed the homicide to have been committed, and that appellant, “without further cause or provocation,” then killed the deceased, he was guilty of murder in the first degree. This kind of instruction is not commendable, and is, at best, hazardous. The particular objection in the present instance is that the elements of deliberation and premeditation were not expressly stated in the instruction. But the court, in other parts of its charge, had fully and in various forms of language instructed the jury about the difference between murder in the first degree and murder in the second degree; and that to constitute the former the killing must be willful, deliberate, and premeditated. For instance, the court, among other instructions, gave the following: “It therefore becomes necessary for me to define what is necessary to constitute murder in the first degree, with reference to the willful, deliberate, and premeditated killing. * * * The killing must have been willful, which implies simply a purpose or willingness to do the killing. *Fourth*, it must have been the result of deliberation; that is, it must have been done after the slayer had considered and weighed the matter in his mind. And, *fifth*, it must have been premeditated; that is, preconcerted and *planned*, and *meditated beforehand*. And each one of these elements must be proved by the prosecution beyond a reasonable doubt. The law does not imply deliberation and premeditation. That must be proved by the prosecution affirmatively, and beyond a reasonable doubt. And if you find that any of these elements is wanting in this case, or if you have a reasonable doubt as to the existence of any of these elements from the evidence, I charge you that you cannot find a verdict of murder in the first degree.” This language states the law most liberally in favor of appellant.

The facts grouped and enumerated in said instruction 20 were all facts about which there was evidence, and which the jury might well find to be true. There was evidence that appellant had previously threatened to kill the deceased, for the very reasons which the prosecution claimed he did kill him. Keeping in view, therefore, the evidence and the previous instructions, and assuming that the jury found all the facts enumerated in said instruction 20 to be true, and that, “without further cause or provocation,” appellant killed

the deceased, I do not see how the jury could have been misled, or could have come to any other conclusion than that the appellant was guilty of murder in the first degree. The proposition presented to the jury, under these circumstances, necessarily includes the elements of deliberation and premeditation, although those or equivalent words were not *expressly* used in the particular instruction complained of. In *People v. Moice*, 15 Cal. 331, an instruction similar in principle was affirmed.

I think that the judgment and order should be affirmed.

I concur: SEARLS, C. J.

(73 Cal. 522)

CHUNG KEE and another v. DAVIDSON and others. (No. 11,605.)

(Supreme Court of California. September 30, 1887.)

CONTRACTS—BENEFICIAL INTEREST OF THIRD PARTY.

Defendants and A. and W. entered into an agreement concerning certain mines, under which the latter were to retain possession and management of the mines, and to turn over to defendants the entire result of each "clean up" of the mines, which was to be applied by defendants to the "defraying of the expenses of running and working said mines," and to the payment of indebtedness of A. and W. to defendants. In working the mines under this agreement, A. and W. became indebted to the assignors of plaintiffs for labor in such working. Held, that the agreement between A. and W. and defendants was not of such a character as to sustain an action by plaintiffs against defendants, under Civil Code Cal. § 1559, providing that "a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it."¹

Department 1. Appeal from superior court, Calaveras county; C. V. GOTTSCHALK, Judge.

Jos. H. Budd, for appellants. *J. A. Louttit*, for respondents.

BY THE COURT. The defendants W. Cook and A. Cook executed a deed which upon its face purported to be an absolute conveyance of certain property therein described, consisting, in part, of some mines, which deed was in fact a mortgage to secure certain indebtedness from the Cooks to the defendants L. Davidson and S. C. Peek. Afterwards, the latter persons executed and delivered to the former an agreement in writing, which stipulated that, if by a certain time the indebtedness secured by the mortgage deed should be paid, L. Davidson and S. C. Peek would reconvey the property set out therein to the Cooks. The agreement contained, among other things, a provision that the Cooks should retain the possession and management of the mines mentioned in the mortgage deed, and that they were to turn over to L. Davidson and S. C. Peek the entire result of each "clean-up" of the "flumes and under-currents of the mines," the result of which "clean-ups"—that is, the precious metals extracted therefrom—was to be applied by those to whom "turned over" "to the defraying of the expenses of running and working said mines," and "the payment of all promissory notes, obligations, and accounts of indebtedness, of whatsoever nature, due said parties of the first part;" that is, L. Davidson and S. C. Peek, "and the firm of Davidson & Peek." L. Davidson was not a member of the firm of Davidson & Peek; that firm, it appears, was composed of M. Davidson and S. C. Peek. While the Cooks under that agreement were working the mines, they became indebted to certain Chinamen for labor done and laborers furnished in such working, and they gave to the Chinamen a written statement of such indebtedness. These claims the Chinamen to whom they were given, and in whose favor they originally stood, transferred properly to the present plaintiffs, who brought this action for the amount due on the assigned claims for work and labor done and fur-

¹Concerning the enforcement of contracts by third parties, see *Woodland v. Newhall's Adm'r*, 31 Fed. Rep. 434; *Wright v. Terry*, (Fla.) 2 South. Rep. 6, and note.

nished in working and running the mines, alleging that, under the terms of the agreement or written contract formerly mentioned, they were entitled to receive those amounts from L. Davidson and S. C. Peek, and the Cooks, out of certain "gold-dust," the result of the "clean-up" of July, 1884, which was delivered to L. Davidson, in accordance with the terms of the stipulation, and which amounted in value to the sum of \$5,564.40. From that sum it seems that Davidson paid the firm of Davidson & Peek for goods, wares, merchandise, etc., furnished to the Cooks, and to others upon their order, the sum of \$2,794.28, and took therefrom for himself the sum of \$1,152.97 on account of advances of money and goods made by him to the Cooks, and that he also supplied towards the payment of a note for \$2,000, given by the Cooks for money advanced to them by him the previous year, the sum of \$1,700. He also paid about a month afterwards, out of his own money, to a man named Guy, the sum of \$425, the amount of a lien for work done by Guy for the Cooks, in the mines aforesaid, in the year 1883. The Cooks did not defend the action, and judgment by default was rendered against them for about \$2,100. The action, as to the defendants L. Davidson and S. C. Peek, was tried before a jury, who brought in a verdict for the plaintiffs for \$1,900, without interest, upon which a judgment was duly rendered, from which, and an order refusing to grant them a new trial, L. Davidson and S. C. Peek have appealed.

The court instructed the jury: "*Third*. When a person receives money or property which it is his duty to pay to third persons, as to those third persons he becomes an original debtor and promisor." "*Fifth*. It is not necessary for the plaintiffs to prove a direct promise from the defendants Davidson and Peek, or either of them, to entitle them to recover, provided the jury believe from the evidence that the gold-dust * * * was delivered to said Davidson in pursuance of said contract, and that the same was sufficient in amount to pay the claim and demand of the plaintiffs, or such proportion thereof as should remain after paying other running and working expenses." "*Ninth*. The moment the gold-dust was delivered, the plaintiffs' claim, or, at least, the claim of plaintiffs' assignors, became vested, and neither of said defendants, Davidson or Peek, or the Cooks, or either of them, or all, had any right or power to change or divest that right."

The deed and written agreement, when read together, show a mortgage, and the conditions upon which a redemption of the mortgaged property may be had. Respondents contend that the agreement is a contract, made for the benefit of plaintiffs' assignors, and as such can be enforced, although said assignors are not named as parties therein. Section 1559 of the Civil Code, upon which this contention is based, reads as follows: "A contract made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." The general rule applicable to cases of this kind is that, "when two persons, for a consideration sufficient as between themselves, covenant to do some act which, if done, would incidentally result in the benefit of a mere stranger, that stranger has not a right to enforce the covenant, although one of the contracting parties might enforce it as against the other." *Railroad Co. v. Curtiss*, 80 N. Y. 222. We cannot say that the contract before us was made expressly for the benefit of the plaintiffs' assignors. On the contrary, we think it was made expressly for the benefit of the parties named therein. The most that can be said is that it is a contract *incidentally* for the benefit of those who worked in the mine. The clean-up was to be paid by the Cooks to the defendants. The Cooks were largely indebted to these defendants when this agreement was made, and advances evidently were to be made by the defendants to the Cooks during the working of the mine for the running expenses thereof, and this, no doubt, was the consideration which caused the parties to place the covenant referred to in the contract. Such advancements were, in fact, made to the extent of sev-

eral hundred dollars. It is not necessary that the parties for whose benefit the contract has been made, should be named in the contract. It must appear, however, by the direct terms of the contract that it was made for the benefit of such parties. It cannot be implied from the fact that the contract would, if carried out between the parties to it, operate incidentally to their benefit.

Judgment and order reversed, and cause remanded for a new trial.

(73 Cal. 511)

PEOPLE v. FLYNN. (No. 20,295.)

(*Supreme Court of California*. September 28, 1887.)

1. BURGLARY—POSSESSION OF STOLEN PROPERTY.

The finding of recently stolen property in the possession of a defendant is not sufficient to support a conviction for burglary without other corroborating circumstances.¹

2. CRIMINAL PRACTICE—INSTRUCTIONS—CREDIBILITY OF WITNESS.

An instruction that the jury might reject, wholly or in part, the testimony of a witness who had "willfully testified falsely in regard to any one person or any one particular fact in the case," was objected to on the ground that it should only have told the jury to distrust or reject the testimony of a witness who had willfully sworn falsely "as to a material point in the case." *Held* that, under the rule "that a witness false in one part of his testimony is to be distrusted in others," (Code Civil Proc. Cal. § 2061, sub. 3,) the instruction was not erroneous.

3. SAME—INSTRUCTIONS—CHARGING AS TO FACT.

The mere statement in an instruction that there is a conflict in the evidence in certain respects cannot be regarded as an expression of an opinion upon the weight of evidence, or a charge with respect to matters of fact, in violation of Const. Cal. art. 6, § 19, providing that "judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law."

4. SAME—INSTRUCTIONS—REASONABLE DOUBT.

An instruction that the jury must be "satisfied" of defendant's guilt is not erroneous, because it omits the words "beyond a reasonable doubt," when the whole of the instructions, taken together, clearly inform the jury that they cannot convict the defendant unless they are satisfied of his guilt beyond a reasonable doubt.

5. SAME—SUFFICIENCY OF EVIDENCE.

In a prosecution for burglary, although the fact that defendant was seen near the place where and about the time when the burglary was committed, is a material circumstance, a conviction based upon circumstantial evidence may be supported without it.

6. SAME—INSTRUCTIONS—REQUEST BY ACCUSED.

Omissions by the court to instruct the jury "that no presumption of guilt follows from [defendant's] failure to testify in his own behalf," and to define the phrase "reasonable doubt," as used in some of the instructions, are not erroneous, where defendant's counsel did not request such instructions at the proper time.

7. SAME—SENTENCE—PRIOR CONVICTIONS.

A defendant on trial for burglary pleaded guilty to the charge of "prior convictions" and the court did not instruct the jury as to such prior convictions, nor did it appear from the record that any reference was made to them during the trial. The jury found the defendant guilty of burglary in the first degree, but did not find in reference to the prior convictions, which before judgment were withdrawn on motion of the district attorney, and the court only sentenced the prisoner to imprisonment for 10 instead of 15 years. *Held* that it must be presumed that the clerk had obeyed the law (Pen. Code Cal. § 1093) and omitted to read the prior convictions to the jury, and that the court in view of their withdrawal had disregarded them in considering the sentence.

Commissioners' decision. In bank.

Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

Indictment for burglary.

Geo. A. Knight, for appellant. Geo. A. Johnson, Atty. Gen., for the State.

¹ As to the weight to be assigned to the fact of the possession of stolen goods recently after the theft, see *State v. Kirkpatrick*, (Iowa,) 34 N. W. Rep. 301, and note.

BELCHER, C. C. The defendant was charged with the crime of burglary, committed on the third day of May, 1886, by breaking and entering the saloon of one Clement Dixon, in the city of San Francisco, with intent to commit larceny. He was tried and convicted of burglary of the first degree, and sentenced to suffer imprisonment for 10 years. He moved for a new trial, and has appealed from the order denying his motion, and from the judgment. The appellant makes 10 points for the reversal of the judgment, the first five of them relating to the evidence, which, it is claimed, did not justify the verdict.

It was clearly proved that a burglary was committed at the time and place named in the information, and it was not necessary, in order to establish the defendant's guilt, that any of the witnesses should have actually seen him break and enter the premises, or should have seen him in the vicinity of the premises about the time the burglary was committed. It rarely happens that an offense, like that here complained of, can be proved by witnesses who saw and recognized the defendant in the act, and resort must, therefore, ordinarily be had to circumstantial evidence. And the fact that one was seen near the place where a burglary was committed, and about the time of its commission, may or may not be a circumstance tending to show guilt; but it cannot be necessary in every case of burglary to prove that the defendant was so seen before a conviction can be had. Here there was some evidence tending to connect the defendant with the commission of the offense charged. A considerable sum of money was stolen, and one of the pieces of money taken was found in the possession of, and was claimed by, the defendant when he was arrested on the next day. The court properly instructed the jury as to the possession of recently stolen property, and as to the necessity of other corroborating circumstances being shown before one having such possession could be found guilty. It is unnecessary to detail the evidence at length. The question was, did the defendant commit the crime charged against him? That was a question of fact for the jury, and, as the jury found that he did commit it, we cannot say that the judgment should be set aside because the finding was not warranted.

It is next contended that sundry errors were committed by the court, to the manifest prejudice of the defendant. The defendant did not take the stand as a witness in his own behalf, and the court did not instruct the jury in reference to his failure to do so. It is claimed that "it was the duty of the court to charge the jury that no presumption of guilt followed from his failure to testify in his own behalf, and that they could not consider his failure to testify in arriving at a verdict." It does not appear from the bill of exceptions that any such instruction was asked. If counsel for defendant desired such an instruction to be given, they should have asked it at the proper time; and, as they failed to do that, they cannot now be heard to complain. *People v. Haun*, 44 Cal. 100; *People v. Ah Wee*, 48 Cal. 239; *People v. Marks*, 13 Pac. Rep. 149.

In a portion of its charge to the jury the court used the following language: "And if you are satisfied that the defendant is guilty of the offense charged, and that he committed it in the night-time, that is, between sunset of one day and sunrise of the next, you should find him guilty of burglary in the first degree." It is claimed that this instruction was erroneous because it omitted the words "beyond a reasonable doubt," and left the jury to be simply "satisfied" of the defendant's guilt, no matter whether they entertained a reasonable doubt of his guilt or not. Looking at the whole charge, it will be found that the words "beyond a reasonable doubt" are repeated some 15 times. For example, the court told the jury: "It devolves upon the prosecution to establish the guilt of the defendant to your satisfaction, beyond a reasonable doubt, before you are authorized to find a verdict against him." "All persons charged with a criminal offense are presumed to be innocent until the jury

are satisfied beyond a reasonable doubt of their guilt." "If you have a reasonable doubt as to the guilt or innocence of the defendant, you should give him the benefit of the doubt, and acquit him." "You must be satisfied in the case, beyond a reasonable doubt, from all the facts and circumstances of this defendant's guilt, before you will be authorized to bring in a verdict against him." "If you entertain a reasonable doubt of his guilt, however, you should give him the benefit of the doubt, and acquit him."

And the very next sentence after that complained of is as follows: "If you are satisfied beyond a reasonable doubt that he is guilty of burglary, but are not satisfied beyond a reasonable doubt that it was committed in the nighttime, you should give him the benefit of that doubt, and find him guilty of burglary in the second degree."

Taking, then, the whole charge, and reading, as we must, the different parts of it together, it appears that the jury were clearly told that they could not find the defendant guilty of burglary of the first degree, or at all, unless they were satisfied of his guilt beyond a reasonable doubt. We are unable, therefore, to see how the defendant could have been prejudiced by the part of the charge objected to.

The court also, in its charge, used these words: "If you are satisfied that any witness has willfully testified falsely in regard to any one person, or any one particular fact in the case, then you are authorized to distrust his or her testimony in all particulars; that is, you may reject it entirely if you choose to do so, or you may reject it in part and receive it in part, as you find it contradicted or sustained by other testimony, as you are satisfied of its truth or falsity." It is claimed that the instruction was erroneous, that it should only have told the jury that they were authorized to distrust or reject the testimony of a witness who had willfully sworn falsely "as to a material point" in the case. We think the instruction was properly given. The rule, as stated in the Code of Civil Procedure, is "that a witness false in one part of his testimony is to be distrusted in others." Section 2061, sub. 3. If a witness has willfully testified falsely as to "any one person or any one particular fact in the case," his testimony, we think, comes clearly within the rule; and we see nothing in *People v. Sprague*, 53 Cal. 491, in conflict with this view. See *People v. Treadwell*, 69 Cal. 238, 10 Pac. Rep. 502.

The court further stated to the jury that "there is some conflict in the testimony in regard to where this money was obtained, when it was obtained, and where he was a part and portion of the night." This is complained of as being a charge with respect to matters of fact, in violation of section 19 of article 6, of the constitution. We do not think the objection well taken. Judges may state the testimony and declare the law, but must not express an opinion upon the weight of the evidence. We are unable to see how the mere statement that there is a conflict in the evidence in certain respects can be regarded as the expression of an opinion upon the weight of the evidence, or a charge with respect to matters of fact. In *People v. Casey*, 65 Cal. 261, 3 Pac. Rep. 874, cited by appellant, the court instructed the jury that "the testimony in the case shows that the defendants," etc. This was held to be erroneous, and the court said: "To state the testimony is one thing. To declare what it shows is another and very different thing. It is for the jury exclusively to determine what the testimony shows." That case is not in point here.

The court in its charge nowhere defined or stated what is meant by the words "reasonable doubt," and this failure is assigned as error. No specific instruction upon the subject was asked by the defendant. Possibly he and his counsel then thought that the phrase was so familiar that no definition was required. However this may have been, the fact, as we have seen, that they failed to ask for the instruction is a full answer to the point which they now make.

The last point to be considered relates to certain charges of prior convictions found in the information. Defendant was charged with burglary, and with prior convictions of robbery and burglary. When called upon to plead, he "acknowledged the prior convictions, and pleaded not guilty to the charge in the information." After the jury was impaneled, "the information charging the defendant with the crime of burglary was read, and his plea of not guilty duly stated." The court did not instruct the jury in relation to the charge of prior convictions, and, so far as appears, no reference was made to that charge by any one during the whole progress of the trial. The jury found the defendant guilty of burglary in the first degree, but did not find in reference to the prior convictions. Before judgment was pronounced the prior convictions were withdrawn, on motion of the district attorney. It is claimed that, as the information contained charges of prior convictions, these charges must have been read to the jury, and that they impeached the character of defendant, and without doubt prejudiced the jury against him, to his injury. We see nothing to indicate that the charges of prior convictions were read to the jury. Section 1,093 of the Penal Code provides: "If the indictment or information be for felony, the clerk must read it and state the plea of the defendant to the jury; and in cases where it charges a previous conviction, and the defendant has confessed the same, the clerk in reading it shall omit therefrom all that relates to such previous convictions." As the defendant, when arraigned, confessed the previous convictions, we must presume that the clerk obeyed the law and omitted the reading of all that related to those charges. The court might have sentenced the defendant to imprisonment for 15 years. The extreme penalty was not pronounced, but the sentence was for 10 years only. As the previous convictions were withdrawn, it must be presumed that the court paid no attention to them in pronouncing judgment, and that the sentence would have been the same if the previous convictions had not been charged in the information.

We conclude from an examination of the whole record that the judgment and order should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(73 Cal. 477)

DOWER v. RICHARDS. (No. 12,076.)

(*Supreme Court of California.* September 28, 1887.)

1. MINES AND MINING—TUNNELING LAND—RIGHTS OF THIRD PARTIES.

Defendant owned land in fee-simple to which he had acquired title under a grant by town-site patent issued by the United States in 1869. Plaintiff ran a tunnel under this lot, claiming a right to do so, in order to reach and work a gold-bearing quartz ledge situated within said lot, and known to exist at the date of the town-site patent under which said lot was held. Defendant, in order to restore the water to a well which had become drained by reason of the tunnel, sunk a shaft, and caved in the same, and plaintiff brought an action to recover for the alleged trespass. *Held*, the grant by town-site patent being prior to the passage of the act of 1872 (Rev. St. U. S. § 2320,) which gives to a quartz-mining claim a width not exceeding 300 feet on each side of the center of the croppings of the ledge, vested in the grantee, and those claiming under it, an absolute title to all the land it describes in fee-simple, excepting, under Rev. St. U. S. §§ 2386, 2392, only such portion as may contain a mine of gold, silver, cinnabar, or copper, or mining claim, or possession, which may be held under local authority or existing laws. And plaintiff, in the absence of any contract with defendant, had no right to dig the tunnel.

2. TRIAL—INSTRUCTIONS—EVIDENCE TO SUPPORT.

It is not erroneous to neglect to submit to the jury, as a material issue, the question whether the defendant's grantor had given the plaintiff, before the sale of the

lot to defendant, the right to run a tunnel under such lot, when such allegation in the pleadings and the evidence in the case fail to show any consideration to support such agreement.

Commissioners' decision. Department 1.

Appeal from superior court, Nevada county; F. D. SOWARD, Judge.

H. L. Gear, for appellant. *Gaylord & Searls* and *Cross & Simonds*, for respondent.

FOOTE, C. Richards was the owner of a lot of ground which he claimed and held by a deed of conveyance from a Mrs. Bigelow, who had acquired it with other land under the town-site patent of the city of Nevada, issued in the year 1869, by virtue of the provisions of title 32, Rev. St. U. S. The plaintiff had run a tunnel under this lot, claiming that he had a right to do so, because, as he alleged, in such way only could he reach and work a "gold mine" situated within said lot, and known to exist at the date of the town-site patent under which said lot was held and claimed. As a consequence, a well belonging to the defendant, located on that lot, several hundred feet from the tunnel, had become drained of its water, and to restore the water to the well the defendant caved in the plaintiff's tunnel at a point where the latter claimed it had reached a spur of the quartz ledge or "gold mine." Because of the alleged trespass of the defendant in digging in his own lot in such a way as to cave in the tunnel of the plaintiff, and to recover the damages resulting therefrom, the latter instituted this action. The cause was tried by a jury, who returned a verdict for the defendant, and from the judgment rendered thereupon this appeal is prosecuted. A bill of exceptions presents the grounds relied on to reverse that judgment.

The main points made in support of the plaintiff's contention are: (1) That the court erred in its instruction to the jury numbered "one;" (2) that it refused to grant 12 instructions requested by the plaintiff.

The instruction first mentioned is as follows: "The jury is instructed that if they believe from the evidence that the place where Philip Richards caved in the tunnel was upon ground to which he had previously derived title under the town-site patent of the city of Nevada, and that such place was not upon any mining or tunnel possession held at the date of, or prior to the date of, such town-site patent, then the jury should find for the defendant, unless you find the acts of the defendant in filling up the tunnel were done through malice and oppression."

It is very plain that the United States, in granting the patent under which the defendant held and possessed his lot, reserved to itself the title to any "gold mine" which might be known to exist in any part of that lot, (section 2392, Rev. St. U. S. 1878, 2d Ed. p. 438;) and the plaintiff urges that, as a consequence, the government, or any one authorized by it to explore such gold mine, may tunnel under a lot granted by a town-site patent dated in the year 1869, and drain the water from a well situated on that lot, if it be necessary to the reasonable and proper construction of that tunnel, even if, while so doing, there be no gold mine existing in that part of such lot under or in which the tunnel runs. This is to say, she claims the right, for her own private purposes, to make use of and run a tunnel in the land of another, and drain his well of water, because in some part of said lot there is a gold mine which was known to exist prior to or at the time the patent was issued under which the defendant claims, and which can only be reached by such tunnel running through another part of that lot in which there is no mine. Is not this an effort on the part of the plaintiff to appropriate the private property of the defendant to the private use of plaintiff? Is it not an enterprise to be conducted solely for her personal profit.

At the time when the patent to the town-site was granted,—that is, in the year 1869,—congress had not passed the act of 1872, (Rev. St. § 2320,) giving

a width to quartz-mining claims of not exceeding 300 feet on each side of the center of the croppings of the ledge; so that there was then existing no law of the United States which prescribed the method by which a "gold mine" could be prospected and worked, and as the law then stood it reserved the title to such mine in the government, but went no further. The grant, then, by the town-site patent, carried an absolute fee-simple title to the grantee, and those claiming under it, of all land in which "no gold, silver, copper, or cinnabar mine" existed, or in which no valid mining claim or possession was had or held under local authority or rules or existing laws. Sections 2386, 2392, Rev. St. U. S.

It would therefore appear that the defendant had an absolute fee-simple title to all that part of his lot which had been tunneled prior to the draining of his well, and that the plaintiff had no right, in the absence of any contract with the defendant, to dig that tunnel, and that the defendant did no wrong, and committed no trespass, in caving it in. For it cannot be (in the absence of any law of the United States reserving rights to work gold mines in a specific way) that a mere reservation of the title to such a mine in a patent in any way limits the title which it passes to that portion of the land in which no mine exists; and the grantee takes under the town-site patent all the land it describes by an absolute title in fee-simple, excepting only such portion as may contain a mine of gold, silver, cinnabar, or copper, or mining claim or possession which may be held under local authority or existing laws. For example, an individual owns a town-site lot which is 300 feet square. There is in a corner of that lot a gold mine embedded in the ground in the shape of a quartz ledge. The gold mine only occupies a space say 10 feet square. In the absence of any legislation by congress before or at the time when this patent, including that lot, is issued, stating how that mine shall be worked, or of any valid state law to the same effect, authorized by congress, the owner of the lot under the patent holds all the ground, save that part in which the mine is located, by a fee-simple title; and, without some law in accordance with the constitution of the state and of the United States, no man can tunnel under the part of the lot held by this title in fee-simple, except by contract with the owner. This use attempted to be obtained by the plaintiff in tunneling the defendant's land was not a public use, and no valid state law authorizes it. *Consolidated Co. v. Railroad Co.*, 51 Cal. 269. As we have seen, no law of the United States gave it, as the patent issued in 1869, when no legislation had been had as to the manner of working gold mines. The right to 300 feet of ground on each side of a quartz ledge was not granted until the passage of the act of 1872, (Rev. St. § 2320.)

We are of opinion that instruction 1 was correctly given, in so far as it did not inform the jury, as the appellant claims it should have done, that the plaintiff had a right to run her tunnel under the defendant's land in a reasonable and proper manner, in order to reach and work the gold mine which lay in another part of said lot. But the appellant makes a further point on that instruction: she claims that it did not submit to the consideration of the jury a material issue, which was whether or not the defendant's vendor, Mrs. Bigelow, had given to the plaintiff (before her sale of the lot to defendant) the right to run the tunnel as she did. It nowhere appears, either as alleged in any pleading or in evidence, that any consideration whatever moved from the plaintiff to Mrs. Bigelow or the defendant which would support any such agreement; hence the allegation as made in the pleading, and its denial, did not raise any material issue upon which the jury should have been called to pass, and an instruction on the point was unnecessary.

The whole 12 instructions asked for by the plaintiff, and refused by the court, are expressed in such a way as that, taken altogether, the jury must necessarily have been impressed with the idea that the court intended to say to them that, if they believed there was "a gold mine" in any part of the de-

fendant's lot, the title thereto being reserved to the government, and not vested in the defendant, the plaintiff had a right to run her tunnel as she did. The defendant had no right to cave it in, and was therefore liable in damages. The instructions would have misled the jury, and were properly refused.

As we have before said, the defendant owned in fee-simple the whole of the lot to which he had a conveyance, except the part in which the alleged "gold mine" lay. There was no valid law of the state or United States existing which at the time of the issuance of the town-site patent prescribed any method of working a "gold mine" so situated. Therefore, the title to the gold mine and its *locus* remained in the United States government; but, that government not having legislated so as to impose any method of working said mine as a condition or restriction upon the fee-simple holding of the part of the lot where there was no gold mine, the owner of the lot held it absolutely, subject only to the right which might be given by a constitutional state law to condemn it for a public use.

We perceive no prejudicial error in the record, and the judgment should be affirmed.

I concur: BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

(73 Cal. 537)

JANUARY v. SUPERIOR COURT. (No. 20,165.)

(*Supreme Court of California*. September 30, 1887.)

1. EXCEPTIONS, BILL OF—TIME OF SETTLING—NEW BILL.

Defendant's attorneys, without notice to the opposite side, took a bill of exceptions already filed by them with the clerk, which the court had declared defective, separated the first 10 and last 15 pages therefrom, and between these two portions introduced a statement of the evidence in narrative form, and presented it for settlement. *Held*, that the bill, as thus presented, was a new bill, and, as defendant's time within which he could regularly file his bill had expired, it was not an abuse of discretion for the court to refuse to settle it.

2. SAME—DEFECTIVE BILL.

A bill of exceptions, consisting simply of a transcript of the reporter's notes of the evidence and proceedings, is defective, and the court is justified in disallowing it.

3. PRACTICE IN CIVIL CASES—SERVICE OF PAPERS.

Code Civil Proc. Cal. § 1011, providing for the service of papers upon attorneys, requires them to be left "in a conspicuous place in the office," in the absence of the attorney. *Held*, that a box designated by an attorney for the deposit of letters and papers in his absence is "a conspicuous place," within the meaning of the section.

In bank. Application for *mandamus* to superior court, Sacramento county; W. C. VAN FLEET, Judge.

A. Green Curtis, John H. McKune, and Henry Edgerton, for plaintiff. Atty. Gen. Geo. A. Johnson, for the People.

PATERSON, J. The first bill of exceptions was prepared in time and properly left with the clerk for the judge. The service of the notice, which was made by depositing a copy thereof through the door into the postal box which had been placed there for the reception of documents, was sufficient. It cannot be said that a box so clearly designated by an attorney as the proper place for the deposit of letters and papers during his absence from the office, is not a "conspicuous place" within the meaning of section 1011, Code Civil Proc.

The bill as originally presented was a transcript of the reporter's notes of the evidence and proceedings, and the court was justified in refusing to settle it. It is claimed, however, that he should have ordered a statement in narrative form. This he did not do, nor did he give any one authority to change

or amend the statement which had been presented. Counsel for defendant asked permission of the judge to revise the bill by reducing the evidence to a narrative form, but were informed by the respondent that he would take no action without notice to, or in the presence of, the district attorney. Thereupon defendant's attorneys, without notice to the district attorney or to respondent, took the bill, separated the first 10 and last 15 pages therefrom, and between these two portions introduced a statement of evidence in narrative form. This new bill as prepared was delivered to the clerk on the twelfth day of November, 1885, and notice given to the district attorney that it would be presented to the judge for settlement on the sixteenth day of November, 1885. On the last named date, the district attorney appeared and objected to the settlement or allowance of the bill, on the grounds that the document presented for settlement was not the bill of exceptions left with the clerk on the eighteenth of August, 1885; that since the filing of the original bill of exceptions with the clerk, the same had been mutilated, portions torn out, and new matter put in; that the time for filing the bill of exceptions had long since expired, and no order extending the time had been made; that the original bill filed was improper in form and substance. The judge heard the evidence as to the facts alleged in these objections, found the same to be true, sustained the objections, and refused to settle the bill, saying: "Now, with reference to the bill as proposed and introduced on the twelfth day of November, this bill must doubtless be held to all intents and purposes to be a new bill. * * * The body of the bill was entirely changed, new matter inserted, and the bill in its revamped form again presented for settlement upon formal notice to the district attorney. It will have to be considered, therefore, from the standpoint of a newly proposed bill, presented at a date subsequent to the expiration of the time allowed for that purpose; defendant's time, as allowed by the court, within which he could regularly present his bill, having unquestionably expired August 20th. Defendant contends that the mere fact that his bill was presented after a lapse of the time allowed, is not of itself sufficient to deprive him of the right to have it settled; that the statute is directory merely; that it is a matter of discretion with the judge whether he will settle it or not, and that he should settle the bill notwithstanding the delay. * * * The discretion, however, which is to be exercised by the court or judge, is intended to be a sound judicial discretion, founded upon a just and legal ground of excuse as contradistinguished from mere arbitrary assertion of personal will power on the part of the individual. The evidence shows that the defendant in this case was afforded, in addition to the time allowed by the statute, a very generous period within which to prepare and serve his bill of exceptions; the time being repeatedly extended by the judge upon the application of his counsel. * * * At the eleventh hour he presents for the consideration of the court a proposed bill in a form which he must have been aware, in fact was bound to know, could not be entertained or allowed." The judge then went on to speak of the manner in which the new bill had been prepared, without excuse for the delay, and concluded that it would be an abuse of judicial discretion, in view of the decisions of the supreme court in *People v. Sprague*, 53 Cal. 422, and *People v. Getty*, 49 Cal. 581, to allow or settle the bill. The second bill having been prepared by mutilating the original bill without the consent of the court or the district attorney, we think the judge was right in treating it as he did, as essentially a new bill, filed without authority of law or permission of the court; and we cannot say that there was an abuse of discretion in refusing to settle the same.

Application denied; alternative writ dismissed.

We concur: SEARLS, C. J.; MCFARLAND, J.; MCKINSTRY, J.

We dissent: TEMPLE, J.; SHARPSTEIN, J.

(73 Cal. 486)

Ex parte HENSHAW, on Habeas Corpus. (No. 20,310.)

(Supreme Court of California. September 23, 1887.)

1. **OFFICE AND OFFICER—POWER OF SUPERIOR COURT TO TRY USURPATION OF OFFICE.**
Under Code Civil Proc. Cal. c. 5, the superior court has jurisdiction of the subject-matter of an action brought against the defendant for the usurpation of a public office, and incidentally has the power to determine the question of the existence or non-existence of such office.
2. **SAME—JUDGMENT OF USURPATION—COLLATERAL ATTACK—NON-EXISTENCE OF OFFICE.**
The judgment of the superior court, finding that the defendant has usurped and is unlawfully holding a public office, cannot be attacked collaterally; and such judgment cannot be annulled by the subsequent decree of that or of any other court adjudging the non-existence of the office.
3. **CONTEMPT—FORM AND SUFFICIENCY OF JUDGMENT.**
The petitioner for a writ of *habeas corpus* had been arrested and imprisoned for contempt of court in disobeying the orders of a judgment. It was ordered and decreed that, as a punishment for said contempt, he "be, and he is hereby, fined in the sum of \$500; and that he pay said fine to the clerk of this court; and it is further ordered and adjudged that, in default of the payment of said fine, he be imprisoned in the county jail of the county of Alameda until the said fine is paid; such imprisonment not to exceed one day for each and every dollar of said fine that shall so remain unpaid." *Held*, that the judgment was a substantial compliance with Pen. Code Cal. § 1205, and was valid.
4. **SAME.**
When a contempt is not committed in the immediate view and presence of the court, it is not necessary that the judgment should set forth the facts constituting the contempt. Code Civil Proc. Cal. § 1211. *McFARLAND, TEMPLE, and THORNTON, JJ.*, dissenting.
5. **SAME—COSTS.**
A judgment for contempt in disobeying the orders of court, besides imposing upon the defendant the penalty of fine or imprisonment, decreed that the relator should have his costs in the proceeding, without specifying the amount of such costs. *Held*, that the whole judgment was not void, there being no judgment for imprisonment for non-payment of such costs.

In bank. Application for *habeas corpus*.

Moore & Reed, James A. Johnson, and Charles Tuttle, for petitioner. *Fox & Kellogg*, for respondent.

McKINSTRY, J. The attorney general, upon the relation of one Daniels, commenced an action against the petitioner herein, in which action judgment was entered, by the superior court for Alameda, that the petitioner had usurped, and intruded into, and was unlawfully exercising, the office of police judge of the city of Oakland, and that the relator therein was entitled to the office. From that judgment the defendant therein appealed, but the appeal did not stay its execution. Code Civil Proc. § 949. Upon proceedings taken in the said superior court, the defendant in that action, petitioner here, was adjudged guilty of contempt in that he had disobeyed the judgment, and continued to occupy and exercise the office in disregard thereof.

1. It is contended by the petitioner that the judgment in the action for usurpation was absolutely void, and he was therefore not guilty of contempt in disregarding it; that when the action was commenced, and judgment therein entered, there was no such office as that of police judge of the city of Oakland, because the act of March, 1866, "to establish a police court," etc., "in the city of Oakland," was repealed by the act of 1885, to "provide for police courts," etc. St. 1865-66, p. 193; St. 1885, p. 213. The decisions cited by counsel for petitioner do not meet the question here presented: *First*. Persons imprisoned for contempt in having refused obedience to judgments in civil actions commanding them to do or refrain from a certain act, have been discharged on *habeas corpus* when a court of limited statutory jurisdiction has tried an action it had no power to try, and entered a judgment it had no

power to enter, and has then attempted to enforce compliance with its judgment by imprisoning a party refusing to obey it. *Second.* Where there are no public offenses except those made such by statute, persons held under judgments directing their imprisonment have been discharged on *habeas corpus*, when it appeared that the act charged against the prisoner, and which he had been adjudged to have done or committed, was not a crime, and could not be a crime, however fully it might be stated or described. *Third.* Where, although the act charged, and of which the prisoner had been found guilty, constituted a crime, yet the court had no power to impose the imprisonment as a consequence of his conviction.

In the last two of the classes mentioned, as in the first, the discharge is founded upon the proposition that the court had no jurisdiction to render the judgment. Why no jurisdiction? Because a court of criminal jurisdiction is limited to the trial of crimes or public offenses, and to the rendition, in each instance, of the judgment prescribed by law. In the second class, the jurisdiction is in part derived from, and is limited by, the statutes declaring certain acts to be public offenses. In the third class, the power to pronounce judgment is derived solely from the statutes attaching certain penalties to certain offenses.

The jurisdiction of the superior court to try the question of usurpation of an office, and, incidentally, the question of the existence of the office, is not derived from the act of 1866, (claimed to have been repealed by the act of 1885,) or from any act relating to a particular office, but from its constitutional grant of general jurisdiction in civil cases, the exercise of which, so far as respects actions of this character, is regulated by the chapter of the Code of Civil Procedure treating of "actions for the usurpation of an office or franchise." The act of 1866 provides for a police court, and the election of a judge thereof; the act of 1885 provides for a police court, and the designation of a justice of the peace to be judge of the police court. Under either act the judge of the police court is the police judge within the city of Oakland. The complaint alleged that the petitioner had usurped the office of police judge of the city of Oakland. The court had jurisdiction to decide that petitioner had usurped the office of police judge, if, in its opinion, the act of 1885 was in force, and the petitioner without authority was exercising the office of police judge under that act. It had jurisdiction to decide that the complaint was sufficient to justify such a judgment, and to disregard as surplusage erroneous allegations as to the statutory origin of the office. Moreover, the existence or non-existence of the office described in the complaint was an issue which the court had jurisdiction to try. Its finding upon that issue cannot be assailed collaterally, though it should be conceded the finding was erroneous; or though, in determining the issue, the court may erroneously have believed and assumed a statute was not repealed which was repealed. The trial of the issue could not have been stayed by prohibition, nor could the judgment be annulled by *certiorari*.

Suppose, in a proceeding like that, the judgment wherein is here claimed to be void, the superior judge should erroneously (in the opinion of another superior judge) hold that a statute creating an office had been repealed, when it had not been repealed, and base a judgment against the people on such erroneous ruling, would not the judgment, if unreversed, be a bar to a subsequent action on the same facts? In such case the judgment would turn on a question of law, and a court can no more set aside a statute, still in force, than it can re-enact a repealed statute. But, in deciding properly or erroneously that a statute purporting to create an office has been or has not been repealed, it neither abrogates nor does it create *the office*. It construes the law; and a mistake of law in that regard no more invalidates its judgment than does a mistake of law in any other particular. It decides the question of law because its grant of jurisdiction authorizes it to decide all questions of law

involved in the issues it has power to try. Except with respect to statutory limitations of the powers of the *court itself*, a court is authorized to treat statutes as but part of the law, and an erroneous interpretation of a statute, or an erroneous ruling as to the operative force of one of two statutes, apparently conflicting, no more affects the jurisdictional power to render a judgment than does an erroneous interpretation of the unwritten law.

Every judgment that an office has been usurped involves an adjudication that there is an office to be usurped. The court has power to adjudge the existence, unless its jurisdiction is limited by the *fact*. But here the court had power to determine the fact, since its jurisdiction is not limited by the existence or non-existence of the fact. On the contrary, it has power to try and determine its existence or non-existence. None the less so because the fact depends upon the law. "An action may be brought by the attorney general, in the name of the people of this state, upon his own information, or upon the complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this state," etc. Code Civil Proc. § 803. "In every such action, judgment may be rendered upon the right of the defendant, and also upon the right of the party so alleged to be entitled, or only upon the right of the defendant, as justice may require." Code Civil Proc. § 805.

Even if it should be conceded that the jurisdiction of the superior court in this class of actions is derived solely from the Code of Civil Procedure, it could not successfully be contended that, by section 803, the jurisdiction is limited by the fact that there is an office, established by law, which the alleged intruder has usurped; that any other court may determine, on *habeas corpus*, or in any collateral proceeding, that, under the law, there is no such office, and therefore that the judgment in the action for usurpation is void. It is claimed that, in the exercise of the *habeas corpus* jurisdiction, every other superior court in the state has power to decide that the office does or does not exist, but that the court to whom is confided the trial of the question of usurpation has no such power. Surely the legislature (violating no constitutional provision) could confer on the superior court the power to determine, in an action brought for usurpation of an office, whether, under the laws of the state, the office exists. The rest is merely matter of statutory construction. Has the legislature conferred on the superior court the power to determine the question? In our opinion, section 803 places the jurisdiction in the superior court. Even if the act of 1866 was repealed by the act of 1885, and if (by reason of specific averments in the complaint) the superior court had no power to decide that the petitioner had usurped the office of police judge, as created and defined by the act last mentioned, petitioner is not entitled to his discharge. Certainly the superior court did *not* decide that the petitioner was rightfully in office under the act of 1885.

The superior court adjudged that the petitioner had unlawfully usurped and was unlawfully holding the office of police judge of the city of Oakland. It is claimed by the petitioner that the findings and judgment are to be referred to the averments of the complaint, and are therefore a finding and judgment that he had intruded into the office described in the complaint, and was unlawfully exercising the functions attributed by the complaint to that office; that the references in the complaint to the statutes relating to the police judge of Oakland—his election, term of office, and duties—clearly indicate that the defendant (petitioner) was charged with usurping the powers of police judge of the city of Oakland, as prescribed in the *act of eighteen hundred and sixty-six*; and that the judgment was that he was exercising such powers. But, if all this should be conceded in favor of petitioner, the result would be the same. It might be admitted that if no such office (police judge of the city of Oakland) exists, *in law*, the portion of the judgment which declares the relator to be entitled to it is void; but that is a matter with which the peti-

tioner has no concern, except as to the matter of *costs*, of which something will be said hereafter. If the petitioner was exercising the functions of a judge, as the same are defined in the act creating the office of judge of the police court of the city of Oakland,—trying causes and rendering judgments,—and was called on by the state to show by what authority he was doing these things, he could not defend his conduct by proving no one else had power to exercise such functions. As between the people on the one hand, and the petitioner on the other, the important question was not so much whether the office existed, as whether he was unlawfully exercising public functions, such as were attached to the office when the office did exist. It may be true that an office must exist *de jure*, but it by no means follows that one who is exercising the public functions of an office, as the same were defined in a repealed statute, can deny the existence of the office, and base upon that denial a right to continue the exercise of powers unauthorized by law.

In argument it is suggested that petitioner did not intrude into the office of police judge, but that he was lawfully exercising the functions of "city justice." But the court found that he had usurped the office described in the complaint. If the office of "city justice" is the same as that of police judge, the superior court adjudged petitioner had usurped that office; if the office of "city justice" is different from police judge, the court adjudged petitioner had usurped the police judgeship.

An office is of the nature of a franchise, in that it can only be derived from the sovereign. Section 803 of the Code of Civil Procedure provides for an action against one who unlawfully exercises any public office "or any franchise." A franchise is said to be a particular privilege conferred by grant from government, and invested in individuals. 3 Kent, Comm. 458. If an individual or corporation shall assume, without grant, to exercise powers which are prerogatives of the government, and such as can be exercised by a private person only when granted by the government, can it be doubted that he or it should be adjudged to be unlawfully exercising such powers under the chapter of the Code of Civil Procedure which relates to actions for the usurpation of franchises? In such case, would the intruder be permitted to say: "I have not usurped a franchise, because there can be no franchise without a grant?" The response would be: "You have usurped a power of the government. You cannot act as if you had the franchise, and say you are not exercising it." At least, the office of police judge of the city of Oakland *was*. One who unlawfully has assumed the powers of the former police judge is estopped from asserting, when he is pursued for the usurpation, that the office no longer exists. Our conclusion is that the judgment that the petitioner usurped the office described in the complaint is not void. Whether it be erroneous is a matter to be decided after the appeal therefrom shall have been heard.

2. The contempt judgment of the superior court under which the petitioner is imprisoned, after reciting the proceedings (including the affidavit of one Daniels) on which it is based, proceeds: "Now the court, being fully advised of the facts and of the law in the premises, finds as matters of fact that each and all of the facts, matters, charges, and things stated and specified in the affidavit of said Daniels hereinbefore set forth, and upon which the order to show cause herein was based, are true and correct as there stated and alleged; and as a conclusion of law therefrom the court finds that the same constitute a contempt of the authority of this court. Wherefore, it is ordered, adjudged, and decreed by this court that, by reason of the acts and conduct of the said F. W. Henshaw, specified and stated in the affidavit of the said S. F. Daniels, hereinbefore set forth, he, the said F. W. Henshaw, is guilty of contempt of the authority of this court; and it is further ordered and adjudged by this court that, as a punishment for said contempt, the said F. W. Henshaw be, and he is hereby, fined in the sum of \$500, and that he pay said fine to the clerk of this court; and it is further ordered and adjudged that, in de-

fault of the payment of said fine, he be imprisoned in the county jail of the county of Alameda, until the said fine is paid; such imprisonment not to exceed one day for each and every dollar of said fine that shall so remain unpaid. It is further ordered and adjudged by this court that the said S. F. Daniels have and recover of and from the said F. W. Henshaw, defendant herein, his costs in the proceeding."

It is claimed by petitioner that this judgment, in so far as it provides for his imprisonment, is void; that the judgment, while purporting to impose the imprisonment as an alternative, yet directs that the petitioner be imprisoned until the fine be paid; or, if not to be so read, that it provides he be imprisoned for the full period of 500 days; that by the terms of the judgment the petitioner would not be entitled to his discharge although he should pay the whole or any portion of the fine prior to the expiration of the 500 days. The argument is based upon the language of section 1205 of the Penal Code, which reads as follows: "A judgment that the defendant pay a fine, may also direct that he be imprisoned until the fine be satisfied, specifying the extent of imprisonment, which must not exceed one day for every dollar of the fine." Section 1446 of the Penal Code, to which reference has been made, relates only to judgments of justices' and police courts. In *Ex parte Crittenden*, 62 Cal. 534, it was held that, upon a judgment imposing a fine for a contempt, it is competent for the court to direct that the party stand committed until the fine be paid. Even, however, if it be conceded that section 1205 of the Penal Code is a limitation upon the power of courts to punish for contempts, we think the judgment conforms to that section. The judgment directs that the petitioner be imprisoned until the fine be paid; and to avoid the possible interpretation that the word "paid" is used in any sense different from "satisfied,"—the statutory term,—it provides that such imprisonment shall not exceed one day for each and every dollar of said fine that shall *so remain unpaid*. The judgment further provides that the imprisonment shall not occur at all, except in default of the payment of the fine. In legal contemplation the petitioner was present in court when the judgment was rendered. He certainly could not escape its consequences by reason of his absence, if he was absent. To say that he ought to have been given time to pay the fine, is but to say that the judgment ought to have been one not directed by section 1205 of the Penal Code. We find nothing in the statute which commands or requires the court to give a defendant any definite period of time to raise the money to pay the fine, before the expiration of which he is not to be imprisoned. The judgment specifies the extent of the imprisonment in specifying the maximum of time, and in providing that it shall not exceed one day for each dollar of the fine remaining unpaid. This view accords with the decision in *Ex parte Ellis*, 54 Cal. 204. The section of the Code does not in express terms authorize the discharge of the defendant who has suffered a portion of the term of imprisonment, in case he shall pay the balance of the fine not satisfied by imprisonment, at the rate of one day for each dollar of the fine. His right to be discharged, under such circumstances, is the result of judicial construction of the language of the section. A judgment in a criminal case which, after assessing the amount of a fine imposed, should also direct that the defendant be imprisoned until the fine be satisfied, and specify the extent of the imprisonment, by fixing a term not exceeding one day for each dollar of the fine, would be sufficient in form, and valid, because it would comply with section 1205 of the Penal Code. The judgment before us limits and specifies the imprisonment, by providing that it shall not exceed one day for each and every dollar of the fine remaining unpaid. It is sufficient and valid because it declares what has been decided to be the legal effect of a judgment in literal accord with the statute.

The whole judgment is not void because it attempts to give costs to the relator, or because it does not specify the amount of such costs. It does not

provide for the imprisonment of petitioner in default of the payment of costs.

Petitioner also contends the judgment is void because it does not recite the facts which constitute the contempt of which the defendant (petitioner) is adjudged guilty. Section 1211 of the Code of Civil Procedure provides that when a contempt, not in the presence of the court, is committed, an affidavit shall be presented of the facts constituting the contempt. Upon the affidavit may be made an order to show cause. Code Civil Proc. § 1212. When the person upon whom the order is served appears, the court must proceed to investigate the "charge," (Code Civil Proc. § 1217,) and must determine whether the person proceeded against "is guilty of the contempt charged." Code Civil Proc. § 1218. Under the sections of the Code the finding of the superior court that the averments in the affidavit or charge of Daniels, on which the order to show cause was based, were true; that the commission of the acts affirmed in such affidavit constituted a contempt; and that, by reason of the commission by petitioner of the acts alleged in the affidavit, he was guilty of contempt,—was a determination that he was guilty of the contempt charged. Of course, such determination does not preclude us from inquiring if the acts charged, and found to have been done, really constitute a contempt. But the record clearly shows upon what facts, proved to its satisfaction, the court based the contempt judgment. In *People v. Turner*, 1 Cal. 152, relied on by petitioner's counsel, the judgment was simply that a person "be imprisoned forty-eight hours, and fined \$500, for contempt of court." The supreme court held the order should be annulled on *certiorari*. This was before the enactment of any statute regulating proceedings for contempts. Moreover, the decision was clearly right, upon common-law principles, since, for aught that appeared, the judgment was a mere arbitrary abuse of power, not preceded by any investigation, and not showing an adjudication that any particular contempt had been committed.

In our opinion, the facts charged, and of which the petitioner was found guilty, constituted a contempt which the superior court had power to punish.

Let the petitioner be remanded to custody.

We concur: SEARLS, C. J.; PATERSON, J.; SHARPSTEIN, J.

We dissent: MCFARLAND, J.; TEMPLE, J.

THORNTON, J., (*dissenting*.) The only inquiry to be made herein is whether the court had jurisdiction to imprison the petitioner for a contempt in the case before us. The petitioner is held to be in contempt for refusing to obey a judgment of the superior court of the county of Alameda, rendered and given in the case of *People ex rel. Daniels against The Petitioner*. Unless the judgment is void, the court had jurisdiction, and the imprisonment for contempt is valid. The inquiry, then, relates to the judgment rendered. This judgment was rendered in a case in which it was alleged that Daniels was entitled to an office,—that of police judge of the city of Oakland,—which had been usurped by Henshaw, the petitioner here. It is urged here that the office must exist to be usurped; that there can be no usurpation of an office which does not exist; and, if the office does not exist, there is no jurisdiction in the court to inquire into its usurpation, and render any judgment in favor of the plaintiff against defendant.

If the office did not exist in regard to which the suit was brought, we cannot conceive how there can be any jurisdiction in the court to enter judgment against any one usurping it. An office can only be created by the constitution, or some valid statute passed by the legislature. Then the existence or non-existence of an office is a question of law, not of fact. Its existence depends on law, either constitutional or statutory. If no law can be found show-

ing its creation, it cannot exist. To empower a court to render a valid judgment, it must have jurisdiction of the *res*, where it is a cause *in rem*, or of the subject-matter and parties, when it is a cause *inter partes*. If there is no jurisdiction of the parties, the judgment is void, though it may have jurisdiction of the subject-matter. If there is no jurisdiction of the subject-matter, the judgment is also a nullity, though the court may have had jurisdiction of the parties. If no *res* exists, there can be no jurisdiction in a cause *in rem*, and a judgment pronounced in such cause would be void. If a ship is proceeded against by libel in an admiralty court, in a case appropriate for such proceeding, there would be no jurisdiction if there was no ship. If there was no subject-matter in a cause *inter partes*, we cannot see any ground of jurisdiction. If an action of ejectment is brought in a court in this state, to recover a parcel of land situate in the state of Nevada, we cannot see that there could be any jurisdiction or any judgment pronounced for its recovery which would not be void. If the parties are myths, fictitious persons, a judgment pronounced in an action between them would be void for want of jurisdiction. The same would result if one of the parties was not a real person. If the court had jurisdiction to inquire, the judgment in that case would be void. A court can have no power to pronounce judgment for or against a non-existent person. Such was the point directly in judicature in *Sampeyreac v. U. S.*, 7 Pet. 233. In that case it was held that a decree in favor of a fictitious person (Sampeyreac) was a nullity. The case cited was this: Under an act of congress purporting to authorize it, a bill of review was filed in the superior court of the territory of Arkansas, to impeach a decree previously rendered in the same court in favor of the complainant in the cause of *Sampeyreac v. U. S.* The decree had been rendered in favor of Sampeyreac, and against the United States, for a tract of land. The decree on review was held void, for the reason that Sampeyreac was not a real person. The court said: "The original decree in this case was a mere nullity; it gave no right to any one." And this was so held for the reason that the complainant was a fictitious, and not a real, person.

If a court, to render a valid decree *inter partes*, must have jurisdiction both of the subject-matter and the parties, how can such jurisdiction exist if there is no subject-matter or no parties? Let it be admitted that a court has jurisdiction to inquire whether there is an existent subject-matter; as soon as it finds there is none such, its jurisdiction to enter a decree for its recovery against any person is at an end. It has no more power than it has when a suit is brought to recover a piece of land, and it gives judgment against the defendant for a horse or an office. That such a judgment would be void, we cannot see that there can be any doubt. If such jurisdiction exists, it can only be from a determination of the court that such subject-matter exists, and it is too well settled to be now debated that a court cannot, by holding that it has jurisdiction when it has none, invest itself with jurisdiction. The jurisdiction of a court must be shown by the record of the case on which it passes. The jurisdiction of the court is always open to inquiry in any court in which the record of the action is put in evidence. It is so open in the same court, or in any other court having jurisdiction of the case before it, and can always be called in question collaterally. A court, in rendering a judgment, always, either expressly or impliedly, affirms that it has jurisdiction. It may enter such judgment, and at any time on its own motion re-examine the cause, and vacate the judgment for lack of jurisdiction. When the record of a judgment is offered in evidence in another court, the jurisdiction is a matter of law, and if, upon an examination of the record, it appears that, upon the application of the law, the court rendering the judgment had no jurisdiction, it can declare such judgment to be void. It is in effect always void,—void *ab initio*. The judgment is a nullity. It never had life, and was always naught. It gave no right to any one, and none could be acquired under it.

In the action of *People, etc., ex rel. Daniels v. Henshaw* the complaint is in these words:

"(1) That on the first day of January, A. D. 1885, the city of Oakland was, thence hitherto has been, and now is, a municipal corporation, created, organized, and existing under the laws of the state of California. (2) That among other offices of said municipal corporation, created by statute, and provided by its charter or organic act for the government of said city, is the office of police judge, and the charter of said city provides and requires that there be a municipal election held in said city on the second Monday of March, A. D. 1886, for the election, among municipal officers, of a police judge, for the term of two years next succeeding such election. (3) That on the second Monday of March, A. D. 1886, to-wit, on the eighth day of March, A. D. 1886, a municipal and charter election was duly held in said city, for the election of, among other municipal officers, a police judge, for the term of two years next succeeding such election. (4) That at said election so held in said city one S. F. Daniels received the greatest number of votes cast for police judge of the city of Oakland by the qualified electors of said city, and thereafter, to-wit, on the twenty-ninth day of March, A. D. 1886, and within ten days after receiving a certificate of his election, he took the oath of office, and presented to the city council of said city a bond good and sufficient in form, and as required by law, with two good and sufficient sureties in the penal sum of \$5,000, as and for his official bond as police judge of the city of Oakland, for the term of two years next succeeding his said election. (5) That on said second Monday of March, A. D. 1886, and for more than one year prior thereto, the said S. F. Daniels was, thence hitherto has been, and now is, a resident of the city of Oakland, Alameda county, state of California, and during all of said time he has been, and now is, an attorney and counselor at law, eligible and qualified to fill and hold the office and discharge the duties of police judge of said city. (6) That on the seventh day of April, A. D. 1886, the defendant, F. W. Henshaw, usurped and intruded into the office of police judge of said city, and ever since said day he has usurped and intruded into said office, and withheld the same from the said S. F. Daniels. Wherefore the plaintiff demands judgment: *First.* That the defendant is not entitled to the office of police judge of the city of Oakland, and that he be ousted therefrom. *Second.* That the said S. F. Daniels is entitled to said office of police judge of the city of Oakland, and that he be let and put into possession of said office, and that he have his costs herein, and such other and further relief in the premises as shall seem proper."

The answer of Henshaw is as follows:

"The above-named defendant, for answer in his behalf to the pretended cause of action set forth in the complaint of plaintiff above named, herein filed: *First.* Admits that the allegations contained in paragraph 1 of said complaint are true. *Second.* Denies that among other offices of said municipal corporation created by statute, and provided for by its charter or organic act, for the government of said city, or at all, is the office of police judge. Denies that the charter of said city provides and requires, or provides or requires, that there be a municipal election held in said city on the second day of March, A. D. 1886, or at any time, or at all, for the election, among other municipal officers, of a police judge for the term of two years next succeeding such election, or for any term at all. *Third.* Denies that on the second Monday of March, A. D. 1886, or at any time, or at all, a municipal and charter election, or municipal or charter election, was duly or otherwise held in said city for the election of, among other municipal officers, a police judge for the term of two years next succeeding such election, or for any term, or at all. *Fourth.* Defendant has no knowledge, information, or belief sufficient to enable defendant to answer the allegations contained in paragraph 4 of said complaint, and therefore denies that at said election so held in said city one S. F. Daniels

received the greatest number of votes, or any number of votes, for police judge of the city of Oakland by the qualified electors of said city, and that thereafter, to-wit, on the twenty-ninth day of March, A. D. 1886, or at any time, or at all, or within ten days after receiving a certificate of his election, he took the oath of office, and presented to the city council of said city a bond, good and sufficient in form, and as required by law, with two good and sufficient sureties in the penal sum of \$5,000, as and for his official bond as police judge of the city of Oakland for the term of two years next succeeding his said election, or for any term, or at all. *Fifth.* Answering paragraph 5 of said complaint, defendant admits that the allegations contained therein are true, assuming that the word 'qualified' therein used is intended to convey its ordinary and usual meaning. *Sixth.* Denies that on the seventh day of April, A. D. 1886, or ever, or at all, this defendant usurped and intruded, or usurped or intruded, into the office of police judge of said city, and ever since said day, or ever, or at all, he has usurped and intruded, or usurped or intruded, into said office, and withholds the same, or withholds the same, from said S. F. Daniels. Wherefore, having fully answered, defendant prays judgment that plaintiff be denied the judgment demanded in his said complaint, and that he take nothing by this action, and that defendant have judgment against plaintiff for defendant's costs herein."

The controversy in the action was as to the office of police judge of the city of Oakland. Is there any such office? If there is, the statutes will show it. There is no such office mentioned in the constitution. We must then find it in some statute. It may be conceded that there was under the act of March 10, 1866, an office of police judge for the city of Oakland. See St. 1865-66, p. 193, §§ 1, 2. In fact, there was such an office created by the second section of the act. The first section created a police court for the city named. The police judge was to be elected at the charter election of said city, held on the first Monday in March, 1867, who was to hold office for two years, and until his successor shall be elected and qualified. In the following sections of the act the jurisdiction of the police court as established may be found, and other provisions made in regard to the court. Let it be conceded that other statutes existed by which the office mentioned existed.

On the eighteenth of March, 1885, a statute was passed entitled "An act to provide for police courts in cities having 30,000, and under 100,000, inhabitants, and to provide for officers thereof." The first section of the act is in these words: "The judicial power of every city having 30,000, and under 100,000, inhabitants shall be vested in a police court, to be held therein by the city justices, or one of them, to be designated by the mayor; but either of said justices may hold such court without such designation, and it is hereby made the duty of said city justices, in addition to the duties now required of them by law, to hold said police court." The act consists of 15 sections. It proceeds by the second and third sections to define and settle the jurisdiction of the police court established by the first section; by the fourth, to declare who shall discharge the duties of said court in case of the disability of the justice appointed to hold the court under the first section. By the fifth section the power of the justice of the court is declared and conferred. The sixth section provides for a clerk of the court to be appointed by the city council, and defines his duties, and provides for his salary. Section 7 provides for the disposition of the fines and other moneys collected on behalf of the city in the court, and for a report to the city council each month of all bills for fees and costs due the court. Section 8 provides for rooms for the court and dockets. The ninth section provides that the court shall be always open except on non-judicial days, and then for such purposes as by law are permitted or required of the other courts of the state. Appeals are provided for by section 10; section 11, a place of imprisonment, and a place of labor; section 12, for a seal of the court, to be furnished by the city; section 13, for a

report to the city council by the city justices, on the first Monday of each month, of all the cases, civil and criminal, in which the city has an interest, or which are required to be entered in the city civil docket, or the city criminal docket, etc. The next section (14) provides that certified transcripts made by the clerk shall be evidence, etc., and that all warrants and other process issued out of said court, and all acts done by said court, and certified under its seal, shall have the same force and validity in any part of the state as though issued or done by any court of record of this state. Section 15 provides that this act shall go into effect upon the expiration of the term of office of the present police judges of said cities, or when a vacancy occurs therein.

That this act of 1885 repeals former acts in relation to a police judge in the city of Oakland, we think there cannot be any doubt. The former acts cannot stand with the act of 1885. There is such a repugnance that they cannot stand together. The former act or acts provided for a police judge, to be elected by the electors of the city at a certain election. This act of 1885 provides that the judicial power shall be vested in a police court, to be held in the city by the city justices, or one of them, to be designated by the mayor. The city justices are elected under section 103 of the Code of Civil Procedure, (which section was held constitutional in *Bishop v. City of Oakland*, 58 Cal. 572,) and it is made the duty of the mayor, by the act of 1885, to designate one of such justices to hold the police court. The office of police judge to be elected, as before pointed out, ceases, under the act of 1885, upon the expiration of the term of the incumbent in office at the time the act of 1885 was passed, or when a vacancy may occur in such office. These provisions show that the former acts creating the office of police judge are repealed by the act of 1885. The repeal is shown by its being clearly a revision of the former acts on the subject of police courts in the class of cities referred to. See *Christy v. Sacramento*, 39 Cal. 8; *Ex parte Smith*, 40 Cal. 419; *Estate of Wixom*, 35 Cal. 320; *People v. Burt*, 43 Cal. 560.

That the act of 1885 is constitutional, is clear. The power over this subject is amply conferred by sections 1 and 13 of article 6 of the constitution. It would seem that, under section 1 of article 6, such a court as that established by the act of 1885 may be created by a special law for each city. If a general law is required to create such a law, the act of 1885 is a general law. It is general because it applies to a class of cities. *Thomason v. Ashworth*, 14 Pac. Rep. 615. It makes no difference in this regard that Oakland is the only city belonging to the class having 30,000, and less than 100,000, inhabitants. There is certainly another (Los Angeles) since the act of 1885 was passed, and there will soon be others. It may be remarked here that the police courts constitute a part of the courts of the state, and the police judge part of the judiciary, and section 6 of article 11 of the constitution has no reference to them. *McGrew v. Mayor of San Jose*, 55 Cal. 611; *People v. Ransom*, 58 Cal. 560; *Bishop v. City of Oakland*, 58 Cal. 572; *Jenks v. City of Oakland*, 58 Cal. 578; *Coggins v. Sacramento*, 59 Cal. 599; Const. art. 6, § 1.

The act of 1885, then, repeals all other acts in relation to the office of police judge of the city of Oakland, does away with such office, and is a valid and constitutional act. In this view, it follows that the judgment of the court below, in adjudging that Daniels is entitled to the office of police judge, is clearly erroneous.

Is it also void? For a judgment can also be void as well as erroneous. *Ex parte Lange*, 18 Wall. 163. If merely erroneous, it is not void. But if void it is also erroneous, and will be reversed on appeal. In accordance with the views expressed in a foregoing part of this opinion, the judgment is void, for the reason that it adjudges a person entitled to an office which does not exist. A court can no more render a valid judgment for the recovery of an office which does not exist, than it can for a non-existent parcel of land or a non-existent horse.

Can a person be imprisoned for refusing to obey a void judgment? We cannot perceive how this can be. A void judgment is a nullity; it can confer no rights on any one, nor deprive any one of a right. An imprisonment under a void judgment is an arbitrary one, beyond the power of any court or judge. It is in no sense within their jurisdiction. To render a judgment of imprisonment is an assumption of power authorized neither by the constitution or law, nor justice. The officer who attempts to execute such a judgment is a trespasser, and may be lawfully resisted by any one against whom the process in his hands runs. It cannot be lawful unless the arbitrary edict of a court or judge can make that lawful which is contrary to all law. The above views are, in our opinion, sustained by the decided cases.

In *Batchelder v. Moore*, 42 Cal. 415, there was no jurisdiction of the subject-matter. Calderwood was not a party to the action of *Batchelder v. Moore*, in which judgment had been rendered, and was not dispossessed under it. There was then no jurisdiction of the subject-matter. In *Ex parte Kearny*, 55 Cal. 212, there was no offense charged against Kearney, hence there was no subject-matter of which the court had or could take jurisdiction. The court held in this case, as correctly stated in the head-notes, as follows: "Where it affirmatively appears from the record of the proceedings of an inferior court that a person was tried and sentenced to be punished for an act which is not a crime, the judgment is absolutely void, and a person in custody under such a judgment will be discharged on *habeas corpus*. To constitute an offense under subdivision 3, section 38, of order No. 697, as amended by order No. 1196 of the city and county of San Francisco, which provides that 'no person shall address to another, or utter in the presence of another, any words * * * having a tendency to create a breach of the peace,' the words must be uttered in the presence of the person whom they tend to provoke to such breach of the peace." The same is true of *Ex parte Corryell*, 22 Cal. 179. Corryell had been charged with that which was no crime, and therefore he was discharged. *Ex parte Frank*, 52 Cal. 606, goes on the same ground. The ordinance under which he was convicted was void, therefore the judgment under it was void. *Ex parte Siebold*, 100 U. S. 371, is also an authority. In that case it was alleged that the act under which the imprisonment was adjudged was unconstitutional. The supreme court of the United States held that the act was constitutional, and remanded the applicant. The court held that if the act was unconstitutional the applicant was entitled to his discharge. See opinion of court on pages 376, 377, of 100 U. S. Two of the justices (FIELD and CLIFFORD) dissented, holding the law unconstitutional, and were, on that ground, in favor of discharging the applicant. See 100 U. S. 364. The same rulings were made in *Ex parte Virginia*, 100 U. S. 339, and in *Ex parte Clarke*, Id. 399, as in *Siebold's Case*. In *Ex parte Siebold* the court cited *Rex v. Suidis*, 1 East, 306; Bac. Abr. "Habeas Corpus," B 10; and *Bushel's Case*, T. Jones, 13, Vaughan, 135, 6 How. St. Tr. 999.

Bushel's Case, which was cited approvingly by the court in *Siebold's Case*, is thus stated in its opinion: "There, twelve jurymen had been convicted in the oyer and terminer for rendering a verdict (against the charge of the court) acquitting William Penn and others, who were charged with meeting in conventicle. Being imprisoned for refusing to pay their fines, they applied to the court of common pleas for a *habeas corpus*; and though the court, having no jurisdiction in criminal matters, hesitated to grant the writ, yet, having granted it, they discharged the prisoners, on the ground that their conviction was void, inasmuch as jurymen cannot be indicted for rendering any verdict they choose." Thus holding that the court of oyer and terminer had no jurisdiction of the subject-matter. No offense had been committed by the jurors, therefore there was no subject-matter. *Ex parte Jackson*, 96 U. S. 727, accords. In *Zeehandelaar's Case*, 12 Pac. Rep. 259, this court held that a superior court had no jurisdiction to adjudge in contempt and imprison a wit

ness for refusing to answer a question which was immaterial to any issue in the case, and discharged the petitioner. In all these cases the court had jurisdiction of the parties. In cases where the court had jurisdiction of the subject-matter, the applicant for the writ was remanded, and where it had no such jurisdiction the applicant was discharged. See, also, *Hummel's Case*, 9 Watts, 416; *Com. v. Newton*, 1 Grant, Cas. 453; *People v. Kelly*, 24 N. Y. 74; *In re Fernandez*, 10 C. B. (N. S.) 32; *Burnham v. Morrissey*, 14 Gray, 226.

It can make no difference in this case, conceding that the court below held the act of 1885 unconstitutional, or that the former acts had not been repealed by the act of 1885, so far as relates to the office of police judge. The foregoing are questions of law, which go to the jurisdiction of the court. If the act of 1885 is constitutional, and lawfully repealed the former acts, the court below had no jurisdiction to render the judgment herein mentioned, adjudging Daniels entitled to the office as against Henshaw, and ousting Henshaw therefrom. The judgment being void, the commitment for contempt in refusing to obey it is also void, as being beyond the power of the court to render it. In fact, the case should have been dismissed on an inspection of the complaint. It sets forth no title to an existing office; in fact, shows want of title. The affidavit of Daniels was entirely insufficient to confer any power on the court to punish for contempt.

The conclusion above reached applies as well to judgment in a civil as in a criminal action. There can be no punishment by a court under a void judgment in either case.

The applicant for the writ (Henshaw) should, in my opinion, be discharged from custody.

(73 Cal. 545)

In re Estate of HERTEMAN, Deceased. (No. 9,888)

(*Supreme Court of California. October 6, 1887.*)

1. EXECUTORS AND ADMINISTRATORS—FINAL ACCOUNTING—PROOF OF DISBURSEMENTS.

On final accounting, an administrator produced an ordinary receipt for \$1,500, and testified that \$1,085 was for money borrowed on account of the estate, and \$415 was for the share of the estate in the amount of the expenses above the receipts of a hotel in which the estate was interested; that he did not take a separate voucher for the \$415, as it was not thought necessary, and it was desirable to suppress the fact of a deficit in the business in order to sell the hotel; that the manager of the hotel, to whom the \$1,500 was paid, and who signed the receipt, and kept the accounts, had taken the accounts to France, and died there. In a verified account filed after the alleged payment, the administrator stated that the estate had been put to no expense on account of the hotel. *Held*, that there was no sufficient evidence of the payment of the item of \$415.

2. SAME—MISTAKE IN ACCOUNT.

On final accounting, an administrator claimed to have made a mistake in an account filed five years before, by which the estate was credited with \$720, the amount received from the rent of a hotel, instead of \$120. He testified that the account was made by his attorneys from memoranda furnished by him, and that the error was made in mistaking the figure "1" for "7," and that he signed and verified the account as prepared without going over the details. By the account claimed to be erroneous, and the previous account, it appeared that the rent of the hotel averaged about \$150 per month, which for the period covered by the alleged erroneous item would amount to about \$720. *Held*, that there was no sufficient proof of the alleged mistake.

3. SAME—LIABILITY OF ADMINISTRATOR FOR FAILING TO PAY TAXES AND INSTALLMENTS.

The value of real property lost to the estate by reason of the failure of the administrator to pay taxes, and to pay installments of purchase money and interest on school lands held under a certificate of purchase, he having under his control sufficient money belonging to the estate to pay such taxes, installments, and interest, is properly chargeable to him in his final account.

4. SAME—INTEREST ON MONEY MINGLED WITH PRIVATE FUNDS.

An administrator is chargeable with interest on money of the estate drawn by him, and mingled with his own funds, and omitted from his account.

5. SAME—APPEAL—REFUSAL OF COURT TO SETTLE STATEMENT—MANDAMUS.

The refusal of the trial court to settle a statement, or act upon a motion for a new trial, cannot be reviewed on appeal. If it was the duty of the court to settle the statement, and act upon the motion, *mandamus* would be the proper remedy.

In bank. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Final accounting of an administrator. A two-thirds interest in a hotel belonged to the estate; the other third belonging to one Fouroche, who managed it under a partnership agreement made with decedent. The administrator testified that to pay the expenses of two children of decedent, of whom he was guardian, and other expenses, for which there was available no money belonging to the estate, he had borrowed money at different times from Fouroche, amounting in the aggregate to about \$1,085; that he and Fouroche on July 7, 1876, had a settlement of the hotel business, and for the borrowed money, when it was found that Fouroche had paid \$415 more than his share of the expenses of the hotel above what he had taken in, and that he paid Fouroche \$1,500; that he did not take a separate voucher for the \$415, as he did not think it necessary, and it was desirable to suppress the fact of a deficit in the business in order to sell the hotel; that Fouroche kept the accounts, which the administrator verified; and that Fouroche took the books to France, where he had since died. A receipt signed by Fouroche was produced, simply acknowledging the receipt of \$1,500. It was admitted that there was \$1,500 available to the estate on application to the probate court. A verified account filed November 8, 1877, was produced, in which the administrator stated that the estate had been put to no expense on account of the hotel.

Certain real property was lost to the estate by reason of the failure of the administrator to pay the taxes thereon, and to pay installments of purchase money and interest on school lands held under a certificate of purchase from the state. The administrator claimed that there was no money belonging to the estate out of which he could pay such taxes, installments, and interest, and that the land was of no value. From his inventory and appraisal, it appeared that the appraised value of the real property was \$501.88, and that at the time of the sale for taxes, and at the time the installments of purchase money and interest became due, there was sufficient money belonging to the estate and under the control of the administrator to pay all such taxes, installments of purchase money, and interest.

The administrator alleged that in his account of November 8, 1877, he had made a clerical error of \$600 in favor of the estate. He testified that he was no book-keeper, and knew very little about keeping accounts; that he took *memoranda* of his accounts to his attorneys, who prepared the account, and that he signed and verified it without going over the details; that the error was made in the amount received from rent of a hotel, by mistaking his figure "1" for "7," thus crediting the estate \$720, instead of \$120; that he never at one time got \$720, but did get \$120, for which he meant to give credit; that the memorandum was not preserved, and he did not discover the mistake until he made up his final account. The final account was filed October 9, 1882. To disprove this allegation, an account filed April 15, 1876, was offered in evidence, by which it appeared that the rent of the hotel from April 14, 1875, to March 1, 1876, amounted to \$1,590.85. The account of November 8, 1877, was also offered in evidence, from which it appeared that the item of \$720 received from the hotel was for the period extending from April 14, 1875, to October 29, 1875, and that the receipts from the hotel averaged about \$150 per month, which would amount to about \$720 for the period mentioned.

A. W. Thompson, (L. E. Bulkely, of counsel,) for appellant. R. Percy Wright and Selden S. Wright, for respondent.

McFARLAND, J. This is an appeal by E. Chaquette, administrator of the estate, from an order settling his final account, from the decree of distribution,

and from an order refusing to act upon the administrator's motion for a new trial.

1. The particular items of the account with respect to which appellant contends that the court erred are these: *First*. The item of \$415 charged by appellant as money paid to a partner of the deceased to cover loss in running a hotel, and disallowed by the court. Whether such a charge could be allowed under any circumstances it is not necessary to decide, because there was no sufficient evidence of the item. *Second*. Appellant was charged with \$501.89, the value of certain real property lost to the estate by the neglect of appellant to pay taxes, etc. We see no error in this ruling. *Third*. Appellant claimed a correction of \$600 in a former account, rendered several years before, which was not allowed. We cannot see that the court erred in holding that there was not sufficient evidence to warrant this correction. *Fourth*. Seven hundred and forty-two dollars interest on money of the estate drawn by appellant, and mingled with his own funds, and omitted from his account, and charged to him by the court. This was in accordance with well-settled principles, and there was no error in the ruling. The appeal, therefore, from the order settling the account, presents no grounds for a reversal; and the appeal from the decree of distribution stands on the same footing.

2. After the order settling the account was made, the appellant filed and served a notice of intention to move for a new trial, and prepared and served a statement of the case. The contestants thereupon objected to the settlement of any statement, and to any proceeding on said motion, on the ground that the provisions of the Code relating to new trials were not applicable. The court sustained the objection, and declined to hear, or in any way act on, said motion. If it was the clear duty of the court to settle the statement, and act upon the motion for a new trial, *mandamus* to compel such action would have been the proper remedy; but this non-action of the court—this nothing—cannot be reviewed on a general appeal of the case. It may be remarked, however, that it is doubtful if the true construction of that part of the Code of Civil Procedure relating to probate matters is that every contested motion in probate proceedings assumes the character of a civil action with all the attendants of a right to a jury trial, motion for new trial, etc. Such a construction would greatly confuse and prolong the settlement of estates,—a matter already sufficiently complicated. The subject is discussed to some extent in the opinion of Mr. Justice TEMPLE in the case of *Estate of Moore*, 13 Pac. Rep. 880, and there are reasons for holding that the suggestions there made should be adopted as expressive of the true meaning of the Code. However, all we desire in the case at bar is to be understood as not determining whether it was the duty of the court to entertain the motion for a new trial.

Orders affirmed.

We concur: SEARLS, C. J.; TEMPLE, J.; MCKINSTRY, J.; SHARPSTEIN, J.; PATERSON, J.

(2 Cal. Unrep. 807)

BULL v. COE, Adm'r, and others. (No. 12,055.) *

(Supreme Court of California. September 30, 1887.)

1. HOMESTEAD—MORTGAGE OF—FORECLOSURE—PRESENTMENT OF CLAIM AGAINST DECEDENT'S ESTATE.

Under Code Civil Proc. Cal. § 1475, providing that claims secured by liens or incumbrances "on the homestead" must be presented and allowed as other claims against the estate, a deed absolute, intended as a mortgage, executed by a husband and wife upon the wife's separate property, which had been declared a homestead, to secure the debt of the husband, cannot be foreclosed after the death of the husband, no claim having been presented against the estate.

*Reversed in banc. See 18 Pac. 808, 77 Cal. 54.

2. **SAME—FORECLOSURE OF MORTGAGE.**

The provision of Code Civil Proc. Cal. § 1500, that an action may be brought to enforce a mortgage or lien against the property of a deceased person where all recourse against any other property of the estate is expressly waived in the complaint, has no application to a mortgage upon a homestead, whether a probate homestead or one selected and recorded before the death of decedent.

3. **SAME—ABANDONMENT OF HOMESTEAD.**

Where the homestead, upon which the foreclosure of a mortgage is sought after the death of one of the mortgagors, has been released from the lien of the mortgage by the failure of the mortgagee to present his claim against the estate within the time limited for that purpose, the foreclosure proceedings cannot be sustained on the ground of an abandonment by the attempt of the survivor to get a homestead on other property after the expiration of the time for the presentation of claims.

4. **SAME.**

By Civil Code Cal. § 1243, a homestead can be abandoned only by a declaration of abandonment, or a grant thereof; and the execution of a deed of the homestead absolute in form, but intended as a mortgage, is not an abandonment.¹

5. **SAME—ENFORCEMENT OF MORTGAGE FOR EXCESS.**

Where a homestead has been released from the lien of a mortgage by the failure of the mortgagee to present his claim against the estate of one of the deceased mortgagors, if the right to enforce it as to any excess above \$5,000 remains, the burden of proof is upon the mortgagee to show the existence of such excess.

Commissioners' decision. In bank.

Appeal from superior court, Los Angeles county; A. BRUNSON, Judge.

Wells, Vandyke & Lee, for appellant. *Bicknell & White* and *Chapman & Hendrick*, for respondent.

HAYNE, C. The defendant, Hattie W. Strong, and her husband, by a deed absolute in form, mortgaged to the plaintiff the wife's separate property, upon which a homestead had been declared, to secure a debt of the husband. The husband died and the defendant Coe was appointed administrator of his estate, and as such gave notice to the creditors to present their claims. The plaintiff did not present any claim, but commenced an action to foreclose the mortgage, under section 1500 of the Code of Civil Procedure; stating in his complaint that he waived all recourse against the other property of the estate. The court below gave judgment for the defendants, and the plaintiff appeals.

In the case of *Camp v. Grider*, 62 Cal. 21, it was held that section 1500 applies only to "mortgages and liens other than liens and incumbrances on the homestead," and that claims secured by liens and incumbrances on the homestead are required to be presented under section 1475. We see no ground for saying that the rule applies only to probate homesteads. Section 1475 expressly mentions "the homestead selected and recorded prior to the death of the decedent;" and it was this "homestead" which the section refers to when it says that, "if there be subsisting liens or incumbrances on the homestead, the claims secured thereby must be presented and allowed as other claims against the estate." To say otherwise, would be to make the necessity for the presentation of claims secured by liens upon the homestead dependent upon the intention of the survivor to apply or not to apply to have the property set off as a probate homestead. In view of the fact that there is no time limited for the making of such an application, this test would be too uncertain;

¹ In *California*, a homestead cannot be abandoned except in the statutory mode; and a removal from the premises, even to another state, becoming a citizen thereof, voting in its elections, and being offered as a candidate for office therein, where there is no intention to relinquish a residence in this state, is not such an abandonment. *Porter v. Chapman*, (Cal.) 4 Pac. Rep. 237.

In general, as to what constitutes an abandonment of a homestead, see *Newman v. Franklin*, (Iowa,) 28 N. W. Rep. 579, and note; *Tipton v. Martin*, (Cal.) 12 Pac. Rep. 244; *Newton v. Calhoun*, (Tex.) 4 S. W. Rep. 645; *McElroy v. Magoffin*, (Tex.) Id. 547; *Reece v. Renfro*, Id. 545; *Gates v. Steele*, (Ark.) Id. 53, and note; *Kaes v. Gross*, (Mo.) 3 S. W. Rep. 840; *Sanders v. Sheran*, (Tex.) 2 S. W. Rep. 804; *Honaker v. Cecil*, (Ky.) 1 S. W. Rep. 392, and note; *Repenn v. Davis*, (Iowa,) 34 N. W. Rep. 326.

and it cannot be supposed that the legislature intended it. Such a test would enable the survivor to lull the creditor into the belief that the application was not going to be made, and, after the time for the presentation of claims had expired, to cut him out by having the property set off as a probate homestead. We think, therefore, that the rule of *Cump v. Grider* is not to be limited to cases where application is made to have the property set off as a probate homestead.

Nor does it make any difference that the property upon which the homestead was declared was the separate property of the wife. The debt was the debt of the husband, and the claim for it was against his estate. The language of section 1475 is general, and contains no limitation dependent upon the ownership of the property upon which the homestead was declared. It may well be that, in the opinion of the legislature, it was necessary for the probate court to have before it all the facts as to homestead, so as to enable it to act intelligently upon an application to set off a probate homestead, or in applying the funds of the estate in paying off particular liens. At any rate the requirement of the statute is general, and we do not think the court is warranted in limiting it. The failure to present the claim, therefore, released the homestead from the lien of the mortgage. It is not necessary to consider whether the mortgage can be enforced as to any excess which there may be over the sum of \$5,000, for it does not appear that there was any such excess in this case. And, if we assume that the mortgage could still be enforced as to that, we think it incumbent upon the party whose right to recover depends upon the existence of such excess, to show that it in fact exists.

The appellant contends that the parties did not reside upon the property at the time the homestead was declared. But the court finds the fact in favor of the respondent; and, while the testimony of the witness Russell is subject to some criticism for ambiguity, we cannot say that the finding is unsupported by the evidence. It is also contended that the homestead was abandoned by the attempt of the survivor to get a homestead on other property. But, in the first place, this attempt was not made until the expiration of the time for the presentation of claims; and in the second place, a homestead in this state can be abandoned only in the manner specified in section 1243 of the Civil Code. There is no pretense that the acts mentioned in that section were done. The deed to the plaintiff, though absolute in form, was a mortgage, and hence did not operate as an abandonment. *Mabury v. Ruiz*, 58 Cal. 15; *Porter v. Chapman*, 65 Cal. 365, 4 Pac. Rep. 237.

We therefore advise that the judgment and order denying a new trial be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(73 Cal. 564)

In re Estate of DOYLE, Deceased. (No. 9,710.)

(*Supreme Court of California.* October 7, 1887.)

1. WILL—PROBATE—CONTEST—PLEADING.

Where the allegations of the contestant of a will are not denied, there is no default, but the proponent makes his proof, and then the contestant proceeds to establish his grounds of contest, and, if he fail in this, the will will be admitted to probate, although no issue was made by denying his ground of contest.

2. SAME.

To the petition of the proponents of a will, appellant filed a written opposition, to which no demurrer or answer was filed by proponents, as provided by Code Civil Proc. Cal. § 1312. The parties, however, went to trial upon the petition. Held, that appellant, not having raised the point in the lower court, could not say that no issue was made up between him and the proponents.

3. SAME—NEW TRIAL.

Where facts are assumed to exist which are alleged by one party, and not denied by the other, but the finding is adverse to the admitted facts, the party aggrieved cannot demand a "new trial" on the ground that the finding, being opposed to the admitted fact, is "against law;" his remedy is by appeal.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

R. Percy Wright, for appellant. *H. C. Newhall* and *C. F. Hanlon*, for respondents.

MCKINSTRY, J. A petition for the admission to probate of an instrument as the last will and testament of Michael Doyle, deceased, was presented to the superior court by William R. Doyle, named as executor therein. Richard Doyle, brother of deceased, filed his written opposition to the probate, stating as ground of opposition that "the deceased did not make, sign, publish, or declare as his last will" the instrument propounded. No demurrer was interposed to the written opposition, nor was any written answer thereto filed or served. The superior court tried "the contest," and decided and adjudged that the instrument offered for probate was the last will and testament of said Michael, deceased; that it was executed in all respects as required by law; that the testator at the time of its execution was of sound and disposing mind, and not acting under any undue influence, fraud, or duress; and the court ordered that the will be admitted to probate. No appeal was taken from the judgment or order admitting the will to probate. The contestant, Richard Doyle, moved for a *new trial of the contest*, and has appealed from an order denying his motion.

Section 1312, Code Civil Proc., provides, in effect, that when an opposition is filed and served, the petitioner for probate, or others interested in the estate, may demur to the opposition, or may answer the contestant's grounds, traversing the same, etc.; and that any issue of fact thus raised, must, if requested by either party in writing, be tried by jury; otherwise by the court.

The petition filed by proponent was sufficient; and under its averments he would have been authorized to prove, had there been no contest, that the deceased did "make, sign, publish, and declare as his last will" the instrument offered. Code Civil Proc. § 1308. The petition, therefore, is to have the same effect as if it had expressly averred that the will offered was made, signed, and published as the last will of the deceased. There was, then, in the petition an allegation that the deceased *did*, and in the opposition an allegation that deceased did *not*, make, sign, and publish the instrument as his last will.

Appellant claims that a new trial should have been granted by the superior court, because its decision was "against law," within the meaning of section 656, Code Civil Proc.; that the failure of petitioner to deny, by written answer, the allegation of the written opposition, was an admission that the allegation was true. Code Civil Proc. § 1312. It is insisted that the decision of the superior court that the deceased *did* "make, sign, publish," etc., being contrary to proponent's admission that deceased did *not* sign, etc., was "against law." As we have seen, a direct issue was made by the averment in the petition that the will was executed and published as prescribed by law, and the averment in the opposition that it was not so executed or published. It may be doubted whether section 1312, which provides that an answer "may" be made to the written opposition, requires such answer when the opposition merely denies an averment implied in every sufficient petition for the probate of a will. It may also be very seriously doubted whether the superior court could base a decision against the beneficiaries under the will upon the failure of the *executor* to deny that a will whereby he had been appointed executor, and which he had asked to have admitted to probate upon petition expressly or impliedly averring that it was duly executed and published, was

not duly made and published. But we do not find it necessary to rest the decision of this appeal upon the determination of the question suggested by either of such doubts.

1. The bill of exceptions included in the transcript shows that on a certain day, "*no objection being made*, the court proceeded to try said contest on probate of said will. E. J. Hutchinson, Esq., appearing for Richard Doyle, the contestant and plaintiff, H. C. Newhall, Esq., appearing for William R. Doyle, petitioner and defendant, and J. Howard Smith appearing for absent heirs, and testimony having been offered *in support of said will*, and on the part of contestant in opposition thereto, and the court being *satisfied from said testimony* that said will should be admitted to probate, the court thereupon made its order admitting the said will to probate."

It appears from the bill that at the trial of the contest the course which we believe to be the usual course, and which is one to which the contestant certainly could not object, was pursued; that is, the petitioner made the *prima facie* proof that the will was executed in the manner prescribed by law, and that testator was of sound mind, and the contestant then introduced evidence in support of his ground of opposition to the probate. No objection was made by contestant to testimony in support of the petition for probate; and contestant himself, treating the case as if the averment in his opposition were sufficiently denied by the pleading on the part of the petitioner, offered and put in testimony in support of his written grounds of opposition. For aught that appears, the petitioner then introduced evidence to meet that given on behalf of contestant. Upon the testimony so given on behalf of the petitioner and contestant, respectively, the superior court decided the contest. If the appellant is right in his contention, no evidence was admissible upon the part of the petitioner. A party cannot for the first time in this court object, *on any ground*, to evidence which was introduced by the adverse party at the trial in the court below without objection being made thereto. *Scott v. Lumber Co.*, 67 Cal. 75, 7 Pac. Rep. 131; *Bliss v. Ellsworth*, 36 Cal. 310. Where evidence is not objected to in the court below because not admissible under the averment of a pleading, it is too late to raise the objection in the supreme court. *Scott v. Lumber Co.*, *supra*; *Hutchings v. Castle*, 48 Cal. 152; *Henry v. Railroad Co.*, 50 Cal. 176.

The contestant not only made no objection to the testimony offered on behalf of the petitioner, but introduced evidence in support of the allegations in his written opposition. He did not move for judgment on the pleadings, nor did he in any way call the attention of the court to what is now called the admission by petitioner of everything charged in the opposition. Section 1312, Code Civil Proc., does not, except by inference, limit the time within which the written opposition may be answered; but, if it must be answered within 10 days, here the contest was tried by mutual assent, without objection, the *day after* the written opposition was filed. Had the objection now urged been made by contestant, there can be no doubt, if it was necessary to make an issue, the court would have allowed the petitioner to file an answer forthwith, or have given him time to file an answer denying the allegations of the written opposition. This would accord with the view expressed in *Stringer v. Davis*, 30 Cal. 318; *Clark v. Insurance Co.*, 36 Cal. 175; and *Scott v. Lumber Co.*, *supra*. The case was tried upon the assumption of all the parties in the court below that the material allegations of the contestant's pleading were denied. It has been repeatedly held, under such circumstances, that the point that the denial was insufficient, cannot be first made in this court. *Cave v. Crafts*, 53 Cal. 141. In the case before us, as we have seen, there was direct issue made by the contradictory averments of the petition and the opposition,—the one averring, in legal effect, that the will was duly executed and declared; the other averring that it was not duly executed or declared. The contest was made known by formal written allegations, was understood by the court

and parties, and was tried without objection. The appellant ought not to be heard to say that there was no issue made up between him and the respondent in the exact manner provided by the Code.

2. But if the petitioner were entirely correct in his positions in other respects, it would not follow that the court below erred in denying him a "new trial." If the admission by failure to deny is to be treated as evidence that the fact alleged existed, there was no motion for a new trial on the ground that the evidence did not justify the finding, and no specification of deficiency in the evidence. If, however, the admission in the pleadings is to be treated as having other and greater effect than an admission at the trial of a fact denied by the pleadings, still a "new trial" was properly refused. It is here insisted there was no issue as to the execution and publication of the will, and therefore there should have been a new trial. Of what issue? We are unable to understand how there could be a trial or new trial—an examination or re-examination—of an issue which never existed. "A new trial is a re-examination of an issue of fact in the same court." Code Civil Proc. § 656. When a trial is had by the court, without a jury, a fact admitted by the pleadings should be treated as "found." It has been repeatedly held that the court need not expressly find a fact averred in the pleading of one party, and not denied by the other. If the court does find adversely to the admission, such finding should be disregarded in determining the question whether the proper conclusion of law was drawn from the facts found and admitted by the pleadings. The mere finding by the court against an averment not denied, does not create an issue which a party has a right to have tried. Here the appellant asked for a second trial of a suppositive issue on the ground that there was no issue which the court had right or power to try the first time.

Where all the material issues made by the pleadings are determined by the findings, and the findings are not attacked as unsustained by the evidence, a party cannot demand a new trial upon the ground the court erroneously applied the law to the facts, or drew the wrong conclusion of law from the facts found. The remedy in such case is by appeal. The Code does not contemplate or provide for a new trial or "re-examination" of issues of fact, the findings upon which are indisputably correct. Nothing to the contrary was decided by a majority of this court in *Simmons v. Hamilton*, 56 Cal. 493. In his dissenting opinion in the case last cited, Mr. Justice Ross said: "Since a new trial is a re-examination of a question of fact, where all such issues are correctly found upon, I am unable to find any authority for a 're-examination' of such facts; in other words, for a new trial, or to see any necessity therefor."

In *Martin v. Matfield*, 49 Cal. 45, Justice RHODES said: "A new trial is a re-examination of an issue of fact; and when a new trial is granted the finding is set aside, and of course the judgment resting upon it must fall. But the question whether the judgment is authorized by the pleadings or findings cannot be agitated on a motion for a new trial, for it is not involved in a re-examination of the issues of fact. The Code has provided other and sufficient modes for the determination of both branches of that question; and it is very clear that the question whether the issues of fact were correctly found does not depend in any manner on the question whether a pleading states sufficient facts to entitle a party to the relief granted by the judgment, or whether the issues as found sustain the judgment."

We fully concur with Justices RHODES and ROSS that a new trial cannot be granted on the ground that the judgment, or the conclusion of law on which the judgment is founded, is not authorized by the findings of fact. The rule must be the same where, as the appellant claims is the case here, the material allegations in the pleading of one party are not denied by the other. In such case the facts alleged must be assumed to exist. Any finding adverse to the admitted facts drops from the record, and any legal conclusion which is not

upheld by the admitted facts is erroneous. An order purporting to direct a new trial would be a vain thing, since any further action of the court must end in the same result; that is, the facts now admitted will then be admitted. If, after the order, there would be any issue to try, it would be because the order granting a "new trial" would have the effect of declaring—not by its terms, but as its legal result—that the failure of petitioner to deny any of the averments of the opposition *denied* them by implication. But the order was asked on the ground that the petitioner had not denied them.

If the decision of the court was not supported by the facts admitted by the pleadings, the remedy of the contestant was to appeal from the order admitting the will to probate. He was not in a position to demand a "new trial" in the court below. Order affirmed.

PATERSON, J. I concur.

TEMPLE, J. I concur. The provisions of the Code with reference to contesting probate of wills are very peculiar. The enumerated grounds of contest all consist in merely negating the allegations of jurisdictional facts which the petitioner is bound to aver and prove. All these facts must be found and certified by the court, whether there be a contest or not. The burden of establishing them would naturally be on the petitioner. Yet the statute provides that in the case of a contest the contestant shall be plaintiff, and the petitioner defendant, thus compelling the contestant to assume the affirmative. The contest need not cover all the jurisdictional facts; still, the court must find upon all. Evidently it is not contemplated that the evidence given upon the trial of the contest should be all the evidence submitted. Section 1317, Code Civil Proc., provides that the court shall be satisfied from the proof taken, or from the facts found by the jury. Now, the contest may include all the facts which the court is required to certify to upon admitting the will to probate. If, upon a trial of a contest before a jury, the contestant offered no evidence, since the burden of proof is upon him, the jury would be compelled to find all the facts against him, and in favor of the petitioner. In that case, the court, if the contest is all there is before the court, might base the probate entirely upon findings made in the absence of proof. This was certainly never intended. The same procedure is made applicable to a contest after the will has been admitted to probate, as before. In both, the contestant has the laboring oar, as though he is attacking something which he must overcome by affirmative proof. Under such circumstances, I think the theory of the statute must be that the contest begins after the petitioner has made his *prima facie* case. In such case, the burden would naturally be on the contestant, and all the provisions consistent and harmonious.

In case there is no contest, the petitioner is still required to introduce evidence to establish all the jurisdictional facts. If a contest is inaugurated, and the allegations of the contestant are not denied, there is no provision for a default. In fact, considering the nature of the proceeding, and that the usual case is that there are minors or absent heirs, we should be surprised if anything was taken by default and without proof. When, therefore, the allegations of the contestant are not denied, the petitioner first makes his proof, and then the contestant proceeds, without the presence of the petitioner, to establish his grounds of contest. If he fail in this, the will will be admitted to probate, although no issue was made by denying his ground of contest. On the other hand, if, having heard the proof on the part of the petitioner, the court is then prepared to refuse probate of the will, there would be no occasion to try the contest.

v.15p.no.4—9

(73 Cal. 560)

SIDDALL and another v. HARRISON and others. (No. 11,675.)

(Supreme Court of California. October 7, 1887.)

WILL—ACTION TO CONSTRU—WHEN IT LIES.

If the superior court has jurisdiction of an action for the construction of a will, (as to which, *quære*,) it is not bound to exercise such jurisdiction, and may properly refuse to entertain an action brought to have plaintiffs' heirship determined, and certain legacies declared void, where the plaintiffs are not mentioned in the will, and no special reason is shown for the intervention of equity, or for the adjudication asked for before final distribution.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

D. Wm. Douthitt, for appellant. *John F. Swift* and *Robert Harrison*, for respondent.

TEMPLE, J. This action is brought against the executors of the will of Elizabeth Traylor, deceased, and a great many other persons who do not appear to have any interest in the estate, or in the controversy, and no reason is shown in the complaint why they are or should be joined as defendants.

The plaintiffs are not mentioned in the will, and claim no interest under it, but they aver that either plaintiff Siddall is the sole heir, or that her co-plaintiff, White, is alone entitled to share the estate with her as heirs at law. By the terms of the will all the property of the testatrix is disposed of, but the complaint avers that various legacies are void, and among them the residuary bequest, and that, the legal and valid legacies being paid, there will be a large sum undisposed of. The plaintiffs aver that the executors claim that neither of the plaintiffs are heirs at law to said estate, and that all the legacies are legal, and should be paid; and they ask that the legacies may be declared void, and that the plaintiffs, one or both, are heirs at law to said estate, and for general relief. To this complaint a demurrer was interposed, which was sustained; the plaintiff declining to amend, final judgment was entered, and the plaintiff appeals.

Among the grounds of demurrer is the claim that the court has no jurisdiction of the action and that the complaint does not state a cause of action. In the recent case of *Williams v. Williams*, 14 Pac. Rep. 394, it is said that the jurisdiction of the superior court to construe a will was determined in the case of *Rosenberg v. Frank*, 58 Cal. 403. The attention of the court does not seem to have been called to the fact that that case was brought in the district court, and arose under the former constitution, nor to the fact that a majority of the court did not concur in the opinion on the subject of jurisdiction. Only Justices THORNTON, SHARPSTEIN, and the chief justice concurred in the opinion. Mr. Justice ROSS concurred specially, saying that he gave his adhesion only because the former court had held that the district court had such jurisdiction, and perhaps property rights had grown up under such decisions. The cases of *Williams v. Williams* and *Rosenberg v. Frank*, *supra*, as also the case of *Payne v. Payne*, 18 Cal. 292, were all in a sense consent cases. No one objected to the jurisdiction, and all parties interested desired the decision. In view of these facts, and of the weighty reasons against the jurisdiction given in the dissenting opinion in the case of *Rosenberg v. Frank*, to which others might be added, I do not know whether the court will adhere to these conclusions, but I am convinced the jurisdiction ought not to be exercised unless some good reason is given for thus interfering with a matter pending in another court. The inconvenience may be very great.

The superior court is liable to be called upon to construe a will to some extent as soon as it is probated. Certain payments, for instance, may be required to be made at once and at intervals. One of the principal reasons given for the interference of a court of equity was to save the executor from

liability for misconstruing the will while executing his trust. Here there is no such trouble; but, suppose he has acted during administration under the directions of the probate judge, and, in an action to construe the will another court takes a different view of its terms, which shall prevail? And, if the latter, is the executor responsible? Take the case put by Judge Story (section 1065, Eq. Jur.) as a proper case for the interposition of a court of equity. The will makes certain real estate subject to payment of debts and legacies. It is doubtful, he says, whether the personal estate is exonerated, or is the primary fund to be exhausted before the real estate can be taken. The probate court is competent to determine this. Suppose it has done it, or is about to do it at the instance of creditors, can the executor delay that court, in compelling the payment of the debts until the clause of the will has been construed in an action in another court? And when the matter has been so determined, why should that construction prevail over that of the court to which the matter is specifically referred by the constitution? Shall this court suspend its proceedings until advised by another court of co-ordinate jurisdiction?

But, as already said, if in a proper case courts of equity have jurisdiction to construe wills, and this court shall finally so hold, it is evident the court is not bound to entertain such suits, and should not do so, except in cases where there are special reasons for it. Its interference is always a matter of discretion, and there must always be some other purpose than a mere desire to obtain the opinion of a court of equity. *Crosby v. Mason*, 32 Conn. 482. And since our courts have in probate proceedings most ample powers, and may recognize and declare trusts, and compel their execution, and in the final decree must define all estates, legal or equitable, which pass under the will or the statute of descents, (*Estate of Hinckley*, 58 Cal. 459,) it is evident the occasion which would justify such interference can rarely occur.

There is no such exigency in this case. The plaintiffs are not executors, trustees, or *cestuis que trust*. They claim to be heirs at law, who, in case the residuary legacy is void, might succeed to some of the estate. They ask to have the question of their heirship determined, and some of the legacies pronounced void. No reason is shown why this should be determined in advance of the decree of final distribution. The expense of proceedings of this character is usually saddled upon the estate, and parties should not be permitted to incur costs merely to satisfy idle curiosity.

We think the judgment should be affirmed, and it is so ordered.

We concur: PATERSON, J.; MCKINSTRY, J.

(73 Cal. 550)

RIVERSIDE LAND & IRRIGATION CO. v. JENSEN, Ex'x, etc. (No. 11,950.)

(*Supreme Court of California*. October 7, 1887.)

1. PRACTICE—AMENDMENT OF COMPLAINT AFTER COMMENCEMENT OF TRIAL.

In an action to quiet title brought under Code Civil Proc. Cal. § 738, the plaintiff was permitted, after the commencement of the trial, to file, upon terms imposed by the court, a second amended complaint, which was substantially the same as the original. *Held* no error.

2. EASEMENT—EVIDENCE.

In an action to quiet title, the defendant claimed an easement across plaintiff's land. His claim was based upon certain quitclaim deeds made by plaintiff to defendant subsequent to the construction of the irrigating ditch for which the easement was claimed. The defendant testified that it was understood between both parties that he should have a right of way across the plaintiff's land for his ditch. Two witnesses, the president and ex-president of the corporation plaintiff, testified that plaintiff was ignorant of the existence of the ditch at the time the deeds were made, and that there was never any agreement or understanding between the par-

ties that the right of way should pass by the deeds. *Held*, that the court was justified in finding no agreement to grant defendant the right of way for his irrigating ditch.

3. APPEAL—FINDINGS IN ACCORDANCE WITH ANSWER—DEFENDANT NOT PREJUDICED.

In an action to quiet title, the court found the facts concerning defendant's claim to an easement across plaintiff's land to be as alleged in defendant's answer. *Held*, that defendant could not be heard to complain of such findings.

Commissioners' decision. Department 1.

Appeal from superior court, county of San Bernardino; R. E. ARICK, Judge.

Action to quiet title, brought under Code Civil Proc. § 738. The original complaint alleges that the plaintiff, the Riverside Land & Irrigating Company, is a corporation of San Bernardino county, California; that it is the owner of certain lands comprising a part of what is known as the "Rubidoux Rancho," in which the defendant, Cornelius Jensen, claims an adverse interest, and that the defendant's claim is without right. The defendant answered. When the cause came to trial, the plaintiff asked and obtained leave to file an amendment setting forth all the facts out of which grew the defendant's claim. The plaintiff demurred to the defendant's answer, and the demurrer was sustained as to a part thereof, and overruled as to the balance. Upon the trial, certain evidence which the plaintiff attempted to introduce was excluded by the court, and leave was granted a second time to amend the complaint, upon payment of costs. The second amended complaint was substantially the same as the original.

The defendant answered, alleging that he was the owner of the right of way for a water-ditch through which he conducts water for irrigating purposes on lots 25 and 17 hereinafter described; that the land through which said ditch is constructed, until it reaches lot 25, is owned by plaintiff, and is included in the description of the land described in the complaint. Defendant further alleges that he is the owner of two-thirds of the water that flows out of Spring brook into the Santa Ana river, and which is conducted through the ditch aforesaid to and upon lots 27 and 17 for irrigating them, and that said water is necessary for that purpose. For further and separate answer, the defendant alleges that the Rubidoux rancho, in San Bernardino county, California, was at one time owned by Louis Rubidoux, Sr., who had sold, granted, and conveyed to different purchasers several separate tracts of said rancho, as many as 20, containing in the aggregate more than 1,000 acres; that the description in each deed was exceedingly vague and indefinite; that the plaintiff, in 1876, bought of the said Rubidoux such interests that he became owner in common with defendant and another of all that portion of said rancho not sold in severalty by the original owner. It was then agreed between plaintiff and all these persons who had the deeds of such vague and indefinite descriptions that plaintiff should survey and plat and mark by lots the tracts of land so described, and then execute and deliver to each person a quitclaim deed of his land. The agreement was entered into to make certain and definite each owner's tract. Plaintiff made the survey and plat which is known as "Miller & Newman's Survey;" that lot 25 was of the portion allotted to the defendant; that at the time said partition was made it was understood and agreed between plaintiff and defendant that the latter should have the water out of Spring brook and Santa Ana river to irrigate lot 25; that in May, 1877, the defendant, with the knowledge and consent of the plaintiff, proceeded to construct the ditch, and diverted the water from Spring brook on plaintiff's land into the said ditch, whereby it was conducted to lot 25; that in October, 1878, defendant bought what is known as the "Baldwin Tract," described as lot 17 of the new survey, and the ditch was then extended through lot 25 to lot 17, and the water was there used with plaintiff's knowledge and consent for irrigating purposes; that in July, 1879, the

plaintiff quitclaimed to said defendant the lot 17 by that description, and that he now holds under said deed; that in March, 1877, the plaintiff conveyed to defendant lot 25 by quitclaim, but has never conveyed to him the right of way for the ditch.

The action was tried before the court without a jury. The defendant was the only witness who testified that there was any agreement, understanding, or intention on the part of the plaintiff that the right to construct the irrigating ditch should pass with the conveyance of the land; while, on the other hand, both the president and ex-president of the corporation plaintiff testified that, in all their conversations with the defendant in regard to the resurvey, platting, and partition of the land, there was never anything said that could lead the defendant to suppose they meant to give him the right to construct the ditch across the land of plaintiff, and that, as a matter of fact, no such thing was ever thought of or intended, and that at the time of making the deeds plaintiff was ignorant of the existence of the ditch.

Among other findings of fact, the court found—

"(14) That while the Rubidoux *rancho* was owned by Louis Rubidoux, Sr., he had sold, granted, and conveyed to different persons and purchasers several separate tracts of said *rancho*,—as many as twenty, containing in the aggregate more than one thousand acres; that the description in each and every grant to the different purchasers aforesaid was exceedingly vague and indefinite; that plaintiff, in 1876, bought of the Rubidoux *rancho* such interest that it became the owner of thirteen-fourteenths, undivided, of all that portion of said *rancho* not sold in severalty by the original owners. It was then agreed between plaintiff and all other persons who had deeds of such vague and indefinite descriptions that plaintiff would survey and plat and mark by lots the tracts of land so vaguely and indefinitely described, as nearly correct as could be done, and would then execute and deliver to each person a quitclaim deed to his land designated by lots, and that each would accept such quitclaim deed, and hold according to the description therein. This agreement was entered into to make certain and definite each man's tract. Plaintiff did make such survey and plat, which is known as 'Miller & Newman Survey.'

"Afterwards, to-wit, on the twenty-sixth day of October, 1878, the defendant bought of the administrator of the estate of William Baldwin, deceased, a tract of land on said Rubidoux *rancho*, known as the 'Baldwin Tract,' which was one of those tracts above referred to with a vague and indefinite description. That upon such purchase defendant immediately took possession of said Baldwin tract, with the knowledge and consent of plaintiff, and from that time to this has cultivated and improved it. On the Miller & Newman survey said Baldwin tract is known as lot 17; it lies below and immediately adjoining lot 25 aforesaid."

"(18) That such quitclaim deed was executed by plaintiff to defendant in pursuance of the understanding hereinbefore mentioned, and not otherwise."

Judgment was rendered for plaintiff, and the defendant appealed. The defendant having died since the appeal was taken, it is prosecuted by his executrix.

Curtis & Otis and *H. C. Rolfe*, for appellant. *Byron Waters*, for respondent.

FOOTE, C. The second amended complaint filed herein shows that the action was instituted under section 738 of the Code of Civil Procedure. The plaintiff at a certain stage in the trial, which was in progress under the first amended complaint, seems to have abandoned the effort to prove certain issues involved in the pleadings, and to have obtained leave of the court (upon conditions as to costs, etc.) to file the second amended complaint, against the objection of

the defendant. The effect of this was that the latter pleading was framed upon the theory of the original complaint filed in the action, and the cause was tried upon that basis. Judgment was rendered for the plaintiff and from that, and an order denying a new trial, the defendant prosecutes this appeal.

The latter, who is now the executrix of the last will of Cornelius Jensen, who died since this appeal was taken, alleges in support of her contention that the court erred in allowing the second amended complaint to be filed; that certain of the findings were not supported by the evidence, and were improperly made.

The gist of the action as stated in the original complaint was the same as that contained in the complaint upon which the trial was had. The amended complaint was only permitted to be filed upon terms imposed by the court, with which the plaintiff complied, and we see nothing in the action taken in the premises, under the circumstances, which worked any hardship or surprise upon the defendant. Therefore, no error was therein committed. Code Civil Proc. §§ 473-475; Hayne, New Tr. §§ 53-56; *Bank v. Stover*, 60 Cal. 387.

The appellant, in support of her second point, claims that the quitclaim deed of the plaintiff to her decedent, Cornelius Jensen, dated July 1, 1879, carried with it, as a servitude imposed upon the land thereby conveyed, the right to maintain a certain water-ditch thereon, and use for irrigation the waters running therein; and that the evidence does not sustain the fourteenth and eighteenth findings of the fact; further arguing that those findings were unauthorized, as outside of the issues made by the pleadings. There is nothing in the language of the deed itself which conveys any such right as is thus claimed, and the evidence is conflicting as to whether or not, at the time that deed was executed and delivered, any water-ditch existed as an easement on the land, which had been "obviously and permanently used by the person" (in this case the person being the plaintiff here) "whose estate" was "transferred for the benefit thereof, at the time when the transfer was agreed upon or completed." Civil Code, § 1104. The evidence for the plaintiff negated the claim that Jensen, the deceased, ever constructed the ditch on its land, or appropriated its water with its consent. On the contrary, it declares that, as soon as it knew of his acts in the premises, it protested against them, and held him as a trespasser. As a consequence of this conflict in the evidence as to the existence of the water-ditch as an easement imposed as a servitude on the land quitclaimed to the defendant by the plaintiff, we cannot say that the court was not justified in making the findings to which the defendant objected, notwithstanding her contention that the evidence showed such an easement as would have impliedly passed under the quitclaim deed. Parol testimony given at the trial supports the findings objected to. The facts which the court recites therein were alleged to be true in the answer. The fourteenth finding contains almost the exact language of that pleading. The eighteenth, referring to the "understanding as hereinbefore mentioned," that is, as set out in the fourteenth finding, says that the quitclaim deed was "executed" in accordance therewith, and "not otherwise." It follows necessarily, then, that the defendant ought not to be heard to complain of those findings, because, as we have seen, the facts which they affirm to have existed were asserted in the answer; and, if the court assented to the defendant's allegations of facts, on which findings were thus invited, we cannot see how it can be said that tribunal committed prejudicial error.

The record discloses nothing which would warrant a reversal of the judgment or order, and they should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(73 Cal. 555)

In re Estate of FREUD, Deceased. (No. 9,922.)

(Supreme Court of California. October 7, 1887.)

WILL—ANNULLING PROBATE FOR INVALIDITY—FORM OF JUDGMENT.

Code Civil Proc. Cal. §§ 1330, 1331, provides that, if a will is found to be invalid, the probate must be annulled and revoked, and the powers of the executor cease. In a will contest, in which the jury found the will to be void for want of testamentary capacity, undue influence, fraud, and menace, judgment was rendered annulling and revoking the will as to contestant, and adjudging the contestant not bound by the will, and that she take the same share as if decedent had died intestate. *Held*, that such judgment was void, and could not be reviewed on appeal, although, by stipulation, no exception was taken to its form.

Department 1. Appeal from superior court, city and county of San Francisco; T. H. RIORDAN, Judge.

Matt. I. Sullivan, for contestant. *Cowdery & McCutchen*, for proponent.

TEMPLE, J. This is a contest as to the probate of a will, commenced after the will had been admitted to probate, but within one year. The contest covered all the grounds expressly defined in the Code as grounds of contest. It was tried before a jury, who found for the contestant: (1) That Morris Freud, at the time of the execution of the proposed will, was not of sound and disposing mind; (2) that he was induced to sign the proposed will by means of undue influence exercised against contestant by the proponents of the will; (3) that the proposed will was procured to be signed by means of fraud or fraudulent misrepresentations, practiced upon him by proponents; and (4) that the will was signed while acting under menace by proponents.

The trial was on September 8th. November 2d following, this stipulation was filed:

"STIPULATION RESPECTING ENTRY OF JUDGMENT AND JUDGMENT ROLL.

[Title of court and cause.]

"It is stipulated that the judgment or order setting aside the last will of the said deceased as to said contestant, Sophia Alexander, may be entered as of November 17, 1884, and proponents' bill of exceptions may be served within ten days thereafter, notwithstanding the said order or judgment may not have been actually entered. It is further stipulated that the judgment roll herein shall consist of the last will of deceased, the order admitting it to probate, the amended grounds of opposition of Mrs. Alexander, proponents' answer, a copy of the verdict of the jury and judgment, and the stipulation as to form of judgment and this stipulation.

"Dated November 2, 1884.

"MATT. I. SULLIVAN, Attorney for Contestant.

"COWDERY & MCCUTCHEN, Attorneys for Proponents."

(Indorsed:) "Filed Nov. 2, 1884."

Afterwards the following stipulation was filed.

"STIPULATION AS TO JUDGMENT.

[Title of court and cause.]

"It is hereby stipulated that the proponents of the will of said Morris Freud, deceased, will take no exception on motion for new trial, on appeal, or otherwise, to the form of the judgment herein in favor of contestant, Sophia Alexander, nor because the said judgment sets aside the proposed will and the probate thereof, only as to the said contestant.

"November 17, 1884.

"COWDERY & MCCUTCHEN, Attorneys for Proponents."

(Indorsed:) "Filed November 17, 1884."

On the same day judgment was entered, by which it was adjudged that the probate of the will be annulled "as to contestant, Sophia Alexander, and that probate of said will be, and the same is, hereby annulled and revoked to the extent that said contestant, Sophia Alexander, is not bound by said will, and shall take, upon distribution of the estate of said deceased, the same share as she would have taken if the said Morris Freud had died intestate."

There can be no question as to the character of the judgment which the statute directs to be entered on such a verdict. The probate is annulled and revoked, and the powers of the executor cease. Sections 1330, 1331, Code Civil Proc. No objection is raised here to the judgment, but the record shows that it is void, and a review of it upon an appeal would be a vain thing.

The cause is remanded, with directions to vacate the unauthorized judgment, and render that required by law.

We concur: MCKINSTRY, J.; PATERSON, J.

(73 Cal. 558)

In re Estate of CUNNINGHAM, Deceased. (No. 12,205.)

(*Supreme Court of California.* October 7, 1887.)

EXECUTORS AND ADMINISTRATORS—SALE OF LAND—PUBLICATION OF NOTICE.

Under Code Civil Proc. Cal. § 1547, directing a notice of sale of the property of a decedent to be "published in a newspaper for three weeks successively;" and section 1705, providing that, when any publication is ordered, the judge or court may order a publication for a less number of times than each issue of the paper,—a sale of decedent's property at the instance of creditors, the notice of which was published in a daily newspaper once a week for three successive weeks, pursuant to an order of the court, is valid.

Department 1. Appeal from superior court, city and county of San Francisco.

R. Percy Wright, for appellant. *Thos. F. Barry, Naphtaly, Freidenrich & Ackerman*, and *M. I. Sullivan*, for respondent.

TEMPLE, J. This is an appeal from an order confirming a sale of real property, and the ground of the appeal is that it appears from the return of sale that the notice of sale was published in a daily newspaper, once a week for three successive weeks. Section 1547, Code Civil Proc., directs that the notice shall be published in a newspaper for three weeks successively. It is contended that the notice must be published in each issue of the paper, and that on those days on which it is not so published it is not published at all, and, therefore, in such case it will not be published for or during three weeks. The phrase "three weeks successively" evidently means the same thing as "three successive weeks." It simply indicates the time during which the sale must be advertised, and not the manner of the publication, as that it shall be published *successively* during the period. The word "successively" refers to weeks, and not to the publications of the paper. It is, therefore, within the provisions of section 1705, Code Civil Proc., a case in which the judge or court may order a publication for a less number of times than each issue of the paper; that is, it is not otherwise expressly provided. In this instance such an order was made by the court.

It is claimed that section 1705 only applies to publications ordered by the court; but this is not the language of the Code. "When any publication is ordered" may as well be held to include all notices ordered by the statute. Indeed, if it is not so read, it will be found to apply to very few publications required.

And no reason is apparent why the dispensing power should exist as to the publications directed by the court, and not to those ordered in probate proceedings by the statute. Besides, all the probate proceedings are under the direction of the probate judge. The word "ordered" in the section was prob-

ably intended to have the same meaning as the word "required." The order of sale having been made, the administrator was thereby required to make the publication. The question is not whether the court can direct in what paper it shall be advertised, but whether, under section 1705, the court can dispense with the publication in each issue of the paper. In this case it is suggested that the appellant, as administrator, was contumacious, and refused to proceed with the sale, which, at the instance of creditors, had been ordered. To force obedience, an order was made directing the administrator to act, and specifically directing how he should proceed. We think the record discloses no error.

As it appears very plainly that the order must be affirmed on the merits, we have not thought it necessary to determine whether the proper record is before us. Order affirmed.

We concur: MCKINSTY, J.; PATERSON, J.

(15 Or. 98)

STATE *ex rel.* REED v. SMITH and others.

(Supreme Court of Oregon. 1887.)

For majority opinion, see 14 Pac. Rep. 814.

LORD, C. J., (*dissenting*.) The memorandum, it is agreed, establishes the relation of pledgeor and pledgee. The inquiry then presented is twofold, viz.: *First*, whether a pledgee, to whom is assigned a certificate of shares of stock of a corporation as collateral security for a promissory note executed by the pledgeor with an irrevocable power of attorney authorizing such pledgee to transfer such shares to his own name on the books of the company, may, in pursuance of such power or contract, have such transfer made, and a new certificate issued to himself before default and sale; and, *second*, whether, after such transfer and issuance of a new certificate, but while such debt or promissory note remains unpaid, the pledgee may, as an incident of such pledge or contract, vote such shares of stock.

Upon the first point, the case of *Rich v. Boyce*, 39 Md. 314, is decisive. The facts were these: Boyce loaned Rich a sum of money for which he took his note, and also a certificate of stock as a pledge to secure the loan. The face of the certificate declared that it "was transferable only in person or by attorney, on the books of the corporation, on return of this certificate." On it was indorsed a power of attorney executed by Rich, authorizing Boyce to have the stock transferred to his own name on the books of the corporation. Boyce two days after the loan, and before the maturity of the note, surrendered the certificate to the company, and a new certificate was issued to him in his own name. The note falling due, Boyce sued Rich on it. The court say: "The sixth exception was taken to the ruling of the court below, refusing to permit the appellant to offer evidence of the market value of the pledged stock at the time it was pledged. This proof was offered on the theory that the appellant, by delivering up to the railroad company the certificate of stock No. 727, and taking a certificate of the same number of shares of the same stock in his own name, had thereby converted the certificate No. 727, and the stock it represented, to his own use. By the power of attorney on the back of the certificate, which is proved to have been executed by the appellant, the appellee was authorized to have the stock transferred to his own name upon the books of the company; and the certificate shows upon its face that this could be done in no other way than by returning the certificate to the company, and having another issued to himself. The evidence offered in this exception was therefore clearly inadmissible. The seventh exception is to the refusal of the court to permit evidence to be offered to show that the appellant had never at any time or in any manner authorized the appellee to

surrender the stock pledged, or to have it reissued to the appellee in his own name. As we have shown in considering the preceding exception that such authority was given by the power of attorney indorsed on the back of the certificate, the proof offered was properly rejected. The eighth exception was taken to the rejection of proof of usage or custom in Baltimore city among brokers that a pledgee has no right to surrender to the company issuing it the stock pledged, and have it reissued in his own name; but that the pledgee must retain the same as pledged until default, and, if no default takes place, to return the identical stock pledged to the pledgee. The contract between the parties expressly conferred authority upon the appellee to have the stock transferred to his own name, and, as this contract is perfectly plain and unambiguous in its language and terms, no evidence of usage or custom was admissible to explain or control it. The ninth exception was taken to the refusal of the court to permit evidence to be given that the appellee has neither made a demand for the payment of the note, nor offered to return the stock he pledged. The appellee was not bound to make any demand for payment of the money due upon the note, the suit itself being all the demand which the law required. Nor was he obliged to tender a return of the pledge. His contract gave him the right to hold the pledge until the note was paid. All that was required of the appellee was to have the stock ready to be returned on the payment of the money to secure which the pledge was given. The evidence offered was therefore properly rejected." And the court further say in respect to certain prayers: "So far from the transfer of stock to the appellee's own name being a wrongful conversion, it was the mere exercise of an undoubted right conferred upon him by the appellant; without such right the pledge would have been doubtful security, as the stock would have been liable to execution or attachment by any creditor of the appellant."

Now, what are the facts in the present case? Seeley assigned and delivered to Reed a certificate of 361 shares of the capital stock of the corporation, as collateral security for the payment of a note of \$50,000 given to him by Seeley, and at the same time executed an irrevocable power of attorney authorizing said Reed to transfer said shares to his own name on the books of the corporation. Before the note became due, Reed caused the stock to be transferred to his name upon the books of the corporation. Manifestly, he had the right to do this, as it was in conformity with the plain terms of the contract, and in pursuance of the right conferred upon him by Seeley. Now, is such transfer to his own name inconsistent with the legal relation of the parties, but necessary to render the pledgee's security available, and to protect it from attachment or execution of the creditors, if any, of Seeley, the pledgee? "The delivery of certificates of stock," says Mr. Colebrooke, "as collateral security, with a power of attorney to transfer them to another person, confers a power coupled with an interest, and gives to any one claiming under an execution of the power a right to demand of the bank a new certificate of stock. The power thus given can only be revoked by payment of the debt for which the stock has been transferred as collateral security." *Coleb. Coll. Secu.* § 272. "Where," said OKEY, J., "as in this case, the pledgee executes an irrevocable power of attorney, authorizing a transfer of such shares on the books of the bank issuing the same, the pledgee has a right to demand such transfer to be made. *Bank v. Bank*, 37 Ohio St. 215. See, also, *Dickinson v. Bank*, 129 Mass. 279; *Gill v. Gas Co.*, L. R. 7 Exch. 332.

Reed, therefore, exercised but an undoubted right conferred on him by Seeley under the plain terms of the contract, when he procured the transfer of the shares to his own name on the books of the corporation. Subsequently, in July, 1886, and while the debt or note still remained unpaid, a meeting of the stockholders was convened, and these shares appeared on the books of the company in Reed's name. Mr. Seeley attempted to vote these shares, but his

vote was rejected. Had Reed a right to vote these shares pledged to him and standing in his name on the books of the company? "A person in whose name the stock of the corporation stands is, as to the corporation, a stockholder, and has the right to vote upon the stock. * * * Nor would this result follow any the less certainly if the shares of stock were received in pledge only to secure the payment of a debt, providing the shares were transferred on the books of the company to the name of the pledgee." BOYNTON, J., in *Bank v. Bank*, 36 Ohio St. 355.

"In the absence of restrictive statutes," says Mr. Colebrooke, "the pledgee of certificates of stock, indorsed and transferred on the books of the company, has a right to vote at its meetings. His name appearing as stockholder upon the records of the corporation, he becomes for all purposes a stockholder. *The right to vote is an incident of the pledge and according to the presumed intentions of the parties.* Where such stock remains in the name of the pledgeor on the books of the company, the right to vote remains with him." Coleb. Coll. Secu. § 283, and notes 2 and 3, in which numerous authorities are cited. Now, Reed had put his name on the books of the corporation by force of the authority conferred on him by the power of attorney executed by Seeley. That power being coupled with an interest, remained irrevocable until the note was paid for which the shares of stock were transferred as collateral security. As Seeley had not paid the note, the power was unrevoked, and the right of Reed to appear upon the books of the corporation as transferee of the shares was intact, and according to the terms of the contract. His name thus appearing on the books of the corporation, Reed became liable to the responsibilities, and entitled to the privileges, of a stockholder, among which is the right to vote. As Seeley had clothed him with the power to assume such duties, responsibilities, and privileges, what right has he to complain, while his note remains unpaid and the power unrevoked? When he shall have relieved himself from his default by the payment of the note, he will then be entitled to a return of his collateral, or, what is the same thing, a transfer of the stock whereby he may again appear upon the records of the corporation as a stockholder, and entitled to enjoy his privileges as such.

(2 Ariz. 305)

TERRITORY *ex rel.* HAWKINS v. WINGFIELD, Chairman, etc.

(*Supreme Court of Arizona.* October 18, 1887.)

1. OFFICE AND OFFICERS—SALARY—PROBATE JUDGE AND SUPERINTENDENT OF SCHOOLS.

By act of legislative assembly of Arizona, approved March 12, 1885, it was provided that the superintendent of schools of Yavapai county should have an annual salary of \$600, payable out of the "School Fund" of the county, and, by another enactment of the same day, that the probate judge of Yavapai county should receive, as full compensation for services as judge of the probate court, *ex officio* county superintendent of schools, and as clerk of said court, the salary of \$2,000, payable out of the "Salary Fund." *Held*, the two salaries being payable out of different funds, that the enactments were positive, and entitled the person holding the offices of probate judge and superintendent of county schools to both salaries.

2. STATUTES—CONSTRUCTION—ACTS PASSED AT SAME TIME.

Statutes passed, approved, and to take effect on the same day, and relating to the same subject-matter, will be assumed to have been enacted at the same time, and are to be construed as one act.

BARNES, J. This is an action for *mandamus*. During the years 1885 and 1886 the relator was the probate judge of the county of Yavapai, in the territory of Arizona, and for said time was the county superintendent of public schools for said county. The defendant is now the duly-qualified chairman of the board of supervisors of said county of Yavapai.

The Thirteenth legislative assembly of the territory of Arizona passed an

act entitled "An act to establish a public school system, and to provide for the maintenance and supervision of public schools in the territory of Arizona," which said act was approved March 12, 1885. Section 31 of said act provides, among other things, that the county superintendent of schools of the county of Yavapai shall have an annual salary of \$600, payable quarterly out of the "School Fund" of said county, by a warrant drawn upon said fund in favor of such county superintendent, *countersigned* by the chairman of the board of supervisors of said county. The said Thirteenth legislative assembly of Arizona also passed on the same day an act entitled "An act to create the office of county assessor, to make the county treasurer *ex officio* county tax collector, and prescribe the salaries and duties of certain county officers of the county of Yavapai." Approved March 12, 1885. Section 13 of said last-mentioned act provides that the probate judge of the county of Yavapai shall receive to his own use as full compensation for all services rendered by him as judge of the probate court, *ex officio* county superintendent of public schools, and as clerk of the probate court, including all services rendered by deputies, the salary of \$2,000, etc. Section 19 of said last-mentioned act provides for the payment of such salary out of a fund created by said act known as the "General Salary Fund," on warrants drawn by the board of supervisors upon such fund. These acts were passed by the same legislature, and were approved on the same day; and at the same time five acts relating to salaries of county officers were considered and passed, viz., one for each of the counties of Cochise, Mohave, Apache, Pima, Graham, and Yavapai. All these acts were approved March 12th, except Cochise and Mohave, which were approved on March 11th. Statutes passed on the same day, and to take effect at the same time, will all be assumed to have been enacted at the same time, and are to be construed as of one act. Such construction should be given, if possible, as shall leave all to stand. If this cannot be done, only so much is to be disregarded as cannot stand. Distinct affirmative propositions should stand as against mere negations or provisos.

In this case, it is enacted that the county superintendent of schools shall have an annual salary of \$600, payable out of the "School Fund." This is a positive, affirmative enactment. It is also enacted that the probate judge shall receive, in full for all services as judge, *ex officio* superintendent of schools, and clerk, etc., a salary of \$2,000, payable out of the "Salary Fund." This is a positive, affirmative enactment. The two salaries are payable out of different funds. If they be construed to mean that the \$2,000 only shall stand, it repeals the former, or, rather, destroys it. The salary of \$600, and the provision providing for it out of this school fund, falls. It is evident that it was intentional for the school fund to provide for the salary for its superintendent of schools. But to limit it to the \$2,000 from the salary fund destroys that intention. There is but one way to construe these acts that both shall stand; that is, to hold that the probate judge shall receive a salary of \$2,000, and the superintendent a salary of \$600, as is provided, but discard the limitation or proviso that the probate judge shall receive, *as full compensation for all services* as judge and superintendent of schools, etc. The acts recognized the fact that, by law, the judge is *ex officio* superintendent of schools; that he holds the offices and performs the duties of both; the compensation and salary is fixed for each, and the fund from which he is to be paid for each service is provided. The officer is entitled to the salary so appropriated, and, though the same person, he is entitled to both salaries. The courts are continually called upon to revise the results of careless and sometimes reckless legislation; to try to make consistent that which is inconsistent; to harmonize that which is full of discord. This they must do as best they can by known rules of construction. *Red Rock v. Henry*, 106 U. S. 596, 1 Sup. Ct. Rep. 434; *United States v. Walker*, 22 How. 299; *Clay Co. v. Savings Soc.*, 104 U. S. 579; *Fussell v. Gregg*, 113 U. S. 550, 5 Sup. Ct. Rep. 631;

Louisiana v. Taylor, 105 U. S. 454; Sedg. Const. St. 198, 209; *Cain v. State*, 20 Tex. 355.

The prayer of the petitioner is granted. Let the writ issue.

WRIGHT, C. J., and PORTER, J., concur.

(2 Ariz. 299)

In re Estate of BALDRIDGE, Deceased.

REILLY v. CLARK.

(*Supreme Court of Arizona*. October 22, 1887.)

1. EXECUTORS AND ADMINISTRATORS—APPOINTMENT AND REMOVAL—POWER OF COURT.

Under Comp. Laws Ariz. 1877, c. 29, § 100, providing that when the rights of those interested in the estate, in the opinion of the court, require it, the court may revoke letters testamentary or of administration, and appoint an administrator, the probate court has power, on the application of a non-resident heir, to remove an administrator, and appoint another in his place.

2. SAME—APPEAL—FINDINGS OF FACT.

A finding of fact made by the probate court, although the proof is technically defective, will not be disturbed on appeal if it appear that substantial justice has been done.

3. SAME—DISCRETION OF PROBATE COURT.

The action of the probate court in removing an administrator, in the absence of a plain abuse of its discretion, will not be disturbed on appeal.

Appeal from district court, Cochise county; BARNES, Judge.

Goodrich & Smith and *Thomas Mitchell*, for appellants. *George C. Berry*, for respondent.

WRIGHT, C. J. This case was originally appealed from the probate court of Cochise county to the district court therein, and from the latter court it has been brought here. James Reilly, the appellant, had been the administrator of the estate of W. J. Baldridge, deceased, for several years; but on the twenty-second day of March, 1886, the judge of said probate court, after citation as the law directs, removed the said Reilly, upon the petition of Henry T. Baldridge, father and heir of the deceased, and appointed C. S. Clark, the respondent, administrator of said estate. From this order the appellant appeals; and the main point upon which he relies for a reversal of the judgments of the courts below is that the said probate court had no power to grant the prayer of the petition.

The legislature has conferred upon probate judges a large measure of discretionary power in appointing and removing administrators, guardians, etc. Is it not unreasonable to suppose that the legislature would impose duties so delicate, responsible, and even sacred, without at the same time conferring plenary power to discharge those duties in such manner as to subserve the best interests of the estates?

Counsel for the appellant refer us to the opinion of Judge SAWYER in *Re Estate of Carr*, 25 Cal. 586; but we think the cases are not quite similar. There, Bolton, a brother-in-law of the deceased, had been appointed to administer, but failed to qualify. Mark Carr, a brother of the deceased, then applied, but the court, in the exercise of its discretion, denied his application. Then Bennett & Addison, strangers, filed their petition asking that letters issue to them; accompanying which were written requests from Bolton and wife, and Mark Carr, that said petition be granted. As the judge of probate had already judicially determined that neither Bolton nor Carr was competent to administer,—the former because he was unable to give bond; the latter for want of integrity,—the judge also denied this petition. Was this a stretch of judicial discretion? Judge SAWYER thought not, and sustained the action of the probate judge. Will it be pretended, however, that Judge SAWYER, in this decision, means to say that where a party, otherwise entitled under sec-

tion 67 to administer, is disqualified by reason of non-residence, and a stranger has received letters of administration, this party has no right to petition for, or the probate judge has no right to order, the removal of the distasteful administrator? Is it not the logic of such a position that in such case there would be no remedy? The party entitled cannot ask to have himself appointed, by reason of non-residence, and the court has not the power to revoke and appoint anybody else. What is to be done? We think, in such case, the probate judge, under the California statute, could either grant or refuse a petition, and his action in either case would be entirely legitimate,—clearly within the sphere of his legal functions. Perhaps one reason that influenced the probate judge in the exercise of this discretionary power was that the Carr estate was already in the hands of the public administrator, an officer sustaining most intimate relations with, and under the absolute control of, the probate judge. Besides, all the parties were residents of the state of California.

Here, Henry T. Baldridge, the father, was and is a non-resident, being a citizen of the state of Tennessee. At the time letters of administration were granted upon his son's estate he was not present, and could not have known whether appellant was a proper person to administer or not. It seems, however, that after the lapse of nearly four years he, and the probate judge as well, concluded that for the good of the estate a change ought to be made. A change was made. The administrator objected on the ground, substantially, that as, by reason of non-residence, the father could not administer, he had no right to ask, and the probate judge had no power to grant, administration to anybody else.

The great purpose for which courts of probate were established was to provide a legal channel through which estates should be transmitted from ancestors to heirs. This was and is the primary object; of course, the payment and collection of debts, etc., are incidental thereto. Where there are no debts the heir is entitled to a speedy admission to his inheritances. In this case there were no debts; and yet, after the lapse of nearly four years, the administrator is reluctant to surrender his charge. Why? True, he impugns the motives of respondent and his attorney; but, if the imputation were true, would their improper motives justify his wrongful action? Is that really a matter about which he has a right in this behalf to complain? If Baldridge has made a bad selection in securing the respondent to represent him in an estate that is now rightfully his by inheritance, should it concern the appellant? No tie of consanguinity existed between him and the intestate. Now, it is the policy of the law to prevent the wasting of estates in litigation. This may have been an additional reason prompting the action of the probate judge. It seems that appellant during his four years of administration spent \$1,300, and incurred additional liabilities to the extent of \$900, and had only collected \$850, and at the same time had become involved in five, and may be six, lawsuits.

Appellant's counsel contend that these proceedings were had under section 67, c. 29, Comp. Laws 1877, and that under that section the probate court could not remove appellant and appoint respondent. But it is a familiar rule of construction that the whole act must be taken together, and section 67 is not the only section in the act conferring power of removal upon the probate judge. Our view of that section is that it simply confers a right upon the surviving husband or wife, child, father, etc., to obtain the revocation of letters granted to any one else, and administer themselves; provided they are resident within the jurisdiction, and are otherwise qualified; and that it leaves the determination of these preliminary questions entirely with the court. Section 100 of the same act, however, provides, after declaring that any executor or administrator may resign his trusts after settling up his accounts, and delivering all the estate to the person appointed by the court, that "if by rea-

son of any delays in such settlement and delivering up of the estate, or for any other cause, the circumstances of the estate, or the rights of those interested in the estate, shall, in the opinion of the court, require it, the court may, before such settlement of the accounts and the delivering up of the estate shall have been completed, *revoke the powers* or letters testamentary or of administration of such executor or administrator, and appoint in his stead an administrator," etc. Without the aid of this section, the probate judge might in certain cases have been unable to afford adequate remedy, against a wasteful administrator, to the party entitled to the estate; as in this case, where the father and heir to the estate, by reason of non-residence, could not administer. We think the probate judge had ample power, under the circumstances, to remove the appellant. Appellate courts will not interfere with a probate judge in the exercise of his discretion in the removal of an administrator, unless he has clearly abused that discretion. See *Deek v. Gherke*, 6 Cal. 667.

Another point relied on is that there was no legal proof that the petitioner was the father of the intestate. Substantially, we think there was. True, there was a technical defect in the proof. The affidavits were taken before a justice of the peace in the state of Tennessee. Section 427, c. 48, Comp. Laws, 1877, directs that affidavits taken in another state or territory, to be used in this territory, shall be taken before a commissioner appointed by the governor of this territory, or before a judge, notary public, or clerk of a court, having a seal. The judge of the county court of Sumner county, Tennessee, certifies to the characters of the affiants for veracity, etc., and the clerk of said county court certifies, under seal of that court, to the official character of that judge, and to the genuineness of the justice's signature, etc. Section 435 of said chapter of the Compiled Laws authorizes any justice of the peace in another state or territory, selected by the officer granting the commission, to take depositions to be read in evidence in this territory. Whether there was a substantial compliance with our law or not, in taking the affidavits, ought that to affect the real question here? The proof seems to have been sufficient to convince the mind of the probate judge. He found the fact, and we are not disposed to disturb that finding. Whether Henry T. Baldridge was the father of W. J. Baldridge, the deceased, or not, was certainly a question of fact, which it was proper for the probate judge to determine. We doubt not, substantial justice has been accomplished, and that the facts are as the judge found them to exist. We cannot see what right the appellant has to complain.

There was another question raised by counsel for the respondent in his brief, and which also appears in appellant's answer, viz., that said administrator, Reilly, was not a proper party to administer on said estate, by reason of his having a partnership interest in a considerable portion thereof. Section 52, p. 262, of said Compiled Laws of 1877, provides that where there is any partnership between the deceased and any other person at the time of the decease, that person shall in no case be appointed administrator. Reilly admits, in his answer, that by an agreement with the intestate, on account of the latter's inability to pay costs, lawyers' fees, etc., he had a half interest in certain lawsuits which he was to prosecute, and did prosecute. This may also have had something to do with his removal. At all events, does it not make it doubtful whether or not appellant was the proper person to administer upon said estate?

We think the judgment should be affirmed; and it is so ordered.

BARNES and PORTER, JJ., concur.

(5 Utah, 315)

SUITZGABLE v. WORSELDINE and another.

(Supreme Court of Utah. October 17, 1887.)

BOUNDARIES—MISTAKE—LIMITATION OF ACTION—ESTOPPEL.

The owner of a lot of ground inclosed it upon what he supposed to be its boundaries, and then divided it into two parcels, and, reserving an alley-way running east and west through the center of the lot, sold the parcels to different grantees, who went into possession. The north and south boundaries of the original lot as established by the owner were by a subsequent survey found to be on both sides a short distance south of the true line. *Held*, though it were shown that the adjoining proprietors, on the north and south, had acquiesced in the boundaries as first established for a time covered by the statute of limitations, that fact could not determine the boundary lines of the owners adjoining the alley, nor estop them, as between themselves, from asserting their true lines. *BOREMAN, J.*, dissents.

Appeal from district court, Second district; *ZANE*, Judge.

Hall & Marshall, for appellants. *W. H. Dickson*, for respondent.

HENDERSON, J. The plaintiff complains that the defendants have encroached upon an alley-way running east and west through the center of the east half of the south half of lot 3, in block 39, of plat "A," in Salt Lake City, in which he has an interest. He claims damages, and asks to have the encroachment abated as a nuisance. The defendants filed an answer and cross-complaint denying their encroachment, and claiming that the plaintiff has encroached upon the alley.

The facts are that in May, 1868, one Robert A. Russell was the owner and in possession of the lands above described, and then inclosed the same by inclosures upon what he supposed to be the boundaries thereof. On the twenty-second of September, 1874, he conveyed the north half thereof to one Robert W. Russell, reserving to himself and his grantees the right to the perpetual use of an alley-way five feet wide along the south side of the land so conveyed; and also conveyed to said Robert W. Russell and his grantees the use of an alley-way five feet wide along the north side of that retained by him,—thereby constituting an alley-way ten feet wide along the center of said tract of land, to be used and enjoyed by the parties jointly, and their grantees, as an alley-way perpetually. Said Robert W. Russell conveyed said north half of said land, and all his rights in said alley-way, to the defendants, September 27, 1876. The said Robert A. Russell conveyed the south half of said land, and all his rights in said alley-way, to the plaintiff, February 16, 1877. The parties respectively entered into the possession of the lands so conveyed to them at the time of the conveyances, and so remained up to the commencement of this suit; the north and south boundaries remaining as established by Robert A. Russell; and such boundaries were acquiesced in by the adjoining proprietors for a period of 15 years from the time they were established by said Robert A. Russell, and before the commencement of this suit. Upon an accurate survey of the premises, it was found that the inclosures made by Robert A. Russell on the north and south sides of the land first described were not on the true line, but were a short distance south thereof on both sides. The plaintiff claims that the boundary line between him and the defendants is on the true line as shown by the plat, and that the alley-way is five feet each side of it, and before the commencement of this action (but when is not shown) built his fence accordingly. The defendants claim that the line is in the center of the land as inclosed as aforesaid, and have built their fence accordingly. This is the real dispute between the parties. The district court rendered judgment in favor of the plaintiff, and the defendants appeal.

The defendants contend that the land had been occupied as inclosed for 15 years prior to the commencement of this action; and their neighboring proprietors on each side having acquiesced all that time, that being the statutory period of limitations, the plaintiff is estopped from insisting upon the true

line according to the plat as the boundary line between them; and they invoke the principle that boundary lines long acquiesced in conclusively establish that they are the true boundaries, and estop adjoining proprietors from disputing them. We recognize the principle as established by the cases cited by counsel for appellants. *Baldwin v. Brown*, 16 N. Y. —, 359; *Reed v. Farr*, 35 N. Y. 113. But we do not think this principle applicable to this case. It is not claimed by the appellants that the boundary line between them and the respondent has been acquiesced in, or that the boundaries of the entire tract as first described became established by acquiescence before it was sold in parcels by Robert A. Russell, and the parts now held by the parties thereby severed, or that the line was established between them according to appellants' claim, and acquiesced in by the respondent for a time, and the appellants thereby misled into permitting the owner on their north boundary to acquire by prescription a right as against them. In either of these conditions a case might be presented for equitable interference. When Robert A. Russell conveyed the north half of the land, he ceased to be interested in the north boundary of that piece of land so sold. To say that boundary lines between adjoining owners are to be determined and located with reference to the establishment of their outer boundaries, respectively, and in which they are not both interested, would be manifolding the discrepancies between actual boundaries and those established by user and estoppel, beyond what was ever intended by the rule invoked by appellants. Again, while in this action these parties may be able to show a case of acquiescence against their adjoining proprietors, respectively, on their outer boundaries, so as to estop them, yet it is not conclusive upon such adjoining proprietors; and hereafter, in a contention to which they are parties, they may be able to establish a different state of facts, and show that they are not estopped. In such case, according to the contention of the appellants, the boundary line in question would have to be again revised.

This being our view, the other questions in the case are not important. The judgment of the district court should be affirmed.

ZANE, C. J., concurs. BOREMAN, J., dissents.

(7 Mont. 21)

TERRITORY v. MURRAY and another.

(*Supreme Court of Montana*. October 15, 1887.)

1. CONTEMPT—INSINUATING THAT SUPREME COURT WOULD BE INFLUENCED.

Defendant was a party to certain actions in the supreme court, known as the *Smoke-House Cases*, all of which were of a similar character, and part of which had been decided in his favor. While a part of them were pending before the court, defendant caused to be published, in a newspaper published in the city where the court was sitting, a dispatch falsely stating that persons named had made a wager that, owing to the influence of adverse claimants, the supreme court would reverse its former decision in the *Smoke-House Cases*. Held, a contempt at common law.

2. SAME—WAGER ON DECISION.

In proceedings to punish defendants for contempt in wagering upon a decision of the court, it appeared that while one of them supposed he was making an actual wager for one J., the money obtained by him from J., with which to make the wager, was furnished by the other defendant and party to the wager, who had agreed that J. should not lose the money. Held, that there was no wager, and therefore no contempt.

3. SAME—CONTEMPTUOUS TELEGRAM.

The provision of Code Civil Proc. Mont. § 566, subd. 1, declaring "disorderly, contemptuous, or insolent behavior towards the judge while holding court, tending to interrupt the due course of a trial, or other judicial proceeding," to be a contempt, embraces the case of one sending a contemptuous telegram for publication in a newspaper published in the city where the court is sitting.

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4. SAME—INTENT NOT CONCLUSIVE.

Whether or not a publication is contemptuous is to be determined from a consideration of the language used, and the defendant's denial under oath of any improper or disrespectful intent is not conclusive.

5. SAME—JURISDICTION—APPLICATION OF UNITED STATES LAW.

The act of congress of March 2, 1831, (Rev. St. U. S. § 724,) defining the jurisdiction of the United States courts in cases of contempt, is not made applicable to the supreme court of Montana by the provision of the organic act, that "the constitution and laws of the United States, which are not locally inapplicable, shall have the same force and effect within the said territory of Montana as elsewhere within the United States."

6. SAME.

The supreme court of Montana is not a United States court, within the meaning of Rev. St. U. S. § 724, defining the power of the United States courts in cases of contempt.

Sanders, Cullen & Sanders, for the court. *O'Toole & Wallace*, for defendant James W. Murray.

McCONNELL, C. J. This is a case of contempt arising in this court. The subject-matter of the contempt is stated in the warrant of arrest of the defendants, as follows, to-wit: "Whereas, at a former term of this court, certain causes depending therein and known as the *Smoke-House Cases*, involving title to real property in the city of Butte, Montana territory, have been determined; and whereas, at the present term of said court, the tenth and eleventh days of January, 1887, certain other cases involving title to certain real estate in said city of Butte, based substantially on the same claims as the said former cases, were depending and standing for decision, and were also known as the *Smoke-House Cases*; and whereas, it further appears that one James A. Murray of said Butte city, January 10, 1887, did make a certain wager on the decision of this court of said *Smoke-House Cases* then depending, with one James W. Murphy, and with him did bet that the said supreme court would not reverse their former decision in said cases; and whereas, it further appears that the said James A. Murray did publish and utter, and cause to be published and uttered, in a newspaper of general circulation, to-wit, the *Helena Independent*, on the eleventh day of January, A. D. 1887, at Helena, Montana, the following dispatch, to-wit: 'Cannon and Murphy, real estate agents, to-day made a wager of \$500 that, owing to the influence of some surface claimants on the *Smoke-House lode*, the supreme court would reverse their former decision in the *Smoke-House Case*.'"

There are two grounds of contempt set out in said warrant. One is the making of a wager or bet upon the decision of the suit then pending before this court; and the other is the publication of the telegram by the defendant Murray.

2. From the agreed statement of facts filed by counsel, and the affidavits and other testimony heard in the cause, the following facts appear, to-wit: That, as set forth in the warrant of arrest, there were certain cases pending in this court at the time of the publication of the telegram, and that there had been certain other cases heard and disposed of at a former term of this court, of substantially the same kind, all known as the *Smoke-House Cases*, 6 Mont. 397, 12 Pac. Rep. 858; that the defendant Murray was the plaintiff in said cases, and as to those disposed of he had been successful; that he claimed the lots in controversy under a mining right, and defendants in said suits were claimants to the surface of the same lots; that he had gained his suits as to some of the claimants, but as to others they were pending for trial before the court then in session; that, in a conversation between the defendants in this proceeding, Murphy told Murray that he thought the supreme court would reverse its former decision; that there would be more influence and new points in the case, and that he had learned this from the attorneys of the claimants; he further said that he could get money to bet on the case.

And it also further appeared that Murray agreed to take the bet, and that he gave one Jolly \$250 to give to Murphy with which to make the bet, and, after Murphy had received the money thus furnished by Murray himself, they made the wager, and placed the money in the hands of one Lowery, as stakeholder. It appears that Murray was the owner of all the money, and, in point of fact, Murphy had no interest whatever in the wager, for it was Murray betting with himself, through a secret understanding with Jolly. Murphy thought he was making a genuine wager for Jolly, and is chargeable with whatever moral delinquency that may attach to such intent. But as Murray had agreed with Jolly that he should not lose the money, and had furnished it himself, there was no wager, and hence Murphy is not guilty of making any wager as charged in the warrant, and must be discharged. So, likewise, must Murray be discharged, so far as this branch of the case is concerned; and we need not pass upon the question whether the making a wager upon the decision of a suit pending before a court is a contempt of court.

3. It further appeared that Murray did prepare, and cause to be published, the telegram as set out in the warrant. This presents a much graver question for our consideration. The defendant disclaims in his affidavit any intention to treat the court with the slightest contempt in publishing said telegram; but the court is not bound by such disclaimer, but may inquire into the truth of the matter. "The meaning and intent of the defendant in publishing the dispatch must be determined by a fair interpretation of the language used." "The construction and tendency of the publication, as bearing upon its character as a contempt, are matters of law for the court." *Henry v. Ellis*, 49 Iowa, 205; *People v. Wilson*, 64 Ill. 195; and also numerous authorities cited in the latter case.

The defendant says in his affidavit that in making the publication in the Independent he "intended no disrespect or improper conduct towards the court; but, on the contrary, was prompted solely to so publish the same as an item of news, and apprise the court of what had transpired, that it might act in the premises as it saw proper." He further says that Murphy and Cannon were copartners in the real-estate business, and on that account interested in having the surface claimants succeed in said cases; that Murphy stated to him in substance and effect the facts published in the Independent, and he was thus informed of the wager at the time he sent the dispatch. On the hearing of this cause, the defendant voluntarily put himself upon the witness stand, and, among other things, swore that his object in sending that telegram was "to have the thing generally discussed to have a chance to make wagers, as he was satisfied the decision would not be reversed." He further discloses the fact that Cannon and Murphy had made no wager at all, but that he had procured a simulated one to be made.

It is seldom we find as many contradictions and as much falsehood in so short a record as the case before us contains. The dispatch itself is false. Cannon and Murphy had made no wager. Murphy had not informed him of the wager; he knew all about it himself. He says his *sole* purpose was to publish it as an item of news, and apprise the court of what had transpired, that it might act in the premises as it saw proper. Then, again, he says his purpose was to have the matter generally discussed, that he might have a chance to make wagers on the decision. We do not believe that any of the reasons given is the true one; but we will consider what the motive was. In the conversation he had with Murphy, the latter told him that the counsel for the claimants in the *Smoke-House Cases* had developed some new points that he believed would cause the court to decide his suits then pending before it against him. In this is to be found the real motive that moved the defendant to send the telegram. In the words "that owing to the influence of some surface claimants on the Smoke-House lode the supreme court would reverse its former decision" lurks the insinuation that undue influence was being brought

to bear upon the court by his adversaries in said suits. He expected in this way to make the public believe that Cannon & Murphy, a firm of real-estate dealers in the city of Butte, would not make a wager of \$500 that some of the "surface claimants" would so influence the court that it would reverse its former decision, without having strong grounds for believing it was true. He intended, by sending the telegram to the Independent, and publishing it in the city where the court was then sitting, to reach the court. He says, himself, in his affidavit, that his purpose was to apprise the court of what had transpired, that it might act in the premises as it saw proper. He fabricated a falsehood, attributed it to other parties, and published it, to apprise the court of what had transpired,—to influence its decision in the suits then pending before it in which he was a party. He hoped by informing the judges that it was believed that the defendants to the suits in which he was plaintiff were bringing influence to bear upon them so that they would reverse their former decision, to make them feel that they could not afford to do so, lest it would be said of them by the public that they had been induced by corruption to make such decision. His purpose to reach each one of the judges, and to influence him to stand firm in his former holding, is as obvious as if he had sent the dispatch to each of them personally, instead of publishing it in a newspaper, where he knew they were bound to read it. If the telegram had been true, he might have been excused upon the ground of an honest motive. But what could have induced him to manufacture a falsehood, and send it, but a corrupt motive to influence the court? Must a court that sits to try causes be insulted by the very parties to the suits which they are trying, by a covert and cowardly insinuation of official corruption, and have no power to punish such parties for contempt? To deprive them of such power is to take away from them the right of judicial self-defense. There can be no doubt but that his conduct is a contempt of court at common law.

Mr. Bishop, in his work on Criminal Law, vol. 2, § 245, says: "And according to the general doctrine, any publication, whether by parties or strangers, relating to a cause in court, if it has a tendency to prejudice the public respecting its merits, and to corrupt the administration of justice * * * may be visited as a contempt." In 2 Hawk. P. C. 220, contempts are classified as contempts in the face of the court, and contemptuous words or writings concerning the court. Blackstone says contempts may be committed "by speaking or writing contemptuously of the court or judges acting in their judicial capacity, * * * and by anything, in short, that demonstrates a gross want of that regard and respect which, when once courts of justice are deprived of, their authority is entirely lost among the people." 4 Cooley, Bl. Comm. 285. The supreme court of Illinois has defined contempts to be "direct," such as are offered in the presence of the court while sitting judicially, or "constructive," such, though not in its presence, as tend by their operation to obstruct and embarrass or prevent the due administration of justice." *Stuart v. People*, 3 Scam. 395. And in this case the court held that such acts would be considered as done in its presence. Courts are organized for the administration of justice, and the whole doctrine of contempt grows out of the necessity of removing every obstruction in its way, by visiting summary punishment upon those who undertake to defeat it. The right to punish for contempt is inherent in all courts of justice. It is a part of their very life, and a necessary incident to the exercise of judicial power. *U. S. v. New Bedford Bridge*, 1 Woodb. & M. 407; *State v. Johnson*, 1 Brev. 155; *Yates v. Lansing*, 9 Johns. 416; *Casat v. State*, 40 Ark. 514; *U. S. v. Hudson*, 7 Cranch, 32; *State v. Doty*, 90 Amer. Dec. 674.

In the case of *Stuart v. People*, 3 Scam. 395, the supreme court of Illinois say that "in the class of constructive contempts would necessarily be included all acts calculated to impede, embarrass, or obstruct the court in the administration of justice." Such acts would be considered as done in the presence

of the court. Contempts committed out of the court's presence are often held to have been constructively committed in its presence. It makes no difference whether the defendant was in Butte or Helena, in the court-house in the presence of the court, or out of it, when he published the obnoxious dispatch, the authority to punish for it is equally clear at common law. Upon the right to punish for constructive contempts in England and America, see *Respublica v. Passmore*, 3 Yeates, 441; *Respublica v. Oswald*, 1 Dall. 319; *Masters v. Edwards*, 1 Caines, Term R. 515; *Tenney's Case*, 3 Fost. 162. In the case of *Neel v. State*, 50 Amer. Dec. 209, the court say: "This power extends at common law, not only to acts which directly and openly insult or resist the power of the court, or the purposes of the judges, but to consequential, indirect, and constructive contempts, which obstruct the process, degrade the authority, or contaminate the purity of the court."

But we are met at the threshold of this discussion with the contention that this court has no power to punish for this contempt for want of jurisdiction. This objection is founded upon the idea that the act of congress of March 2, 1831, carried into the Revised Statutes, § 724, applies to this court. Said statute provides that the United States courts "shall have power * * * to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: provided, that such power to punish contempts shall not be construed to extend to any cases, except to misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said court in their official transactions, and the disobedience or resistance of any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts." The contempt under consideration does not come within the classes enumerated in the statute just quoted; hence if this court is a United States court, within the meaning of this statute, it has no jurisdiction to punish the defendant for said contempt. We do not think this statute embraces the territorial court. It applies to the courts of the United States alone. In the case of *Clinton v. Englebrecht*, 13 Wall. 447, the supreme court of the United States say: "The judges of the supreme court of the territory are appointed by the president under the act of congress; but this does not make the courts that they are authorized to hold courts of the United States. This was decided long since in *Insurance Co. v. Canter*, 1 Pet. 546, and in the later case of *Benner v. Porter*, 9 How. 235. There is nothing in the constitution which would prevent congress from conferring the jurisdiction which they exercise, if the judges were elected by the people of the territory, and commissioned by the governor. They might be clothed with the same authority to decide all cases arising under the constitution and laws of the United States, subject to the same Revision. Indeed, it can hardly be supposed that the earliest territorial courts did not decide such questions, although there was no express provision to that effect, as we have already seen, until a comparatively recent period. There is no supreme court of the United States, in the sense of the constitution, in the territory of Utah. The judges are not appointed for the same terms, nor is the jurisdiction which they exercise part of the judicial power conferred by the constitution or the general government. The courts are the legislative courts of the territory, created in virtue of the clause which authorizes congress to make all needful rules and regulations respecting the territories belonging to the United States." This case arose in the territory of Utah upon the question whether a jury had been obtained in a lawful manner. The district judge had them summoned under an act of congress prescribing the manner in which the United States courts should be governed in the selection of jurors. The district judge acted upon the theory that the supreme and district courts of the territories were courts of the United States, and summoned the jury by an open venire, as required by said act of congress. This the supreme court of the United States

held to be error, for the reasons given in the extract from the opinion given above. We think it clear that congress never intended to embrace the territorial courts in the act of March 2, 1831, above quoted. *U. S. v. Beebe*, 2 Dak. 298; 11 N. W. Rep. 505.

But we are met with the further objection that said statute regarding contempts is in force in this territory under that provision of the organic act which declares "that the constitution and laws of the United States, which are not locally inapplicable, shall have the same force and effect within the said territory of Montana as elsewhere in the United States," and it may be insisted that under this clause the act of March 2, 1831, is applicable to the territorial courts. In the case of *Hornbuckle v. Toombs*, 18 Wall. 654, the supreme court of the United States say that "it is argued, by virtue of this enactment, all regulations respecting judicial proceedings which are contained in any of the acts of congress are imported into the practice of the territorial courts. This proposition is not tenable. * * * That clause has the effect undoubtedly of importing into the territory the laws passed by congress to prevent and punish offenses against the revenue, the mail service, and other laws of a general character and universal application, but not those of specific application. The act of March 2, 1831, has a specific application to the courts of the United States by its very terms, and is not of universal application, and cannot be made to apply to the territorial courts under said clause of said organic act." The supreme court, in the same case, further says: "Whenever congress has proceeded to organize a government for any of the territories, it has merely instituted a general system of courts therefor, and has committed to the territorial assembly full power, subject to a few specified or implied conditions, of supplying all details of legislation necessary to put the system into operation, even to the defining of the jurisdiction of the several courts. As a general thing, subject to the general scheme of local government chalked out by the organic act, and such special provisions as are contained therein, the local legislature has been intrusted with the enactment of the entire system of municipal law, subject also, however, to the right of congress to revise, alter, and revoke at its discretion. The powers thus exercised by the territorial legislatures are nearly as extensive as those exercised by any state legislature. * * * In fine, territorial like state courts are invested with plenary municipal jurisdiction."

But the supreme court of the United States have held, in substance, that the territorial legislatures may limit the common-law jurisdiction of this court to punish for contempts. We must then examine this question, and ascertain whether this has been done. Section 566, div. 1, Code Civil Proc., declares that the following acts or omissions, in respect to a court of justice, or proceedings therein, are contempts of the authority of the court. Then follow 12 enumerations of the different kinds of acts or omissions which constitute punishable contempts. There is nothing in the statute that intimates that those enumerated are all the acts or omissions which are contempts of the authority of the court. If any part of the statute embraces the acts under consideration, it is the first, which says: "Disorderly, contemptuous, or insolent behavior towards the judge while holding court, tending to interrupt the due course of a trial, or other judicial proceeding." In Hawkins' definition of contempts, given *supra*, he classifies them as contempts in the face of the court, and contemptuous words or writings concerning the court. Blackstone says that they may be committed in the face of the court, or by speaking or writing contemptuously of the court, or the judges acting in their judicial capacity.

The statute says, contemptuous behavior towards the judge while holding court, tending to interrupt the due course of a trial, or other judicial proceeding. It nowhere provides that this contemptuous behavior towards the judge shall be in his presence. If defendant had written a letter to the

judges, and charged them with corruption, and handed it to them while on the bench, no one would pretend to doubt that this would come within the statute. But suppose he had mailed such a letter to them in the city of Butte, and it had reached them by due course of mail, would not this be as much calculated to interrupt the due course of a trial as if he had handed it to them in person? Would it not have been as much contemptuous behavior towards the court as the former would have been? And wherein would this behavior towards the judges differ in principle, or in the degree of contempt it shows for them, from sending the obnoxious telegram to the newspapers, to not only reach them, but to publish it to the world at the same time? It seems to us that for a party to a case in court to do this is contemptuous and an insolent behavior towards the judges holding court, tending to interrupt the due course of a trial, or other judicial proceeding. This construction of the statute makes it embrace the whole of the common law on the subject of contempts. To limit it by construction to behavior done in the presence of the court, or so near as to interrupt it, would be to add to the provisions of the statutes a modification which the legislature did not attach to it, and to present the legislative anomaly of an act simply declaratory of the common law, less one of its provisions, without the slightest hint that it was the intention of the legislature to repeal such provision. To so construe it as to make it embrace all the common law, would be to make the statute but a codification of the common law. Perhaps it may be contended that the expression of one thing is the exclusion of another, and the leaving out of the statute one provision is the exclusion or repeal of it. Mr. Bishop, in his work on Statutory Crimes, says, section 131, that "when the unwritten and the written law, the same as when two statutes, may stand together without conflict up to a given point, there is not properly a repeal." But we need not discuss this, as we hold that the case under consideration comes within the provision of the statute. We think, then, that the statute "but affirms a principle inherent in a court of justice, to defend itself when attacked, as an individual man has the right to do for his own preservation." "The statute merely affirms a pre-existent power, and does not attempt to restrict its exercise to contempts in the presence of the court; but leaves them to be determined by the principles of the common law."

We therefore find the defendant guilty of contempt, as charged in the second allegation in the warrant, and we assess his punishment by a fine of \$500.

We desire to thank the counsel who has so ably conducted the case as *amicus curiæ*.

MCLEARY and BACH, JJ., concurring.

(36 Kan. 765)

LOWE v. HIGGINBOTHAM.

(*Supreme Court of Kansas.* October 8, 1887.)

NEGOTIABLE INSTRUMENTS—ACTION BY BONA FIDE HOLDER—DEFENSES.

In an action brought by the *bona fide* holder of a negotiable promissory note, it is not error to sustain a demurrer to the evidence of the maker, where there is no testimony tending to show want of consideration for the note or any fraud in the inception thereof, when these are the only defenses set up in the answer.

(*Syllabus by the Court.*)

Error from district court, Dickinson county.

On rehearing. For opinion on former hearing, see 13 Pac. Rep. 790.

SIMPSON, C. Suit upon two promissory notes executed by Lowe, payable to the Jacksonville Sulky Plow Works; sold by them to William P. Higginbotham before maturity, one for \$175, one \$150, with 10 per cent. interest from date;

the first payable the first of May, and the second the first of September, 1884, and both dated twenty-seventh September, 1883; actions originally commenced before a justice of the peace, appealed to the district court, and tried to a jury; separate action on each note before justice, but consolidated by order of the district court for trial. The district court found "the burden of the issues rested on the defendant," Lowe, and gave him the opening and close. His evidence consisted of the testimony of himself, and his attorney, and the depositions of William E. Veitch, the treasurer; William D. Mathews, the secretary; and James H. Hackett, the manager,—of the plow-works company. The plaintiff below demurred to the evidence for the reason "that the facts proven do not constitute any defense to the action of the plaintiff." It was sustained, the jury discharged, and a judgment for the plaintiff for amount of notes, with interest. A motion for a new trial was filed and overruled, and the error complained of here, and principally discussed in the brief of the plaintiff in error, is the ruling of the court sustaining the demurrer to the evidence of Lowe. Lowe filed no answer in writing, reciting his defenses, but the evidence was alleged to be directed to those two defenses set up by oral answer: *First*, fraud in the inception of the notes; and, *second*, no consideration. This case was submitted at the April assignment of the January term, and an opinion filed in May; but, subsequent reflection having satisfied us that there had been a misapprehension as to the facts of the case, a rehearing was ordered, and this was had in June.

I have carefully re-examined the original record of the evidence, and find that, in the copy of the record heretofore used, the remarks of the counsel were so blended with the statements of a witness as to be misleading, and to create the impression on the mind that there was evidence of fraud in the inception of the notes sued on, when in fact there was no such evidence presented. The members of this court have also submitted the record to a rigid examination, and do not find any such evidence. There arose a misconception of the facts in the former opinion, that is now corrected. The same disposition is to be made of the case, but for a very different and much better reason. The plaintiff in error had signed a contract, wherein it was stipulated that he was appointed agent of the Jacksonville Sulky Plow Company, in the townships of Hayes and Sherman, Dickinson county, to sell their light-draught plow attachments. At the same time he executed the notes sued on. The consideration alleged for the notes was royalty of five dollars on each machine to the owner of the patent, including the price of the plow at \$25. The notes were received in payment of the royalty on 60 machines, and the balance due on each machine, being the sum of \$20, was to be paid when ordered. The plaintiff in error acted in the belief that he was the agent of the company; that they would send machines to him on his order, without reference to the time of payment by him to the company; that, under the contract, it was the duty of the company to await payment by him until he sold and made collections; that they had agreed to receive good notes from farmers in payment of their plow attachments, and these notes could not be had until he had made sales. The company insisted on payment for machines when ordered, and the agent must take all the chances of collection on sales made by him; that they would receive good notes in payment of his orders, but the notes must be forthcoming at the time the order was filled. This dispute about the construction of the contract seems to have been the cause of the litigation. There is no evidence tending to show that there was fraud in the inception of the notes.

The plaintiff in error made a very foolish contract. He paid for a machine in advance. He paid the royalty on 30 machines in advance. And, while he testifies that he made some efforts to sell machines to his neighbors, the record does not disclose that he has ever completed the sale of a single machine. There is nothing in the record to show want of consideration for the notes.

While proof tending to show fraud in the inception of the notes would have cast upon holder of the notes the burden of showing innocence in the purchase, and want of notice of the equities of the maker, evidence of a want of consideration would not shift the burden of proof. There being no evidence of fraud in the inception of the notes, the legal principle relied on by counsel for the plaintiff in error has no application to the facts as recited in the record.

There was no attempt to show that the defendant in error had any knowledge or notice of the facts and circumstances attending the execution of the notes and contract. The construction of the contract adhered to by the plow company seems to be the natural import of the words used, and the invariable practice of the company had been, under such contracts, to require payment for the machine when ordered. It seems there was no error in the court sustaining the demurrer to the evidence of the plaintiff in error on the trial below, and we therefore recommend the affirmance of the judgment of the district court.

BY THE COURT. It is so ordered; all the justices concurring.

(37 Kan. 301)

OSBORN v. ANDREES.

(*Supreme Court of Kansas. October 8, 1887.*)

PROMISSORY NOTE—FRAUDULENT ALTERATION—EFFECT UPON MORTGAGE.

Where a note signed by a husband and wife was secured by a mortgage upon their homestead, and the husband, when about to deliver the note and mortgage to the mortgagee, changed "date" to "due" in the note and mortgage; but, upon being detected in his act by the mortgagee, corrected the note so as to read "with interest from date," as originally signed; and the mortgagee accepted the note and mortgage, with the understanding that both read "with interest from date," and loaned his money thereon: *held*, as the note was corrected before delivery so as to read as originally signed, and as the mortgage was intended to secure said note, and the word "date" was changed to "due" fraudulently, without the knowledge of the mortgagee or the wife, that the mortgagee is entitled to recover thereon, as there was no material alteration in the note; and the fraud of the husband in attempting to change the mortgage could not defeat the foreclosure thereof.

(*Syllabus by the Court.*)

Error from district court, Wilson county; I. STILLWELL, Judge.

Kirkpatrick & Vestal, for plaintiff in error. *T. J. Hudson*, for defendant in error.

HORTON, C. J. This action was brought by J. B. Andrees against Lizzie Osborn and her husband, J. W. C. Osborn, upon a certain promissory note of \$400, secured by mortgage, alleged to have been executed by Osborn and wife to J. B. Andrees. In answer to the plaintiff's petition, Osborn and wife admitted the signatures upon the note and mortgage to be theirs, but contended that the terms and conditions of the note, as well as the mortgage, had been materially altered since the execution and delivery of the same to the plaintiff. The jury returned a general verdict for Andrees against Osborn and wife, and Lizzie Osborn complains thereof. The note set forth in the petition is as follows:

"\$400.

CHERRYVALE, KANS., June 28, 1881.

"Six months after date we promise to pay to the order of J. B. Andrees four hundred dollars, payable at Cherryvale, Kansas, with interest at the rate of 12 per cent. per annum from date until paid; interest payable at maturity of note; due December 28th; value received.

J. W. C. OSBORN.

"LIZZIE OSBORN."

In addition to the general verdict, the jury also returned into court certain special findings of fact, as follows: "Question. Was the mortgage in suit,

after it was signed and acknowledged by Osborn's wife, altered by Osborn, so as to make it read 'with interest from due;' instead of 'with interest from date?' *Answer.* Yes. *Q.* Was this alteration made with Andrees' knowledge and consent? *A.* No. *Q.* Was such alteration made without the knowledge and consent of Mrs. Lizzie Osborn? *A.* We believe it was."

Upon the findings of fact, Lizzie Osborn, the wife, moved the court for judgment in her favor. This was refused, and thereupon she filed her motion for a new trial. This was overruled. All the evidence produced upon the trial shows that the note and mortgage were signed, as alleged in the petition, "with interest from date."

J. W. C. Osborn testified concerning the alteration as follows: "I drew up this note and mortgage. They are in my handwriting. At the time I drew up the papers I thought I was to get the \$400, and pay interest at the rate of twelve per cent. per annum from date, and I drew the note and mortgage that way; that is, I drew the note to read, 'with interest from date at the rate of twelve per cent. per A.; interest payable at maturity of note.' When I presented the note to Mr. Andrees, he said he could not let me have the money that way, and wanted to deduct the interest from the face of the note. I finally agreed to let him do so, and I then erased the word 'date,' and wrote the word 'due' after it, and that is the note read, 'with interest from due' at 12 per cent. per A. till paid; interest payable at maturity of note. Andrees accepted the note in that condition, and gave me \$376. I made the change in the note and mortgage after my wife had signed them and acknowledged the mortgage."

Andrees testified, in answer, that, "at the time I loaned Osborn the \$400, I went to his office in Cherryvale, and he showed me the note and mortgage. I read the note, and it was all right, just as we had agreed upon,—that is, it read 'with interest at 12 per cent. per annum from date; interest payable at maturity of note;' and I said to him that that was all right. I then glanced hurriedly over the mortgage, but did not read it. I saw that the lots were described, and that the mortgage was signed and acknowledged, and I threw it and the note down on the table in front of Osborn, and turned partly around, so that my back was partly to Osborn as I was reaching my inside coat-pocket for my pocket-book for the money to give him. I heard him make a move, and I glanced over my shoulder, and saw him crossing out the word 'date' in the note, and writing the word 'due' after it. I turned round and asked him why he did that, and, hesitating a moment, he then tried to make me believe that 'due' was the word we ought to use in the note to make it read right. He insisted that he was right, and I told him that unless he changed the word 'due' back to 'date' he would not get any of my money. He then took his pen and wrote 'ate' over 'ue' in the word "due," and I then accepted the note in that condition and gave him \$400 in cash. I did not deduct the interest from the face of the note, as he has testified, at all. He took the mortgage, and put it in an envelope, and told me I ought to send it to Independence at once, and have it recorded, and I did so without again looking at it. Osborn did not want to take the \$400 loan at first. He wanted \$700, and claimed that \$400 would not be enough to let him out,—that he owed some small claims amounting to more than four hundred dollars; but I would not let him have any more on his property, and he finally took it."

It is evident from the instructions, and the general verdict, that the jury believed, when Andrees received the note and mortgage, that the note read, as originally signed, "with interest from date." The defendants below attempted to show that the note, when actually delivered, read "with interest from due." In this view, the finding of the jury that the mortgage was altered by Osborn so as to read "with interest from due," instead of "with interest from date," is immaterial; because, although it is true that Osborn changed the note "from date" to "from due," under the instructions and gen-

eral finding of the jury, the jury found in accordance with Andrees' evidence that Osborn corrected the note from "due" to "date" before he delivered it to Andrees. In other words, Osborn attempted to change "date" to "due," and thus, by altering the note and mortgage, render them absolutely void; but, when detected in his purpose, he corrected "due" to "date" in the note; and upon the note as thus corrected Andrees loaned the money. This is the note which the mortgage was intended to secure; this is the note which was actually secured by the mortgage. Under the general verdict and the findings, the change in the mortgage of "date" to "due" was the fraudulent act of Osborn, made without the knowledge or consent of either his wife or the mortgagee, and, when the mortgagee accepted the note and mortgage, he understood that the note was secured by the mortgage, and that the mortgage corresponded with the note, which then read, "with interest from date." The fraudulent act and conduct of Osborn ought not, and will not, defeat recovery on the mortgage.

Upon the conclusion we have reached, the refusal of the court to allow Mrs. Osborn to show that the property described in the mortgage had been occupied by her and her husband as their homestead is immaterial. We have not deemed it necessary to consider the exceptions presented to the case made,—although some of them are well taken,—as the judgment rendered is not to be disturbed.

The judgment of the district court will be affirmed.

(All the justices concurring.)

(37 Kan. 298)

MECONCE v. MOWER and others.

(Supreme Court of Kansas. October 8, 1887.)

EVIDENCE—REGISTER OF BAPTISMS AND BURIALS—PROOF OF IDENTITY.

When, by the custom of a religious society, a register of baptisms and burials is kept, and a duly-verified copy of the same is offered in evidence to establish that a child registered as having been buried at a certain time is the same one that was registered as having been baptized at an earlier time, and which shows that the entries of baptism and burial were made in different names, its admission, without further evidence tending to show that they were one and the same person, is error.

(Syllabus by Holt, C.)

Error from district court, Wabaunsee county; JOHN MARTIN, Judge.

Overmeyer & Safford and *H. A. Pierce*, for plaintiff in error. *A. H. Case*, for defendant in error.

HOLT, C. This was an action of ejectment brought by the plaintiff in error, as plaintiff, against the defendant in error, to secure possession of an 80-acre tract of land in Wabaunsee county, Kansas. The plaintiff bases his title on these alleged facts: That he was married to Ahzh-nich, a Pottawatomie woman, daughter of Nwa-yah-ko-se, in 1852, at St. Mary's, Kansas; that in 1853 a daughter was born to him and his wife as the fruit of said marriage, and that she was in early infancy christened Mary Ann Nwa-yah-ko-se at the Catholic Church of St. Mary's Mission, Kansas, of which these people seem to have been members; that in 1862 or 1863 this land was allotted to his daughter as allottee No. 1,173, and that in 1864 she died at St. Mary's; no other children were ever born to plaintiff and wife; that some years after his wife Ahzh-nich died without will, thus leaving him the sole heir of this Mary Ann Nwa-yah-ko-se; that a patent was issued subsequently to said allotment, in the name of Mary Ann Nwa-yah-ko-se, for said land. The defendant admits the allotment to Mary Ann Nwa-yah-ko-se, and that a patent was issued to a person of the same name, but contends that the Mary Ann Nwa-yah-ko-se, to whom the allotment was made and the patent issued, was not the little daughter of plaintiff and Ahzh-nich, but was another granddaughter of Old Nwa-yah-ko-se, by his son Moz-wa.

The vital question to be decided in this action is the identity of the allottee. There seems to be no conflict of testimony about the marriage of plaintiff with Ahzh-nich under the name of Angelica, the daughter of Old Nwa-yah-ko-se, and of the birth of the daughter in 1853, who was christened Mary Ann Nwa-yah-ko-se. It appears in evidence that the plaintiff was a member of the Chippewa tribe of Indians, and was employed as an interpreter. His duties compelled him to be away from his family a great part of the time. His wife and daughter lived with her father, Old Nwa-yah-ko-se, who testifies he is 118 years old. At the time of the allotment they composed one family. The old man obtained 160 acres, the mother 80, and the child the 80 acres in dispute. Some testimony was introduced to the effect that she died either the year of the allotment or the year following. The plaintiff was not at home at the death of his daughter, though he testified that he had seen her after the allotment. On the other hand it was testified to by a number of witnesses that the little daughter of plaintiff, Mary Ann, died in 1859, before the allotment was made, and that the Mary Ann who was living in the family of old Nwa-yah-ko-se was his granddaughter by his son Moz-wa. The two Mary Anns were further distinguished in the evidence given by the name of Mary Ann Smooth-Face, who was the daughter of this plaintiff and Angelica, and Mary Ann Pock-Marked, whom defendant claims to be the allottee. There was some testimony tending to show that Mary Ann Pock-Marked was not known by the name of Mary Ann until some time in the year 1866 or 1867.

There was a good deal of conflicting evidence introduced, with no very strong preponderance in favor of either party. The defendants, to establish the death of Mary Ann Nwa-yah-ko-se, the "Smooth-Face," in 1859, introduced the records of St. Mary's College, a Catholic institution at St. Mary's Mission, Kansas, as follows:

"For the year of our Lord 1852, in the thirtieth day of October, I have received the mutual consent and of matrimony between Edward Meconce and Angelice, the daughter of Nowe'y-ko-se, before witnesses No-wey-kose and Eyen-abi. MOUER GALLOND, S. J.

"On the fourth of August, 1853, I baptized Mary, the daughter of Edward Meconce, and Angelica, his wife. MAUR GALLOND, S. J. [Seal.]

"On the twenty-fourth day of March, 1859, was buried Mary Kitchi-no-wey, A-kesi-os Vegen, about six years of age.

"M. GALLOND, S. J. [Seal.]

"Signed in presence of A. J. BEAKLEY."

A. Sweese, S. J., certifies under oath that the foregoing is a true and correct copy of the marriage of Edward Meconce and Angelica, the daughter of No-wey-axesi, and the baptismal register of Mary, the daughter of Edward Meconce, and Angelica, his wife; also the registry of the burial of Mary Kitchi No-wey-a-no-se Os Vegen, as the same appears of record. The record is authenticated in the manner provided for by sections 380, 381, Civil Code. The name "Mary" appears in the records of baptism and burial, and it also appears therefrom that the babe christened in 1853 would have been in 1859 of about the age of the child buried; but these statements, taken in connection with the other part of the record, are not sufficient to establish the fact that Mary, the daughter of Edward Meconce, and Angelica, his wife, who was christened August 4, 1853, is one and the same person with Mary Kitchi No-wey-a-kesi Os Vegen, who was buried March 24, 1859.

We cannot say that the words "Kitchi" and "Os Vegen" are descriptive in the Indian language, which, being interpreted, might establish the identity, nor is there anything in the record, outside of the register's certificate, that would establish the identity of the babe that was christened in 1853 with the young child that was buried in 1859. Neither is there anything in the certificate of the custodian of the church records that would indicate that this was

a register of a family kept by the church. We can readily perceive that these records of the church at St. Mary's would have had a great, if not a controlling, influence with the jury that tried the case. If there had been any identification of the child who died with the babe who was baptised, the record, if true, would have been conclusive evidence of the fact that Mary Ann, the daughter of the plaintiff, could not have been the allottee.

For the error of admitting this testimony, we think the judgment should be reversed, and so recommend.

BY THE COURT. It is so ordered; all the justices concurring.

(37 Kan. 229)

UNION PAC. RY. CO. v. ESTES.

(*Supreme Court of Kansas. October 8, 1887.*)

1. APPEAL—REVIEW OF RULING ON DEMURRER.

A party who seeks to have the ruling of the district court, on a demurrer to the petition, reviewed in this court, must elect to stand on the demurrer, and at once bring the case to this court; or an answer may be filed, and when the case is tried, if it is tried on the original petition, and then brought here by the party demurring, the ruling on the demurrer will be passed on here.

2. SAME—ANSWER AFTER DEMURRER OVERRULED—PETITION IN ERROR.

If, after an adverse ruling on a demurrer to the petition, the defendant files an answer, he cannot be permitted to file a petition in error in this court to review the adverse ruling; he must await the result of the trial.

3. SAME—AMENDED PETITION—REVIEW OF ORIGINAL PETITION.

When a demurrer to a petition has been overruled and the defendant answers, and the plaintiff is then permitted to amend the petition, and to this amended petition the defendant answers, and, after a trial is had on the amended pleadings, the defendant brings the case here for review, this court will not consider the sufficiency of the original petition.

(*Syllabus by Simpson, C.*)

Error from Wyandotte county; W. R. WAGSTAFF, Judge.

J. P. Usher, A. L. Williams, and Charles Monroe, for plaintiff in error.
Fife & Davidson and J. A. Hale, for defendant in error.

SIMPSON, C. The only question to be determined in this case is one of practice. The action was commenced by filing the petition in the district court of Wyandotte county on the second day of February, 1885. On the second day of March the plaintiff in error (defendant below) filed a demurrer. The decision of the court overruling the demurrer was entered on the journal on the twenty-ninth day of April, 1885, "and the defendant allowed thirty days to answer." The petition in error, to reverse the ruling of the court below on the demurrer, was filed in this court on the tenth day of June, 1885. On the seventeenth day of May, 1885, the railway company filed an answer, and the cause stood at issue until the April term, 1886, when the plaintiff amended his petition, and a trial was had that resulted in the disagreement of the jury. Thereupon the plaintiff took leave to amend his petition, and on the twentieth day of May, 1886, filed an amended petition; and on the first day of June thereafter the railway company filed its answer to this amended petition. Trial was had on the amended pleadings at the July term, 1886, resulting in a verdict and judgment for the plaintiff, and the railway company bring the case here for review; so that at this time the case is here on a petition in error to review the ruling on demurrer, and another petition in error is filed to review the proceedings on the trial.

A party who seeks to have the ruling of the district court on a demurrer to the petition reviewed in this court must elect to stand on the demurrer, and at once bring the case to this court, or an answer may be filed, and, when the case is finally tried, if it is tried on the original petition, and then brought to this court by the party demurring, the ruling on the demurrer will be passed

on here. If, after an adverse ruling on a demurrer to the petition, the defendant files an answer, he cannot be permitted to file a petition in error in this court to reverse the adverse ruling; he must await the result of the final trial. When a demurrer to the petition has been overruled, and the defendant answers, and the plaintiff then is permitted by the court to amend the petition, and to this amended petition the defendant answers, and after a trial is had on the amended pleadings the defendant brings the case here for review, this court will not consider the sufficiency of the original petition. *Moore v. Wade*, 8 Kan. 380; *Briggs v. Tye*, 16 Kan. 285; *Rosa v. Railway Co.*, 18 Kan. 124; *Gilchrist v. Schmidling*, 12 Kan. 263.

It is recommended that the petition in error be dismissed.

BY THE COURT. It is so ordered; all the justices concurring.

(37 Kan. 379)

LEWIS and others *v.* LINSKOTT and others.

(*Supreme Court of Kansas. October 8, 1887.*)

1. APPEAL—CASE MADE—AMENDMENT AFTER SIGNING.

When a case made for this court has been signed and certified by the judge of the district court who tried the case, it has passed beyond his control, and cannot thereafter be amended, altered, or changed by any order he may make.

2. SAME—REVIEW OF EVIDENCE—MUST BE PRESERVED IN RECORD.

In all cases where this court is asked to determine whether there is sufficient evidence to sustain a verdict or finding, and on all kindred questions, the record should show by an affirmative statement, or by such recitals as make it apparent, that all the evidence is preserved in the record. It is better that this should be done in the body of the record than in the certificate of the judge.

3. FRAUDULENT CONVEYANCE—BY DEBTOR TO CHILDREN—JUDGMENT CREDITORS.

A conveyance made by the father to his children of all his available real and personal property, and the delivery by the father to a son-in-law of a large sum of money, on the sole consideration of a promise by his children to pay certain scheduled indebtedness of the father, designated in the schedule as his just debts, excluding therefrom the indebtedness of the father to certain judgment creditors of whose demands the children had knowledge at the time of the conveyance and delivery of the money, is fraudulent and void as to such judgment creditors.

(*Syllabus by Simpson, C.*)

Error from district court, Jackson county; R. CROZIER, Judge.

The plaintiffs in error are N. D. Lewis, the father, and William O. Lewis, James B. Lewis, George A. Lewis, and Joseph W. Lewis, his sons, and Elizabeth R. Locke, his daughter, and A. M. Seaton, a partner in business with N. D. Lewis. On the twentieth day of March, 1884, the defendant in error S. K. Linscott recovered a judgment in the district court of Jackson county, against the firm of Lewis & Seaton, for the sum of \$1,172.20 and costs; the judgment bearing interest at the rate of 12 per cent. per annum. The costs now amount to over \$100. The action in which this judgment was rendered was founded on promissory notes of Lewis & Seaton given to Linscott in May, 1883. Execution was issued on this judgment on the thirty-first March, 1884, and on the first day of April it was levied on the following lands, alleged to be the property of N. D. Lewis in Jackson county, to-wit: N. E. $\frac{1}{4}$, section No. 7; the N. E. $\frac{1}{4}$, section No. 8; the S. E. $\frac{1}{4}$, section No. 5; and the east $\frac{1}{4}$ of S. W. $\frac{1}{4}$, section No. 5,—all in township No. 7 of range No. 16.

On the twentieth day of July, 1883, N. D. Lewis and A. M. Seaton, under the firm name of Lewis & Seaton, made their promissory note to Bohart, Dillingham & Co., of Kansas City, for \$1,000, payable in 30 days, with 10 per cent. interest per annum. This note was assigned to the defendant in error Linscott, probably for collection; and on the twentieth day of March, 1884, a judgment was rendered for the amount remaining due and unpaid on it, in the district court of Jackson, for \$716.40 and costs, with interest at 10 per cent. per annum. Execution issued on this judgment on the first day of April, 1884, and was levied on the above-described lands, alleged to be the property

of N. D. Lewis. These lands were appraised at an average price of \$20.07 per acre. On the seventeenth day of January, A. D. 1884, N. D. Lewis called his children together, and his attorneys drew up, and they all signed, the following memoranda: "JANUARY 17, 1884.

"N. D. Lewis, being in failing health, and in order to throw off the burden of business cares, makes the following disposition of his property, and provision for the payment of his just debts, viz.:

"He owns the following lands in Jackson county. N. W. $\frac{1}{4}$ of sec. 8, township No. 7, range 16: Homestead.

"N. E. $\frac{1}{4}$ of sec. 7. N. E. $\frac{1}{4}$ of sec. 8. }
"S. E. $\frac{1}{4}$ of sec. 5. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ sec. 5. } Town 7, range 16.

560 acres
160

720

"He owns the following property in Colorado: S. W. $\frac{1}{4}$ sec. 19, town 6 south, of range 65 west; and S. $\frac{1}{2}$, N. E. $\frac{1}{4}$, and N. $\frac{1}{4}$, S. E. $\frac{1}{4}$, sec. 24, town 6 south, of range 66 west.

"He owes in just debts as follows: The sum of \$13,225.

"This homestead in Jackson county, above described as the N. W. $\frac{1}{4}$ sec. 8, town 7, range 16, is estimated to be worth about \$7,000. His homestead he will transfer absolutely to his five children by way of advancement, namely, as a gift, provided his wife will consent thereto. The valuation of the remaining real estate in Jackson county, Kansas, is \$11,725. The valuation of personal property on said mentioned real estate is \$1,500.

\$11,725 00
1,500 00

\$13,225 00

"The debts of said Lewis are \$13,225 00

"The design of N. D. Lewis is to make said last-described real estate pay off said just debts.

"The said Colorado lands are incumbered by a mortgage of about \$2,750.

The value of said lands is about - - - \$3,700 00

The value of the cattle on said ranch is about - 1,500 00

Making a total of property in Colorado, - - - \$5,200 00
Less incumbrance on ranch, - - - 2,750 00

Actual estate in Colorado, - - - \$2,450 00

"It is designed to deed and convey the above property in Colorado to Celia Lewis, wife of N. D. Lewis, in consideration of her joining in the conveyance aforesaid, if she will do so. The said Celia Lewis has refused to dispose of any Jackson county property unless she is indemnified with property elsewhere, and the transfer of said Colorado property to her is in justice given her in consideration of the extinguishment of her right elsewhere in the nature of dower, as well as to repay her for moneys and property heretofore advanced by her in the acquisition of the Jackson county property.

"We have read over the minutes above made and here attest to their correctness by our hands this seventeenth day of January, 1884.

"NICODEMUS LEWIS. CELIA LEWIS.
"WILLIAM O. LEWIS. D. W. C. LOCKE.
"J. B. LEWIS. GEO. H. LEWIS.
"J. W. LEWIS. JAMES H. LOWELL."
"W. S. HOAGLIN.

Indorsed: "Memorandum of the transactions of N. D. Lewis with his wife and children."

"A SCHEDULE OF THE DEBTS AND LIABILITIES OF N. D. LEWIS.

One note and mortgage dated 18, bearing ——— per cent. interest, favor of Francis A. White for	\$ 3,000 00
One note and mortgage dated May 3, 1881, bearing 8 per cent. interest, favor of Mary A. Broddus for	1,500 00
Interest,	80 00
One note favor of J. H. Wilson, dated about the first of January, 1884, with 12 per cent. interest,	1,200 00
One note favor of Holton City Bank, dated January 16, 1885,	500 00
One note favor of Mrs. Clara Nichols,	1,320 00
One note given to Sid. Hayden about February 1, 1883—12 per cent.,	500 00
One note favor Valley Falls Bank,	1,500 00
One account favor of Williams and Wenner,	135 00
One account favor of G. F. King,	130 00
One account favor John Knopf,	10 00
One account favor Scott & Co.,	50 00
Miscellaneous accounts, including attorney's fees and claims,	500 00
One note and mortgage favor of one Newlin upon lands in Colorado, amounting, with interest, to	2,800 00

\$13,225 00

"We, the undersigned, children of N. D. Lewis, agree severally to assume the payment of the debts hereinbefore scheduled, as follows: (1) The said William O. Lewis, one-fifth thereof; (2) the said James B. Lewis, one-fifth thereof; (3) the said George H. Lewis, one-fifth thereof; (4) the said Joseph W. Lewis, one-fifth thereof; (5) the said D. W. C. Locke, husband of Elizabeth R. Locke, formerly Elizabeth R. Lewis, a daughter of N. D. Lewis, one-fifth thereof. The consideration for said assumption being the transfer to us of lands of said N. D. Lewis in Jackson county, Kansas, except the homestead or home-place of said N. D. Lewis, and the sale and transfer by said N. D. Lewis to the undersigned of all the chattels and personal property belonging to the said N. D. Lewis, and situated and located on the farm of said N. D. Lewis in Jackson county, Kansas, except the household property.

"In witness whereof we have hereunto set our hands this eighteenth day of January, A. D. 1884.

"WILLIAM O. LEWIS.

D. W. C. LOCKE.

"GEORGE H. LEWIS.

JOSEPH W. LEWIS."

"JAMES B. LEWIS.

Indorsed: "Schedule of debts of N. D. Lewis, assumed by W. O. Lewis *et al.*" "HOLTON, KANSAS, January 18, 1884.

"For and in consideration of the sum of fifteen hundred dollars (\$1,500) to me in hand now here paid, I hereby sell, assign, transfer, and set over unto William O. Lewis, James B. Lewis, George H. Lewis, Joseph W. Lewis, and D. W. C. Locke the following-described personal property, to-wit: Two yoke of oxen, four head of horses, one pony, one cow and calf, seven hundred bushels of corn in crib, three sets of double harness, one buggy, one two-horse wagon, all the saw-logs, wood, and lumber, and all other personal property, on the premises of the undersigned, in Jackson county, Kansas, excepting only household goods.

N. D. LEWIS.

"Witness: JAMES H. LOWELL.

"Contract of sale of personal property from N. D. Lewis to W. O. Lewis *et al.*"

The following are the findings of the trial court, and the conclusions of law:

"This day came the said plaintiff, S. K. Linscott, by his attorneys, Hayden & Hayden, and also came all the defendants, except A. M. Seaton, by their

attorneys, Lowell & Walker and W. S. Hoaglin, Esq. The said A. M. Seaton, though duly and personally served with summons herein, still failing to answer or demur to the petition, though his answer thereto has long been due, and being solemnly called, comes not, but makes default, and a jury being duly waived, this cause is now submitted to the court for trial upon the pleadings and evidence, and, on hearing the proofs and allegations of parties, and arguments of counsel thereon, and being fully advised in the premises, the court finds as follows:

"(1) That the defendant N. D. Lewis and A. M. Seaton were copartners, as alleged in the plaintiff's petition.

"(2) That the defendants N. D. Lewis and A. M. Seaton, for value received, made, executed, and delivered to the plaintiff and to Bohart, Dillingham & Co. all of the promissory notes in the plaintiff's petition described, in the amounts, at the times, and payable as therein alleged, and that said note made to Bohart, Dillingham & Co. was by the payees thereof sold, transferred, and indorsed to said W. H. Bohart, as alleged in plaintiff's petition.

"(3) That said judgments in favor of plaintiff, and in favor of said W. H. Bohart, were duly obtained on said promissory notes against said N. D. Lewis and A. M. Seaton, as alleged in plaintiff's petition.

"(4) No part of said judgments, or either of them, has been paid.

"(5) Executions were duly issued on said judgments, and for want of goods or chattels were each duly levied on the lands in the petition described, and proceedings were had thereon, and the executions returned, as stated in the petition.

"(6) On the twentieth day of March, 1884, after the recovery of his said judgment against said N. D. Lewis and A. M. Seaton, the said W. H. Bohart, for the purpose of avoiding a multiplicity of suits, by an instrument in writing duly assigned his said judgment to the plaintiff S. K. Linscott, and thereby duly appointed him (the said S. K. Linscott) as his true and lawful attorney to ask, demand, and receive and sue out executions, and take all lawful ways for the recovery of the money due, or to become due, on said judgment, and to acknowledge satisfaction or discharge of the same, upon the understanding and agreement between said Bohart and the plaintiff that the second cause of action in plaintiff's petition alleged herein should be prosecuted by plaintiff in this action in behalf of said W. H. Bohart; the expenses and costs for which the plaintiff might be liable to be ratably apportioned between and borne by said Bohart and plaintiff, as alleged in plaintiff's petition herein.

"(7) On and before the eighteenth day of January, 1884, the defendant N. D. Lewis was the owner and seized in fee of all the following described premises, situated in the county of Jackson and state of Kansas, to-wit: The north-east quarter of section number 7; the north-east quarter of section number 8; the south-east quarter section number 5; and east half of the south-west quarter of section 5,—all in township number 7, of range number 16, containing 560 acres.

"(8) On said January 18, 1884, the defendant N. D. Lewis and his wife, Celia Lewis, with intent on the part of N. D. Lewis to hinder, delay, and defraud his creditors, and especially the said Linscott and said Bohart, and without sufficient consideration, made, executed, acknowledged, and delivered to defendants William O. Lewis, James B. Lewis, George H. Lewis, Joseph W. Lewis, and Elizabeth R. Locke, who are children of N. D. Lewis and Celia Lewis, a deed for said 560 acres of land, which deed was on the same day recorded in the office of the register of deeds of Jackson county, Kansas. No part of the land described in said deed was at the date thereof the homestead of the grantors therein.

"(9) Upon the first day of the term of court at which the judgments in favor of said Linscott and said Bohart were rendered, to-wit, March 20, 1884, the lands above mentioned were incumbered with mortgages which are still

unsatisfied, and remain liens thereon, as follows: One in favor of M. A. Broaduss of \$1,500, upon said north-east quarter of section number 7, township 7, range 16; and one in favor of F. A. White of \$3,000, upon said south-east quarter, and the east half of the south-west quarter, of section number 5, township 7, range 16.

"(10) Since the commencement of this action, and on or about June 25, 1884, the grantees in the deed of N. D. Lewis and wife to their children conveyed to James H. Lowell and A. D. Walker the lands aforesaid,—the said Lowell and Walker at the time being fully advised of all the circumstances under which the said N. D. Lewis and Celia Lewis conveyed said lands to their children,—and said Lowell and Walker took said land subject to any claim that may be adjudged against the same in this action in favor of the plaintiff and said Bohart.

"(11) There is now due on the judgment in favor of S. K. Linscott including interest and costs the sum of \$849.65, and on the judgment in favor of Bohart, including interest and costs, the sum of \$1,288.20.

"(12) The said A. M. Seaton is, and at the commencement of this action was, insolvent, and had no property whereon to levy.

"And the court finds as conclusions of law: (1) That the deed set forth in the petition is fraudulent and void as against the rights and claims of the plaintiff, and said W. H. Bohart, as said plaintiff hath in his said petition averred; (2) that plaintiff is entitled to a judgment and decree ordering the lands described in the petition, or so much thereof as may be necessary for that purpose, to be appraised and sold subject to the mortgages found to be liens thereon, and the proceeds applied to the amounts due the plaintiff and Bohart on their judgments and to the costs. To all of which findings, and to each of them, the defendants duly excepted."

Before the trial the defendants in error made an application to amend the second cause of action in their petition by interlineation showing that, instead of Bohart selling and assigning this judgment to Linscott for a valuable consideration, he merely assigned it to him for the purpose of collection, and to save costs, and to prevent multiplicity of suits. The leave to amend was granted, over the objection of the plaintiffs in error. There was a motion for a new trial overruled, a judgment for defendants in error, and all exceptions saved.

The assignments of error insisted on here are—*First*, the court erred in permitting the amendment as to the Bohart judgment; *second*, the court erred in holding the *memoranda* fraudulent; *third*, the eighth finding of fact is not sustained by sufficient evidence, and will not support conclusions of law No. 1; *fourth*, that certain evidence was improperly excluded by the trial court. On the other hand, the defendants in error insisted that the question of the sufficiency of the evidence to sustain finding 8 could not be questioned, because the record did not contain all the evidence; and that the certificate of the trial judge that it did, being made after the case made had been signed and certified, was without authority of law, and should not be considered.

Lowell & Walker and Lucien Baker, for plaintiffs in error. *Hayden & Hayden*, for defendants in error.

SIMPSON, C. The question of practice presented by the record first claims our attention. It affirmatively appears that at the conclusion of the trial the plaintiffs in error were allowed until the first day of April, 1885, within which to make and serve a case for the supreme court, and the defendants in error to have 10 days thereafter to serve suggestion of amendments thereto. The case made was served, and acknowledgment of service indorsed on the third day of March. The case made, with amendments suggested, was presented to the judge of the district court, and settled and signed by him on the sev-

enth day of May, in presence of the attorneys of record on both sides. On the ninth day of May the plaintiffs in error served notice on the attorneys of the defendants in error that application would be made on the twelfth day of May to have corrected the certificate of the judge to the case made. On that day both sides appeared before the judge, and the defendants in error objected to the correction of the certificate for the reasons—*First*, that said case made, having already been settled and signed, and ordered to be attested by the clerk as a case made for the supreme court, the said judge has no jurisdiction to correct, alter, and amend the same; *second*, because it is not true that said case made contains all the evidence. At the same time the defendants in error demanded, in writing, of the attorneys of the plaintiffs in error, that the case made be immediately filed with the clerk, and that said clerk attest the same, and attach the seal of the court thereto. The judge granted the request of the plaintiffs in error, and finds that the case made does contain all the evidence in said case, and certifies accordingly; to all of which the defendants in error duly excepted.

1. It is claimed by the defendants in error that the additional certificate of the judge attached to the case made, on the twelfth day of May, is without authority of law; that all control over the record, and all power to alter, amend, and correct it, ceased on the seventh day of May, when he settled and signed the case made. Numerous decisions of this court, commencing with the case of *Bartlett v. Feeney*, 11 Kan. 593, 602, and ending with that of *Wilson v. Jones*, 29 Kan. 233, 245, are cited to sustain this position. The theory of these cases is that, after the judge has certified the case made, it passes beyond his control, and cannot thereafter be amended, altered, or changed by any order of his.

In this case, some days subsequent to the certification of the case made, a supplemental statement was added to the certificate, to the effect that the case made contained all the evidence. This statement should appear affirmatively in the record in every instance. In all cases in which this court is asked to determine whether there is sufficient evidence to sustain a verdict or finding, and all kindred questions, the record should show by an affirmative statement, or by such recitals as to make it apparent, that all the evidence is preserved in the record. It is better that this should be done in the body of the record than in the certificate of the judge. The judge had no power to make the supplemental certificate of the twelfth of May, and yet his action in that respect does no material injury to the defendants in error, from the fact that it is apparent, from the recitals of the record, that it does contain all the evidence given on the trial of the case. The record shows that the plaintiff introduced certain testimony, and then rested. The defendant then offered testimony, and after the recitation of the evidence of several witnesses comes the expression, "Defense rests." Plaintiff then has William H. Webster sworn, etc. "Plaintiff rests." Defendant then offers in evidence, "and rests." Plaintiff here desires to recall one witness. The court refuses to open the case. "Plaintiff rests." All these entries in the record, showing the regularity of the trial proceedings, are sufficient to indicate to our mind that the evidence is all contained in the record before us. *Dewey v. Linscott*, 20 Kan. 684.

2. Under our very liberal provisions respecting the amendment of pleadings, the district court had an undoubted right to make the amendment complained of. It was one that could not, in its nature, be very prejudicial to the rights of the plaintiffs in error. It was an almost immaterial question to them whether Linscott owned the Bohart judgment absolutely, or whether it was assigned to him for the purpose of collection; in either event he could maintain the suit in his own name. It is not prejudicial to the rights of Lowell & Walker. They are not only purchasers *pendente lite*, but, by reason of their relations to the plaintiffs in error, they had knowledge of the circumstances

under which these conveyances were made, and are not entitled to that favor and partiality that a court of equity always shows to an innocent purchaser.

3. This brings to us the real question of the case: What is the legal effect of the *memoranda* made on the seventeenth day of January, 1884, by Lewis and his wife and his children, and the bill of sale made on the eighteenth day of January, taking them all together, and construing them in the light of the evidence and surrounding circumstances?

The exact facts are that N. D. Lewis, a man 63 years of age, owning property that according to his own showing was in excess of his indebtedness, calls his children together, makes a statement to them of his financial condition, and then, in consideration of a promise by them to pay what he denominates his just debts, conveys to them all his property, including his homestead, personal property, and the sum of \$1,500 in money, and does this at a time when suits are pending against him that result in the rendition of these judgments represented by the defendants in error; there being no promise to pay these judgments in the obligation of the children, but these judgment creditors being carefully excluded in all these transactions. We are called upon by the plaintiffs in error, the father and the children, to legalize the attempt to avoid the payment of these judgments.

It matters not what may be the legal characteristics of these transactions, —whether the conveyances are assignments for the benefit of creditors, and void as to the defendants in error because not in compliance with our statutes; or whether they created a trust in favor of the creditors whose debts were scheduled; or whether they are void as against creditors upon their face, and without the aid of any extrinsic evidence showing that the transaction was fraudulent *per se*. Their legal effect, if permitted to stand, would be that the acts and conduct of the debtor necessarily result in defrauding the creditors who institute this action. No view can be taken, or no construction given these *memoranda* and conveyances, with the accompanying acts and deeds of the father and children, consistent with the rights of the creditors, and with the duty and obligation of Lewis to pay his just debts. The property of the father was a fund out of which all his just debts must be first paid before gifts, advancements, or good bargains could result to the advantage of his children.

The knowledge of the children, who are the grantees in the conveyances, and are to be the recipients of valuable property, rightfully subjected to the payment of the grantor's debts, is abundantly shown in the record. In fact, taking all the circumstances together with the evidence, it is impossible to avoid the conclusion that the children willingly aided the father in the attempt to so cover the property that it could not be subjected to the payment of the judgments sought to be enforced against it.

4. It is said that the eighth finding of fact by the trial court is not sustained by the evidence, and will not support the first conclusion of law. In the first place, these written *memoranda* and the conveyances being in evidence, what was their legal effect was a question for the court. The plaintiffs in error having reduced their transactions to writing, and signed the *memoranda*, and having executed and received the conveyances, their part of the transaction was evidenced by the writing; and the court had the right, and discharged only its duty, by determining the legal effect of these writings, and, as we have practically stated heretofore in this opinion, these of themselves are sufficient to authorize the finding of fact, and compel the conclusion of law.

We do not believe that any disinterested person can read the testimony of the plaintiffs in error without being irresistibly led to the conclusion of fact as stated in the eighth finding. We are not disposed to consider any of the questions arising on this record in a technical spirit; we gather the facts from the whole record, and try, consistently with the rules governing such actions, to determine the abstract right in every suit. As a matter of fact, the record does not show a request for the separate finding of fact and conclusions of

law; but we are bound to conclude that the trial court made such findings as appeared to be material to support the view taken. We have already said that the whole case was here, so that we can determine what was proven on the trial.

There are enough facts established by the testimony that the children of N. D. Lewis, prior to and at the time of the making of the *memoranda*, and at the time of the execution and delivery of the conveyances of the homestead and other real estate, and at the time of the transfer of the personal property of Lewis to his children, and at the time he placed in the hands of Locke, his son-in-law, the sum of \$1,500, all knew that the primary object of all these transactions was to prevent the payment by Lewis of the claims of Linscott and Bohart. There ought to have been a finding of these facts; they were necessarily embraced in the judgment; but, because there is no special finding to this effect, this case should not be reversed, and greater injustice done. There are findings enough to support the judgment, and these findings of themselves are sufficient to justify the legal conclusions as stated in the record. It is true that a debtor can prefer his creditor, and pay him to the exclusion of other creditors; but it is not true, and never was, that, under the pretense of a sale, a debtor can convey all his property to his children, who are not creditors, and thus prevent the application of the proceeds of judicial sale of his property to the payments of his debts. When a man, largely indebted, conveys all his property, real and personal, to his children, and adds to this a large sum of money, it requires very strong proof to disabuse the mind of a natural inclination to conclude that the transaction was intended to defraud creditors. In this case, all the inferences from the facts, and every presumption of the law, is against the plaintiffs in error, because the transaction in all its parts and bearings is an unusual one. It is rare indeed that a man of the age of N. D. Lewis would voluntarily give to his children all his available property and ready money, at a time of life when more than at any other he needed it most, and when, according to their own showing, they were all reasonably well started in life. There can, in the nature of things, be but one explanation for such a transaction, and that is, his desire to avoid the payment of the Linscott and Bohart judgments.

5. One other matter: We do not think there was any material error committed by the court below in refusing to permit Locke and others to answer the questions asked by the counsel for the plaintiffs in error, respecting the *memoranda* and conveyances. The effort of counsel seems to have been to have the witnesses give their construction of this transaction. Mr. Locke identifies the *memoranda*; says that he signed it, and the others signed it. They offer it in evidence, and then commences a series of questions, the object of which is to have the witnesses state the reasons why this property was conveyed to the children by N. D. Lewis. They were asked if it was not intended as a gift, and other questions, the answers to which would indicate how they regarded the transaction. The court sustained objections to all such questions, because it appeared that the transaction was reduced to writing, signed by all the parties, and was offered by them as the primary proof of the facts attending the conveyances. The legal effect of these *memoranda* and conveyances, viewed as parts of one entire transaction, was a question for the court, and not one about which interested parties could be permitted to express opinions as to what they believed them to be, or how they regarded them.

We are bound by every consideration to recommend that the judgment of the district court be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

(37 Kan. 327)

AUSTIN v. JONES and others.

(Supreme Court of Kansas. October 8, 1887.)

TAXATION—LIMITATION OF ACTION TO SET ASIDE TAX DEED—STATUTES CONSTRUED.

Section 1, c. 40, Sess. Laws 1879, which appears in Comp. Laws 1885 as section 143, c. 107, does not repeal or limit section 141, c. 34, Sess. Laws 1876, which appears in Comp. Laws 1885 as section 141, c. 107; as said section 1, c. 40, Sess. Laws 1879, gives the land-owner two years in which to set aside "any and all tax deeds," where different or successive tax deeds upon the same sale have been put on record by the same party,—not merely two years in which to set aside the last tax deed put on record by the same party, but two years in which to set aside "any and all" such different or successive tax deeds put on record, without regard to the length of time which the prior tax deeds, merged in the last tax deed, have been of record.

(Syllabus by the Court.)

Error from superior court, Shawnee county; W. C. WEBB, Judge.

A. Bergen and E. A. Austin, for plaintiff in error. G. C. Clemens, for defendant in error.

HORTON, C. J. This was an action brought to recover the possession of 80 acres of land in Shawnee county. The defendants alleged in their answer that the land was subject to taxation for the year 1873; that the same was sold at a tax sale, May 5, 1874, for the delinquent taxes of 1873, to B. J. Ricker; that on May 1, 1877, Ricker assigned the tax-sale certificate to Josephine B. Thomas; that on May 8, 1877, the land not having been redeemed, Josephine B. Thomas obtained a tax deed thereon, which was recorded May 9, 1877; that subsequently, having been advised the tax deed was void on its face, she obtained another tax deed on October 6, 1880, which was recorded October 9, 1880; that on December 20, 1880, Josephine B. Thomas and her husband Jonathan Thomas conveyed the land to the defendants; that the tax deed of October 6, 1880, had become absolute under section 143, c. 107, Comp. Laws 1885, before this action was commenced, as more than two years had elapsed after the recording of this second tax deed. The plaintiff, in reply, alleged various facts concerning the tax sales, which, if proved, are sufficient to avoid the tax deeds, if such defenses are not barred by the statute of limitations. The defendants demurred generally to this reply. The demurrer was sustained by the court, and of this ruling the plaintiff complains.

The question in this case arises over the construction of section 1, c. 40, Sess. Laws 1879, which amends section 143, c. 34, Sess. Laws 1876. The last tax deed, dated October 6, 1880, was put on record after the amendment of 1879 went into effect. This action was commenced October 27, 1884; nearly four years after the last tax deed was put on record, but less than five years from the recording of the same. Under the provisions of section 141, c. 107, Comp. Laws 1885, the owner of the fee out of possession may commence his action against the tax purchaser at any time within five years from the time of the recording of the tax deed. If said section 141 has not been repealed or limited by said section 143, c. 107, Comp. Laws 1885, plaintiff had five years from October 9, 1880, in which to commence his action. On the part of the plaintiffs it is contended that section 1, c. 40, Sess. Laws 1879, (which appears in the Compiled Laws of 1885 as section 143, c. 107,) does not bar this action. On the part of the defendants it is claimed that said section 143, c. 107, Comp. Laws 1885, changes or limits section 141 of said chapter, in cases of this kind, to two years only.

There are no negative prohibitory words in said section 143. If possible, the two sections should be harmonized. All statutes *pari materia* are to be read and construed together, as if they formed parts of the same statute, and were enacted at the same time. With our view of said section 143, it is not inconsistent with section 141. We do not think the legislature intended, by the adoption of said section 143, to shorten the time within which the orig-

inal owner could maintain an action to set aside tax deeds upon land owned by him. Under a different construction, if the county clerk issued a defective deed at first, and the tax purchaser then procured a second deed regular upon its face, the original owner would be deprived of one, two, three, or more years of the time which the five-years statute gives him in which to attack the possession or title of the tax purchaser. We think the legislature intended to extend, rather than limit, the time of limitation. Under section 141 the land-owner has five years. If a defective or irregular tax deed has been recorded, and no subsequent tax deed is taken out, the owner may commence his action against the tax purchaser at any time within five years; but if a second tax deed is taken out and recorded, he has also two years thereafter in which "to set aside any or all the tax deeds" upon his land. While it is true that the statute provides that all rights claimed by the tax-deed holder under prior tax deeds are waived and merged into the second or latest tax deed, such prior tax deeds may be to some extent a cloud upon the title, and the owner may desire to have a judicial determination thereof. So, if four or more years have elapsed between the issuance and recording of the first tax deed and the issuance and recording of the second tax deed, the owner has two years after the last tax deed is recorded, in which to bring his action to set aside the prior tax deed, as well, also, as the last tax deed. The words in the section are that he has two years in which to set aside "any and all tax deeds."

The statute as we construe it will read as follows: "In all cases where different or successive tax deeds upon the same sale shall be put on record by the same party, or in interest therewith, it shall be deemed and held that all rights which might otherwise be claimed [by the tax-deed holder, and not by the original owner] under all or any tax deed prior to the last one put on record shall be deemed and held to be waived, [by the tax-deed holder, and not by the original owner,] and considered as merged in such last tax deed so put on record; and in all cases where several tax deeds shall be put on record by the same party, or in interest therewith, that the party claiming to own the same land may obtain an action for the recovery of the possession thereof, or to set aside any or all such tax deeds, [not merely the last one, but any or all, and without regard to the length of time which some of them may have been in existence,] at any time within two years from the taking effect of this act, [and as the words 'not thereafter' are omitted, the words 'or at any time within the limitation fixed by other statutes' should be inserted;] and in any case of the recording of such tax deed or deeds hereafter, then within two years from the time of putting on record the last of such tax deeds, [or at any time within the limitation fixed by other statutes.]" Section 1, c. 40, Sess. Laws 1879; section 143, c. 107, Comp. Laws 1885. The construction here given permits section 143 to operate without repealing or limiting said section 141. This construction is also in accord with the decisions in *Myers v. Coonradt*, 28 Kan. 211; and *Corbin v. Bronson*, Id. 552.

The order and judgment of the district court will be reversed, and the cause remanded, with direction to overrule the demurrer filed to the reply.

(All the justices concurring.)

(37 Kan. 281)

EISENHOUER v. STEIN.

(Supreme Court of Kansas. October 8, 1887.)

1. PLEADING—SEPARATE CAUSES OF ACTION—BALANCE DUE, AND OPEN ACCOUNT.

A petition filed in the district court which alleges that defendant is indebted to plaintiff "to balance due, as per settlement," and also on an open, itemized account, states two separate causes of action.

2. SAME—REFUSAL TO NUMBER SEPARATE CAUSES—DISMISSAL OF ACTION.

When a petition embraces two separate and distinct causes of action in one count, and, on motion, plaintiff is required by the court to separately state and number them, and he refuses to do so, it is not error for the court to dismiss the action without prejudice to a future one.

(*Syllabus by Holt, C.*)

Error from district court, Dickinson county; M. B. NICHOLSON, Judge.

Trial had at the May term, 1885, and judgment for defendant. The opinion states the material facts.

John H. Mahan, for plaintiff in error. *Stambaugh & Hurd*, for defendant in error.

HOLT, C. The plaintiff filed his petition in the district court of Dickinson county, Kansas, the first item of which is: "October 24, 1874, to balance due, as per settlement, \$73.03." Then follows a very long, open, itemized account, none of the items of such account being a part of the \$73.03. The defendant filed his motion to compel the plaintiff to separately state and number his causes of action contained in the petition. The court sustained his motion. Plaintiff refused to amend, and elected to stand upon his petition. The defendant then obtained 20 days from the rising of the court to answer the petition of the plaintiff. A few days afterwards, on the motion of the defendant, the court vacated the order permitting the defendant to answer, and dismissed this cause without prejudice to a future action; the plaintiff being present and objecting. The plaintiff complains of the decision of the district court in compelling him to separately state and number his causes of action, and also of the order dismissing the action.

The petition embraces a cause of action on a settlement, and also one upon an open account. These constitute two separate and distinct causes of action, and the order of the court compelling him to separately number and state them was correct. When the plaintiff refused to amend, and determined to stand upon his petition, he compelled the trial court to either violate its own order, and try the case in disregard of the long-established rules of practice, or to dismiss the action without prejudice. The trial court very properly refused to virtually nullify its own reasonable decision, and dismissed the action. This was right. We therefore recommend that the judgment of the court below be affirmed.

By THE COURT. It is so ordered; all the justices concurring.

(37 Kan. 308)

HAYNER and others v. EBERHARDT and others.

(*Supreme Court of Kansas. October 8, 1887.*)

1. PLEADING—GENERAL DENIAL—ISSUES.

When the petition alleges the existence of a partnership, and the execution of a mechanic's lien, and a verified answer is filed denying "each and every allegation, averment, and statement contained in the plaintiff's petition," the existence of the partnership, and the due execution of the lien, are such issues as must be proved on the trial, to entitle the plaintiff to recover.

2. MORTGAGE—RECORDING—PRIORITY.

The effect of our recording acts is to give priority of lien to a recorded mortgage to secure a pre-existing indebtedness, over an unrecorded mortgage given to secure the payment of machinery furnished in the construction of a mill, of which the mortgagee of the recorded mortgage had no notice.

3. APPEAL—JOINDER OF PLAINTIFFS IN ERROR.

One of the numerous parties to an action who does not join as plaintiff in error in the petition in error, will not be allowed to complain in this court, about questions arising on the record that he may deem prejudicial to his interest. If he desires such questions reviewed, he must file, or join in the filing of a petition in error.

(*Syllabus by Simpson, C.*)

Error from district court, McPherson county; S. O. HINDS, Judge.

Smith & Solomon, for plaintiffs in error. *John McPhail, Simpson & Bowker*, and *J. G. Spivey*, for defendants in error.

SIMPSON, C. This action was commenced in the district court of McPherson county on the fourth day of September, 1883, by Eberhardt & Sudendorf, to enforce a mechanic's or material lien for lumber furnished to S. P. Carlton and W. H. Jamison on a contract, and used in the erection, altering, and repairing of a mill building on lots 35, 37, 39, 75, 77, and 79 in the city of Lindsburg. The amount claimed was \$781.82, with interest from August 23, 1882. The petition alleges that the plaintiffs below were "partners under the firm name of Eberhardt & Sudendorf," and a copy of the lien filed September 21, 1882, with all the indorsements thereon, is set up in the petition. The plaintiffs in error were made defendants in the action, and filed an answer verified by affidavit, in which they deny each and every allegation, averment, and statement contained in the plaintiffs' petition. Among the averments of the plaintiffs' petition are—*First*, "that the said plaintiffs are, and at several times hereinafter stated were, partners under the firm name of Eberhardt & Sudendorf." *Third*, "that the said defendants, intending to avail themselves of the benefits of the laws of the state of Kansas securing liens to mechanics and others, and to perfect a lien on said premises hereinbefore described, as a security for the payment of their claim for lumber and other material furnished and used as hereinbefore set out, did on the twenty-first day of September, 1882, file with the clerk of the district court of McPherson county, in his office, their claim, containing a true statement of their demands against the defendants W. H. Jamison and S. P. Carlton, after deducting all credits and offsets, with the name of the owner of the premises whereon the building, appurtenances, and improvements have been erected, altered, and repaired, also a description of the property to be charged with said lien, verified by the affidavit of C. Eberhardt, one of the plaintiffs; a copy of which statement, with all indorsements thereon, is hereunto attached and filed herewith, and marked 'Exhibit A,' and made a part of the petition."

1. The first question presented is, what was put in issue by the averments of this petition, and the verified answer of Hayner & Co.? Section 108, Code, provides: "In all actions, allegations of the execution of written instruments, and indorsements thereon, of the existence of a corporation or partnership, or of any appointment or authority, shall be taken as true, unless the denial of the same be verified by the affidavit of the party, his agent or attorney."

One of the issues made by the pleadings was the existence of the partnership of Eberhardt & Sudendorf. They assert it, and its existence was denied by the sworn answer of the plaintiffs in error. Another issue made by the pleadings was the execution of the material lien asserted by the plaintiffs below in the third paragraph of their petition. They asserted that they had executed a mechanic's lien, and its execution was denied under oath. There can be no question but what the lien set forth is a written instrument, within the meaning of section 108, Code. In *Ferguson v. Tutt*, 8 Kan. 376, a sheriff's bond is held to be such an instrument. In *Railroad Co. v. Wilson*, 10 Kan. 112, a bill of lading is within the statute. In *Reed v. Arnold*, Id. 102, a note and mortgage is considered within it. In *School-District v. Carter*, 11 Kan. 445, the section is applied to a school-order. In *Washington v. Hobart*, 17 Kan. 275, a promissory note is considered. In *McVay v. English*, 30 Kan. 368, 1 Pac. Rep. 795, it is said that a chattel mortgage is included. In *Montgomery v. Road*, 34 Kan. 122, 8 Pac. Rep. 253, a real-estate mortgage is within the operation of the section.

The existence of the partnership, and the execution of the lien, were in issue, and evidence ought to have been offered tending to prove partnership and execution of lien, and, as there was neither, the demurrer of the plain-

tiffs in error to the evidence ought to have been sustained. *Savings Ass'n v. Barber*, 35 Kan. 488, 11 Pac. Rep. 330.

2. Knowlton & Dolan became parties to the action by leave of the court, and filed an answer and cross-petition by which they claimed a machinery lien on lots 35, 37, 39, 75, 77, 79, 81, 83, and 85. They furnished machinery and fixtures used in the mill of the value of \$2,561.40, at divers dates from November 1, 1881, up to and including March 4, 1883. It is a fair statement of the evidence to say that the machinery furnished by Knowlton & Dolan was all delivered and set up about the last of November, 1881. On the fourth March, 1883, they sent an employe of the house to finish a purifier. On the twentieth day of October, 1881, W. H. Jamison, the then owner of the mill, ordered certain machinery from Knowlton & Dolan by written order in which it is stated:

"All deferred payments to draw 8 per cent. interest per annum from February 1, 1882. The title to the above-specified machinery remains and is to be in Knowlton & Dolan until the same is fully paid for, and as security for the payments of the above machinery. I agree to execute a mortgage on my mill, building, and machinery contained therein, and keep the same insured in some good and responsible company in an amount equal to what is due, and the same to be paid to Knowlton & Dolan, in case of fire, as their interest may appear.

[Signed] W. H. JAMISON.

"We accept the above offer.

[Signed]

"KNOWLTON & DOLAN."

In April, 1882, W. H. Jamison sold the mill property to S. P. Carlton, and on May 22, 1882, Knowlton & Dolan took Carlton's notes for the amount of the machinery claim.

J. E. Hayner & Co. had a mortgage covering lots 35, 37, 39, 75, 77, 79, 81, and 83, executed by S. P. Carlton to them on the eleventh day of January, 1883, to secure a pre-existing debt of \$4,000 that Carlton owed J. E. Hayner & Co. for "money collected on goods sold." This indebtedness grew out of business transactions entirely separate from the mill. This mortgage of Carlton to Hayner & Co. was recorded in McPherson county on the thirteenth day of January, 1883. The written promise of Jamison to Knowlton & Dolan to execute a mortgage to them was not recorded. The jury found that, at the time the mortgage from Carlton to Hayner & Co. was executed and recorded, Hayner & Co. had no notice of the agreement of Jamison to execute a mortgage to Knowlton & Dolan on the mill property.

This state of facts raises the question of seniority of lien as between the agreement of Jamison to execute a mortgage to Knowlton & Dolan, and the mortgage executed and recorded by Carlton to J. E. Hayner & Co. to secure a pre-existing indebtedness. In matters of this kind, there is always an equitable assumption that whatever is agreed to be done is to be considered as accomplished; and hence the agreement of Jamison to execute and deliver a mortgage on the mill property to Knowlton & Dolan is to be given the same legal effect, in the determination of their rights in this controversy, as if the mortgage had been executed.

The mortgage to Hayner & Co. having been recorded, and the mortgage to Knowlton & Dolan not having been recorded, and Hayner & Co. having no notice of it, ordinarily the Hayner & Co. mortgage takes precedence as a lien; but it is contended that the fact that the mortgage of Hayner & Co. was to secure a pre-existing indebtedness makes it inferior in lien to that of Knowlton & Dolan, because theirs is first in time, and represents a superior equity in the property bound by the liens of both instruments. Conceding all that is claimed in this respect,—that by the rules of equity as usually administered a mortgage for purchase money, or as security for the payment of material furnished in the construction, is a superior equity to one given to secure a pre-existing debt,—and yet the proper solution of the question here depends

upon the construction and effect of the recording acts of the legislature of this state. Sections 19 and 20 of the act regulating the conveyance of real estate read as follows:

"Sec. 19. Every instrument in writing that conveys any real estate, or whereby any real estate may be affected, proved, or acknowledged, and certified in the manner hereinbefore prescribed, may be recorded in the office of the register of deeds of the county in which such real estate is situated.

"Sec. 20. Every such instrument in writing, certified and recorded in the manner hereinbefore prescribed, shall, from the time of filing the same with the register of deeds for record, impart notice to all persons of the contents thereof; and all subsequent purchasers and mortgagees shall be deemed to purchase with notice."

The evident purpose of these two sections of the statute is so plainly expressed by the legislature that there is no room for construction; and under any known rule of interpretation there are no exceptions to its operation but such as are therein created,—by notice of the existence of a prior mortgage, and probably such notice as possession by some other person than the mortgagor might impart. All outstanding equities of which the mortgagee had no notice at the time of the execution and delivery of the mortgage are rendered subordinate to its lien by the act of recording. This statute, with some variation of phraseology, has been in force ever since the third year of our territorial existence, and has resulted in a plain, easy, and practical method by which title to land, and written instruments affecting real estate, can be determined by men of ordinary intelligence in almost every case with that reasonable certainty that is so much to be desired. To hold now that the lien of a recorded mortgage should be postponed in favor of an unrecorded one, for the sole reason that the consideration of the recorded instrument was an antecedent debt, would not only antagonize the policy of the statute, but would misinterpret the plain language by which that policy is expressed.

It is a wise state policy that sweeps away the accumulated cobwebs of an obsolete system that hang about the muniments, and are entwined around the chains of the titles to real estate within its borders, and adopts a plain, easily-understood, and perfectly just rule of public registration, founded upon the maxim, "First in time, first in right," qualified by notice of the existence of other liens, and the rights of a party in possession. *Jackson v. Reid*, 30 Kan. 10, 1 Pac. Rep. 308; *Lewis v. Kirk*, 28 Kan. 497. So the real question is, which of these two mortgages was first recorded without notice of the existence of the other? The jury find that the mortgage of Hayner & Co. was duly recorded, and that they had no notice of the Knowlton & Dolan mortgage.

3. Another question discussed by counsel for plaintiff in error is the validity of the mechanic or material lien claimed by Knowlton & Dolan. As we gather and understand the facts disclosed by the record they are as follows: The machinery for which the lien was claimed was furnished by Knowlton & Dolan to Jamison, probably with knowledge and acquiescence of Carlton, about the last of the year 1881. It was certainly furnished and put up by the first of February, 1882, for on that date the mill had commenced running and doing business, and it was practically completed. As, under the express terms of the statute, the lien for machinery and fixtures must be filed within four months after the furnishing or putting up of the machinery and fixtures, it was too late. *Bashor v. Nordyke & M. Co.*, 25 Kan. 222. But it is contended that the subsequent action of Knowlton & Dolan some time in the month of May, 1883, by sending one of their employes to the mill at Lindsburg to repair the purifiers, and, in repairing them, furnished some new or additional fixtures, had the effect to extend the time within which they could file their lien to four months after this work was done. There is another pretext for this assumption growing out of some evidence tending to show, at the time of the purchase of this machinery in November, 1881, by Jamison,

from Knowlton & Dolan, they had made a guaranty as to the perfection of the machinery, and its entire adaptation to the work designed, and that this work done and the material furnished in May, 1883, was in pursuance of that guaranty, and had the effect to extend the time of the putting up to that date. We do not think so. If, by the terms of the contract of purchase, the machinery was to be furnished in separate or detached parcels, at stipulated times, the furnishing would not be complete until the delivery of the whole, and the putting up could not be done until all was delivered; and probably the time within which a material lien could be filed would be reckoned from the date of the delivery and putting up of the last portion.

But the evidence in the case does not justify any such conclusion. The fair conclusion to be given all the facts bearing upon this question is that the machinery was furnished in the latter part of the year 1881, and was put in the mill, certainly before the tenth of February, 1882, because it was run at that time, and could not have been running if the machinery had not been put up. The subsequent tinkering in May, 1883, ought not to be regarded as fixing the time within which the lien could be filed. We are in great doubt as to when this lien was filed. There is no positive statement in the record regarding it, and there is no indorsement of the clerk showing the date of filing; and as the case will have to be reversed as to Eberhardt & Sudendorf, and as to Knowlton & Dolan, we will not undertake to determine when it was filed.

4. E. Jerritt was made a party defendant in the original action, as well as in the petition in error in this court. He answered to the original action, setting up a mortgage for \$4,000 on lots 35, 37, and 39, covered by the mill property, given to him by S. P. Carlton, the then owner, on the seventeenth of May, 1882. The court below held this to be the second lien on the mill property; Eberhardt & Sudendorf being first, Knowlton & Dolan being third, and J. E. Hayner the fourth. Counsel for Jerritt filed a brief, and insist that the question as between him and Eberhardt & Sudendorf be determined here. While all exceptions are noted in favor of Jerritt, he does not join in the petition in error, and it is doubtful if, under such a condition of the record, we can consider such questions. Nor does it make any practical difference, so far as he is concerned; for if, on the new trial we grant the plaintiffs in error, the facts do not justify the lien of Eberhardt & Sudendorf, as against the plaintiffs in error, the mortgage of Jerritt would be the first lien, unless it is defeated by some proof that was not offered or contained in the record of the case as it now stands.

It is recommended that, as between the plaintiffs in error and Eberhardt & Sudendorf and Knowlton & Dolan, the case be remanded to the district court of McPherson county with instructions to sustain their motion for a new trial.

BY THE COURT. It is so ordered; all the justices concurring.

(37 Kan. 258)

PERRINE and another v. MAYBERRY.

(Supreme Court of Kansas. October 8, 1887.)

SPECIFIC PERFORMANCE—AGAINST MARRIED WOMAN.

P. and wife were the equitable owners of 160 acres of land, occupied by them as a homestead. They jointly contracted with M. to sell and convey to him 80 acres thereof, and to give a deed therefor when they had obtained the legal title. Six hundred eighty-four dollars and eighty cents were paid as purchase money therefor, by M. to P., and P. and wife put M. into complete possession of the land, and permitted him to make valuable and lasting improvements thereon, of the value of \$1,400. Both P. and wife voluntarily consented to a sale of the land to M., and, after M. had taken possession, stood by and saw him perform his labor, and expend his money thereon. After all this was done, and P. had obtained the legal

title, the wife refused to join her husband in conveying the 80 acres to M. Held, that a court of equity has the power to and will enforce a completion of the alienation, and enforce a specific performance of the contract by P. and wife.

(Syllabus by the Court.)

Error from district court, Harvey county; HOUK, Judge.

Bowman & Bucher and *Clarence Spooner*, for plaintiff in error. *Ady & Henry* and *Green & Shaver*, for defendant in error.

HORTON, C. J. Andrew J. Mayberry brought his action against John A. Perrine, and Emeline, his wife, to compel them to specifically perform an alleged contract for the sale of a tract of land. The petition recites, among other things, "that heretofore, to-wit, on or about the fourteenth day of September, 1871, said defendant John A. Perrine, then being married to the defendant Emeline Perrine, entered into a written contract with the Atchison, Topeka & Santa Fe Railroad Company, a corporation duly organized under the laws of the state of Kansas, by the terms of which contract said John A. Perrine agreed to purchase of said railroad company a certain piece and parcel of land lying and being in the county of Harvey and state of Kansas, and described as follows, to-wit: The south-east quarter of section number one, in township number twenty-four, south of range number one, east of the sixth principal meridian, containing one hundred sixty acres, more or less, according to the United States surveys; that said written contract is not in the possession or within the control or reach of this plaintiff, and it is impossible for him to procure the same or a copy thereof; that by the terms and conditions of said contract the said John A. Perrine was to pay for said land the sum of \$—— in annual installments, the last payment to be made upon the fourteenth day of September, 1882; and that upon the full payment of said sum and amount of money, with the interest and charges thereon, said railroad company agreed to execute and deliver to said John A. Perrine a deed of general warranty, with the usual covenants therein for said land; that on or about the twenty-eighth day of January, 1874, the said John A. Perrine and Emeline Perrine, having ascertained that they would not be able to meet the payments as they would become due by virtue of said contract, proposed to this plaintiff that if he would pay the said John A. Perrine the sum of one hundred seventy-five dollars, and afterwards pay one-half of all subsequent payments falling due to said railroad company for the purchase money of said premises, that the said plaintiff should be considered and held to be the owner of the west one-half of said quarter section of land, and that when such payments were all made, and said railroad company should in pursuance of their contract with said John A. Perrine execute to him a deed conveying to him the legal title to said premises, the said defendants should immediately convey to this plaintiff, by a deed of general warranty with the usual covenants, the said west one-half of said premises; that this plaintiff accepted said proposition, and thereupon paid to said John A. Perrine the sum of one hundred seventy-five dollars; * * * that, in pursuance of said contract, the plaintiff in the month of September, in the years of 1874 and 1875 and 1876 duly paid to said defendant, John A. Perrine, one-half of all the money falling due to said railroad company under said Perrine's contract of purchase from said company; that on or about the —— day of September, 1877, at the instance and request of the said defendants, this plaintiff made a full settlement for the west one-half of said quarter section of land, by then paying to said Perrine the sum of three hundred twenty-five dollars or thereabouts, as nearly as plaintiff can recollect, the same so paid being the full amount of one-half of all the payments yet to become due to said railroad company upon said contract of purchase from said railroad company to said Perrine, and that in consideration of said payment so made, and the payments made prior thereto by this plaintiff to said defendant, the defendants then verbally agreed with this

plaintiff that they would make punctual payments of all sums yet to fall due to said railroad company, at the time the same should become due, and that they would, when said railroad company should deed said land to said John A. Perrine, make to this plaintiff a good and sufficient warranty deed, with the usual covenants therein."

At the trial, a jury was impaneled to answer certain questions of fact at issue in the case. Among other things, the jury found specially that Mayberry entered into an agreement with John A. Perrine, and Emeline, his wife, jointly, by the terms of which the defendants agreed to convey to Mayberry the land in controversy for the sum of \$681.88; that Emeline Perrine made the proposition to Mayberry to sell him this land at his first visit to Kansas, when at Perrine's house, in January, 1874; that Mayberry, after making such agreement, and in pursuance thereof, went into the immediate, actual, and exclusive possession of the land, with knowledge and consent of the defendants; that Mayberry paid the defendants the money required under the agreement, and also performed all of its conditions; that Mayberry has been in the continuous and undisturbed possession and occupation of the land, with the knowledge and consent of the defendants, ever since the making of the agreement; that Mayberry has made valuable and lasting improvements upon the land, consisting of buildings, orchards, trees, hedges, etc., of the value of \$1,400, with the knowledge and consent of the defendants; that John A. Perrine, and Emeline, his wife, abandoned the use and occupancy of the land in controversy, after the making of the agreement above stated, and in pursuance thereto; that Mayberry paid the defendants, to be used by them in the purchase of the land from the railroad company, the sum of \$684.80. These findings were approved and adopted by the trial court, and, upon the evidence, that court also made the following special findings of fact: "That the defendants jointly consented to the alienation of the premises in question, and jointly put plaintiff into possession thereof, and themselves ceased to occupy the premises as a homestead; and have not so occupied the same, or asserted any right to the possession thereof, adverse to the claim and occupancy of plaintiff, since putting him into possession."

From the foregoing findings, and the evidence upon which they are based, it is very clear that there was such a joint consent of husband and wife at the time the contract for the land was made, and during the time that the plaintiff below was holding possession thereof, and making lasting and valuable improvements thereon under his contract, and during the time that he was paying for the same, that the defendants thereby so alienated the land in equity that a court of equity has the power to and will enforce a completion of the alienation, by enforcing a specific performance of the contract. *Edwards v. Fry*, 9 Kan. 417. It is claimed, however, that the verbal agreements entered into between Mayberry and the Perrines were all merged into a written contract, executed January 8, 1884, and signed by Andrew J. Mayberry and John A. Perrine; and that as Emeline, the wife of John A. Perrine, never signed the written contract, the contract was and is absolutely void, as the same concerns the homestead of the Perrines.

The defense was that Andrew J. Mayberry and John A. Perrine were the sole parties to the contract about the land. The writing of January 8, 1884, was attached to one of the answers, and was before the trial court, as evidence that Emeline Perrine was not a contracting party. On the other hand, the evidence of Mayberry was to the effect that Emeline Perrine joined with her husband in selling the land; that she did not sign the written agreement of January 8, 1884, because of advice given at the office of the scrivener that it was not necessary for her to do so. In substance, the evidence of Mayberry established that the writing of January 8, 1884, did not embrace the contract between himself and the Perrines. The jury adopted the evidence of Mayberry, and the trial court found the issue upon this point against the Perrines.

Again, neither the statutes nor the constitution requires that the alienation of a homestead, with the joint consent of the husband and wife, must be in writing. Of course, the joint consent must exist before any voluntary alienation of the homestead. In this case, there was the express joint consent of the husband and wife. Section 9, art. 15, State Const.; section 1, c. 38, Comp. Laws 1879. Upon that joint consent the purchase money was paid, possession was taken, lasting and valuable improvements made. Mayberry cannot now be robbed of the fruit of his toil and outlays by the refusal of Mrs. Perrine to sign the deed. See *Overman v. Hathaway*, 29 Kan. 434; *Newkirk v. Marshall*, 35 Kan. 77, 10 Pac. Rep. 571; *Harkness v. Burton*, 89 Iowa, 101.

We have examined the other questions presented, but the allegations of error stated are not sufficient to reverse or modify the judgment.

Therefore the judgment of the district court will be affirmed.

(All the justices concurring.)

(37 Kan. 287)

GAFFORD and another, Guardian, etc., v. DICKINSON, Adm'r, etc., and others.

(*Supreme Court of Kansas*. October 8, 1887.)

ADMINISTRATOR—FRAUD—ACTION AGAINST—PLEADING—JURISDICTION.

Where the heirs of a deceased person, after the estate has been finally settled in the probate court, bring an action in the district court against the former administrator and others, and set forth in their petition that the defendants, through conspiracy and fraud, procured fraudulent judgments and orders to be entered in the probate court, and committed other wrongs, whereby they cheated and defrauded the heirs out of a large proportion of the estate, and the plaintiff had no knowledge of such fraud and wrongs until after the final settlement in the probate court, and prayed to have the aforesaid judgments and orders set aside, and for other relief, *held*, that the petition states a cause of action, and only one, and that the district court has jurisdiction of the same.

(*Syllabus by the Court*.)

Error from district court, Brown county; DAVIS MARTIN, Trial Judge.

W. D. Webb, for plaintiffs in error. W. W. Guthrie, C. W. Johnson, James Falloon, and Ira J. Lucock, for defendants in error.

VALENTINE, J. The only questions involved in this case arose upon a demurrer to the plaintiffs' petition. The petition states, among other things, as follows:

On November 5, 1879, William Boyd Dickinson died, leaving as his heirs a wife, Mary Dickinson, now Mary Gafford, and one child, Samuel Boyd Dickinson. He also left a large amount of property, both real and personal. He also left three brothers, Samuel P. Dickinson, Martin Boyd Dickinson, and John C. Dickinson, and one sister, Susan C. Dickinson. After the death of William Boyd Dickinson, Samuel P. Dickinson, Martin Boyd Dickinson, and Susan C. Dickinson, who are now the defendants in this action, entered into a conspiracy to cheat and defraud the said Mary Dickinson, who is now the plaintiff in this action, and Samuel Boyd Dickinson, her minor son, out of their interest in the aforesaid estate of William Boyd Dickinson, and, in pursuance thereof, it is alleged: Samuel P. Dickinson "came to the plaintiff, and represented to her that he was her friend, and reminded her that he was the brother of her deceased husband, and told her that the estate was large, and that she was not accustomed to doing business; she could not settle up the estate, and proposed to her that he would do it for her. He further stated to her that he understood all about the business, having come out of it but a short time before, and that he could and would guard it for her from absorption, and protect her interest and that of her child from being wasted or obtained by anybody, and would preserve it for them; that this plaintiff, relying on these and other protestations and representations, and reposing great

trust and confidence in the said Samuel P. Dickinson, and believing that he would carefully guard and protect the interest of the said estate, and would preserve the same for her and her said child, who are the only heirs of the said William B. Dickinson, agreed to receive his counsel, and be governed by his advice in regard to all matters pertaining to said estate; that she was stricken with grief, and unaccustomed to doing business, and naturally looked for some one to rely upon; and that the defendant Samuel P. Dickinson, taking advantage of her forlorn and desolate situation, and the relation of brother to her deceased husband, gained her entire confidence, and she relied implicitly upon his friendship and integrity, and actually surrendered to him the management and control of her interest and the interest of her said minor child."

In pursuance of the aforesaid conspiracy, the following things transpired, and were had and done: No administrator was appointed until June 15, 1881, when Martin Boyd Dickinson was appointed; and on June 17, 1881, John C. Dickinson was appointed guardian for the minor son, Samuel Boyd Dickinson. Martin Boyd Dickinson failed and refused, as administrator, to make an inventory of a large proportion of the property belonging to the estate, and made a false inventory of the remainder. He also permitted a large amount of false and fraudulent claims to be allowed against the estate, and in favor of Samuel P. Dickinson and Susan C. Dickinson, and paid them from the estate. He also sold at private sale and conveyed to Samuel P. Dickinson, for himself and Samuel P. jointly, a large amount of the real estate belonging to the estate, at about one-third of its real value. The conspirators at the proper times fraudulently procured from the probate court all the necessary orders to enable the administrator to perform these acts.

"And this plaintiff further alleges that she did not discover any of the frauds above set forth until long after they were consummated, and all of them were discovered within the last six months by her; that all of the above and foregoing facts, matters, and things are the result of an agreement and conspiracy entered into between the defendants in this suit, for the purpose of cheating and defrauding said estate, and for the purpose of cheating and defrauding this plaintiff and her said ward and minor child, only heirs of the said William B. Dickinson, deceased, and that the entire administration of said estate is illegal and void for the reasons above set forth." A final settlement of the estate, by the administrator, with the probate court, was had on June 28, 1884, and the administrator was discharged.

"But that this plaintiff was not present at such settlement; that she was persuaded to stay away therefrom by the said Samuel P. Dickinson, he representing to her that her presence was unnecessary, and that he would attend to her interests there, and that she could not understand it in any event, and that, relying on him, the said Samuel P. Dickinson, and not then having discovered that he and the said Martin B. Dickinson were absorbing said estate, and cheating and defrauding the same, and still relying on him, the said Samuel P. Dickinson, to protect her interest at such settlement, and to protect the interest of her said son, she did remain away, and trusted everything, as she had done all through the said administration, to said Samuel P. Dickinson."

On October 13, 1884, Mary Gafford, formerly Mary Dickinson, was appointed guardian for her minor son, said Samuel Boyd Dickinson; and on June 27, 1885, she commenced this action in the district court of Brown county for herself, and as guardian and next friend of her said son. The plaintiff also alleges in her petition that the person who was probate judge when the foregoing proceedings were had is still the probate judge, and that he is a material witness in this case, and that she could not safely proceed to trial without his testimony. The plaintiff then prays in her petition that the entire administration of the estate, including all the proceedings had before the probate

court with reference to the estate, be set aside, and that a new administration be had; and for such other and further relief as she may be entitled to; and, in case such relief cannot be granted, then that she and her son may have judgment against Susan C. Dickinson for \$1,554.57, and against Martin B. Dickinson and Samuel P. Dickinson for \$30,000, and interest and costs.

To this petition the defendants demurred, on the grounds (1) that the district court had no jurisdiction; (2) that several causes of action were improperly joined; (3) that the petition did not state facts sufficient to constitute a cause of action.

The court below sustained this demurrer, and, to reverse this ruling, the plaintiff brings the case to this court.

We think the court below erred. The petition states a cause of action, and only one, and the district court has jurisdiction of the same. That the district court has jurisdiction, see the following cases: *Shoemaker v. Brown*, 10 Kan. 383; *Musick v. Beebe*, 17 Kan. 47; *Markson v. Kothman*, 29 Kan. 718, 723; *Brenner v. Bigelow*, 8 Kan. 497; *Griffith v. Godey*, 113 U. S. 89, 5 Sup. Ct. Rep. 383; *Hebard v. Slagle*, 52 Ill. 336; *Stong v. Wilkson*, 14 Mo. 116; *Jones v. Brinker*, 20 Mo. 87; *State v. Roland*, 23 Mo. 95; *Mitchell v. Williams*, 27 Mo. 399; *Dillon v. Bates*, 39 Mo. 292; *Picot v. Bates*, 47 Mo. 390.

It is true that in the exercise of jurisdiction by the district courts, in cases connected with the settlement of the estates of deceased persons, there are some limitations. *Johnson v. Cain*, 15 Kan. 532; *Stratton v. McCandless*, 27 Kan. 297; *Kothman v. Markson*, 34 Kan. 542, 9 Pac. Rep. 218. Generally, while the estate is in the course of settlement in the probate court, the district court will not exercise its jurisdiction; and this for the reason that the jurisdiction of the district court in such cases is equitable only, and the parties have a plain and adequate remedy in the probate court. The jurisdiction of the district court, in all cases like this, is merely equitable, and therefore it will generally refuse to exercise such jurisdiction in any case where the parties have another plain and adequate remedy. In this case, however, the settlement of the estate is no longer pending in the probate court. According to the records of the probate court the estate was finally settled about a year before this action was commenced, and therefore, unless the plaintiff now has a remedy in the district court, she has no remedy. According to the allegations of her petition, she was lulled into a belief of perfect security, and then defrauded by the very persons upon whom she relied for protection, and in whom she reposed confidence. She did not suspect fraud, and had no knowledge of the actual fraud that was committed upon her, until long after it occurred, and until long after the final settlement.

We think she is entitled to the relief which she now asks, and that she is entitled to obtain it in the district court. Fraud vitiates all things, even the most formal judgments; and the same may be set aside, or other proper relief granted, and this in the district court, unless some specific and adequate remedy is furnished by some other tribunal.

The judgment of the court below will be reversed, and cause remanded, with the order that the demurrer to the petition be overruled, and for such other and further proceedings as may be proper in the case.

(All the justices concurring.)

(37 Kan. 321)

REED, Ex'r, etc., v. HAZLETON.

(*Supreme Court of Kansas*. October 8, 1887.)

1. WILL—INSTRUMENT IN PART CONTRACT, AND IN PART TESTAMENTARY.

An instrument in writing may be a contract in one part thereof, concerning one piece of property, and in another part may be testamentary, in relation to other and distinct property.

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2. SAME—INSTRUMENT CONSTRUED.

If an instrument in writing concerning real estate passes a present interest therein, although the right to its possession and enjoyment may not accrue until some future time, it is a contract; but, if the instrument passes an interest or right only upon the death of the maker, it is testamentary in its nature.

(*Syllabus by Holt, C.*)

Error from district court, Ottawa county; M. P. NICHOLSON, Judge.

Plaintiff in error, plaintiff below, brought his action for the recovery of 80 acres of land in Ottawa county. In his petition he alleges that he was the executor of the last will of Henry Ricket, and that by the terms of said will he was to sell the land in controversy; and, further, that defendant wrongfully kept him out of possession of the same. The defendant, in his answer, claims title to the land under the following contract:

"ARTICLE OF AGREEMENT.

"MARCH 8, 1883.

"*State of Kansas, Dickinson County—ss.*: This agreement, made by and between Henry Rickett and John Hazleton, certifieth that Henry Ricket, of the first part, lets unto John Hazleton, of the second part, 18 head of cattle, to be kept on section 13, and sheltered on the north-west quarter of section 13, town 10, range 1 west, of Ottawa county. One-half of the increase to be divided equally between said parties when sold. Henry Ricket agrees to furnish one pony for the use in herding said cattle by John Hazleton, of the second party. Said second party is to cut hay, and put it up in good season, and carefully attend the cattle, by proper shelter and feeding. Said Henry Ricket, when able, will assist in attending the cattle. Henry Ricket, of the first party, during his life-time, will retain full and peaceful possession, and will make such improvements on said premises, from time to time, that he feels himself able. And John Hazleton, of the second party, shall properly care for and see to the wants and interests of the said Henry Ricket in health and sickness. And the said John Hazleton to have his home with Henry Ricket, and have the use of all farming implements during the life-time of the said Henry Ricket. And after the death of the said Henry Ricket, of the first party, the right and title of the north half of the north-west quarter of section 13, town 10, range 1 west, of Ottawa county, Kansas, shall vest in the said John Hazleton, of the second party. One-half of the present cattle, 18 head, to be divided, when sold, between said parties.

his
"HENRY X RICKET.
mark.
"JOHN HAZLETON."

Trial was had in the Ottawa district court at the December term, 1884. A jury being waived, the case was tried by the court, which made the following findings of fact and conclusions of law.

"(1) The court finds that some time during the winter of 1881 and 1882 the defendant and Henry Ricket, deceased, entered into an agreement which was afterwards reduced to writing, and is the writing attached to defendant's answer herein; that at that time the defendant was residing with his family in Morris county, this state, his wife being a daughter of said Henry Ricket; that, at the request of said Henry Ricket, the defendant gave up his home in Morris county, and moved onto the land in controversy, in pursuance of the agreement which was about a year afterwards reduced to writing, as already stated; that the defendant and said Henry Ricket, deceased, each entered upon the performance of said agreement about a year before they reduced the same to writing. (2) In the month of April, 1882, defendant moved with his family from Morris county onto the land in controversy, to-wit, the north half of the north-west quarter of section thirteen, in township eleven south, of range one west, where said Henry Ricket then and theretofore lived, and

said parties continued to reside together thereon from that time until on or about the fourth day of August, 1883, when the said Henry Ricket went to Solomon City, Kansas, for the purpose, as he informed the defendant, of receiving more convenient medical treatment than he could at his home, on account of the distance of said home from the nearest physician; that said Henry Ricket from said fourth day of August, 1883, lived with his son in Solomon City until the fifteenth day of September following, where and when he died. (3) That in the written agreement said land, by error and mistake, was described as being in township ten, when the intention of the parties thereto was to describe the land in controversy in township eleven. (4) That after defendant moved upon said land, and before said Ricket's death he dug a well, and set out some trees thereon, and made some other improvements thereon. (5) That the defendant and his family treated said John Ricket well while they were living together on said land. (6) That about the time that said Ricket went to live with said son, and afterwards, he complained to others that the defendant had threatened to strike him with a pitchfork and kill him, and did not treat him well. Of these complaints defendant had no knowledge."

"(1) At the time of the commencement of this action, defendant was entitled to the possession, and was the owner, of the north half of the north-west quarter of section thirteen, township eleven south, of range one west. (2) That the defendant is entitled to the relief asked by him in the third defense of his answer, to have his title quieted to said land. (3) That the plaintiff is entitled to judgment for the south half of the said north-west quarter of section thirteen, township eleven south, of range one west, in said Ottawa county, Kansas, as prayed for in his petition herein."

There was no denial of the allegations of the plaintiff's petition that he was the executor, duly qualified and acting; and for the purposes of this action that must be taken as true.

R. F. Thompson, for plaintiff in error. *Gärver & Bond*, for defendant in error.

HOLT, C. The plaintiff in error complains first that the court was not authorized to make certain findings of fact under the pleadings in the case that were made, and that the findings of fact were not sufficient to authorize the conclusions of law and the judgment of the court. The question to be decided in this case is whether the writing signed by Henry Ricket and John Hazleton, called an article of agreement, is in reality a contract, or an instrument testamentary in its character. If it is a contract, then the judgment of the court below is correct, and should be affirmed; if it is testamentary, it should be reversed. We have not been able to determine the nature of this written instrument without difficulty. It was evidently prepared by some one not accustomed to drawing written instruments, and unacquainted with the usual legal terms. We have not been able to find an instrument like this in all the numerous authorities cited by the parties, and such authorities have been of little service to us, except as they contain the general rules that mark the distinction between contracts and papers testamentary; and we have found it much more difficult to apply the rules of law to this article of agreement than to ascertain what the true rules are.

There are two parts to the instrument we are now considering,—one concerning the disposition of his personal property by Henry Ricket, which we are not called to pass upon, directly at least; the other having reference to his real estate, the title and possession of which is the subject of this controversy. The first part of this instrument is a contract between Ricket and Hazleton; but from that alone it does not follow that the second part is a contract also. One provision of an instrument in writing may be a contract, and another concerning different property, testamentary. *Kinnebrew v. Kinnebrew*, 35 Ala. 628. We shall not discuss the alleged error that the findings of fact are

not within the issues of this case,—if they were, they would not alter the construction that we believe ought to be placed upon this instrument,—but will say, in passing to the main question to be decided in this action, that the fourth finding is probably within the objection made by the plaintiff.

The rule applicable to this case, established by the authorities, is substantially this: If an instrument of writing passes a present interest in real estate, although the right to its possession and enjoyment may not accrue until some future time, it is a deed or contract; but, if the instrument does not pass an interest or right until the death of the maker, it is a will or testamentary paper. *Sperber v. Balster*, 66 Ga. 317; *Turner v. Scott*, 51 Pa. St. 126; *University v. Barrett*, 22 Iowa, 60, 19 Cent. Law J. 46. We shall accept this as the correct rule, and apply it to this instrument. Did Ricket by this instrument give, or intend to give, to Hazleton, a present interest in this land? Let us examine.

The first provision therein contained is that Ricket shall retain full and peaceful possession of the premises during his life-time, and the last thing said of the land is that after his death the title thereof shall vest in Hazleton. These two clauses embrace all that is stated directly about the title and possession of this land. It is provided, however, that Hazleton shall have his home with Ricket. Where? We might possibly, perhaps fairly, infer, upon these premises; though it would be but an inference, and that should not control the provisions that are plainly written. Before his death Ricket left this tract. Would Hazleton, under the terms of this instrument, have been compelled to have gone too, in order to have kept his home with Ricket? It will be noticed that it was not Ricket that was to live with Hazleton, but Hazleton who was to have his home with Ricket. This instrument, as we have suggested, may have been inartistically drawn so far as legal forms are concerned, but when it has reference to the possession of this land during the life-time of Ricket, its language is strong and explicit. He was to retain—to hold, not to lose—full, *i. e.*, complete, entire, and peaceable, possession. There is no joint possession, sharing it with another, nor was it to be divided, but entire. We cannot, therefore, believe that that part of this instrument which provides that Hazleton should have his home with Ricket, gave him any right of possession in this land against Ricket, when it is construed with the unambiguous statement that Ricket should have full and peaceable possession.

Under the view we take of this instrument, it will be unnecessary to examine the nature of a contract of bargain and sale, and a covenant to stand seized to the use of the grantee, which are discussed in the briefs filed in this action. We believe that it ought not to be placed in either of those classes of conveyances. We fail to find in the instrument the ordinary words employed in a conveyance, "give, grant, bargain, and sell," nor are there other words of like signification which would establish an intention to convey a present estate. In a word, this article of agreement did not contain any of the usual operative words of a conveyance, with the possible exception of this clause: "After the death of the said Henry Ricket, of the first party, the right and title of the land in question shall vest in the said John Hazleton, of the second party." That provision had no present operation, and could be revoked by the grantor at any time. It was testamentary. *McKinney v. Settles*, 31 Mo. 541; *Tied. Real Prop.* 803.

By this instrument the possession of the personal property was given to Hazleton, while Ricket retained possession of the real estate. When the provisions were so explicit in reference to Hazleton's possession of the personal property, we cannot believe that the failure to make any reference to the right of Hazleton to possession of the real estate in this instrument of writing was unintentional. The old man wisely kept possession and control of his home, to prepare for the possible change in the feelings of himself and Hazleton.

Hazleton was not without recourse if he had performed services for which he had not been paid. He could have presented his claim against the estate, and the courts were open to aid him in obtaining his dues.

It is recommended that the judgment of the court below be reversed.

BY THE COURT. It is so ordered; all the justices concurring.

(37 Kan. 305)

MULVANEY v. LOVEJOY.

(*Supreme Court of Kansas. October 8, 1887.*)

JUDGMENT—PROCEEDING TO VACATE FOR FRAUD—REQUISITES OF PETITION.

In a proceeding to vacate a judgment against a defendant for fraud practiced by the plaintiff in obtaining it, the petition must set forth the judgment complained of, and must also fully state the facts constituting the defense. Unless the facts stated show an existing valid and meritorious defense, the petition is fatally defective.

(*Syllabus by the Court.*)

Error from district court, Sedgwick county.

Action to vacate a judgment rendered by the district court of Sedgwick county on October 17, 1884, in favor of C. J. Lovejoy and against Peter Mulvaney, for the sum of \$521.01. The petition in this case was filed July 16, 1885, and is as follows:

"(1) Heretofore, to-wit, on the ——— day of ———, 1884, the defendant commenced an action in said court against the plaintiff, by filing a petition, a copy of which is hereto annexed, marked 'A.'

"(2) Thereafter, to-wit, on the ——— day of ———, by consent of the defendant, plaintiff filed an answer in said cause, a copy of which is attached, marked 'B.'

"(3) Thereafter, to-wit, on the seventeenth day of October, A. D. 1884, this defendant obtained a judgment, by the consideration of said court, against this plaintiff, for the sum of \$521.01, and \$—— costs, a copy of which judgment is hereto annexed, marked 'C.'

"(4) At the commencement of said action, this plaintiff employed Harry Strohm, an attorney of said court, to defend said action on his behalf, and fully informed said Strohm of his defense, and the evidence upon which the same could be established, said defense being a general denial of all the allegations of said petition, and this plaintiff relied upon said attorney to make such defense.

"(5) Said attorney wholly abandoned said cause without notifying the plaintiff thereof, and wholly neglected, as he had promised, to notify plaintiff when said cause would be tried, although he could with reasonable diligence have done so, and plaintiff had no notice of the time said cause would stand for trial, and believed, from the statement of said Strohm to that effect, that the same would not be tried until the February term, 1885, of said court, and for the reasons above stated, and from no negligence of his own, the plaintiff was not present at the trial of said cause.

"(6) The plaintiff states that said judgment was obtained by fraud practiced by said defendant as follows: There being no basis of fact, and the allegations of the petition and the account thereto attached being wholly fictitious and false, which was well known to the defendant, he has sworn as a witness in said cause, and testified that the allegations of his petition were true, and that he had performed the services and made the payments charged for at this plaintiff's request, and for his benefit, which testimony was willfully false, and without such testimony this judgment would not have been given. Wherefore the plaintiff demands that said judgment be vacated, and that the plaintiff be given a new trial, and that the defendant pay all costs."

The petition was verified by the plaintiff, but the exhibits referred to are

not attached to the petition, nor included in the record. The defendant demurred to the petition, alleging that it did not state facts sufficient to constitute a cause of action against him and in favor of the plaintiff. The court sustained the demurrer, and granted the plaintiff leave to file an amended petition, but he elected to stand on the petition as filed. The court thereupon dismissed the action, and gave judgment in favor of the defendant for costs. To reverse these rulings the plaintiff brings the case to this court.

W. P. Campbell, for plaintiff in error. *Houston & Bentley*, for defendant in error.

JOHNSTON, J. The plaintiff undertakes to procure a vacation of the judgment and a new trial on the ground of fraud alleged to have been practiced by Lovejoy in obtaining the judgment, and because of the neglect of his own attorney in failing to appear and defend at the trial, and also in failing to notify him when the trial would occur. It is manifest that the plaintiff sought to bring his case within the provisions stated in subdivisions 4 and 7 of section 568 of the Code. The statute prescribes that proceedings to vacate a judgment on the grounds mentioned "shall be by petition verified by affidavit, setting forth the judgment or order, the grounds to vacate or modify it, and the defense to the action, if the party applying is defendant." Civil Code, § 570. The petition fails to conform to these requirements, and hence the demurrer was rightly sustained. It fails to set forth the petition, answer, or judgment in the original action, although reference is made to them. The answer, if any was filed, may or may not have stated a defense. It may have substantially admitted the allegations of the petition, and thus have rendered the presence or absence of Mulvaney unimportant. Not only has he failed to state what the answer was, but he has omitted the more important allegation that he had an existing and valid defense when the present action was begun. This is essential. Judgments will not be set aside merely to allow a defendant to make a technical objection or an ineffectual defense. The provisions of the Code under which this action is brought were enacted in furtherance of justice, and to relieve parties from unjust judgments that were obtained through no fault of their own. If the defendant has no valid defense, and the result of a second trial must be the same as the first, no actual injustice has been done, and it would be idle to disturb the judgment. The facts constituting the defense should be fully stated, and from them it must appear that the defendant has an existing legal and meritorious defense. In this respect the petition in the present action is fatally defective, as well as in failing to set forth the judgment complained of. *Hill v. Williams*, 6 Kan. 17.

The judgment of the district court will be affirmed.
(All the justices concurring.)

(37 Kan. 267)

MURPHY and others, by Their Next Friend, MURPHY, v. HINDMAN.

(*Supreme Court of Kansas. October 8, 1887.*)

1. NEW TRIAL—DISCRETION OF TRIAL COURT—REVIEW ON APPEAL.

A trial court is invested with a large discretion in determining applications for new trials, and to warrant a reversal it will require a clearer showing of abuse of judicial discretion in granting a new trial than in refusing one.

2. SAME—MISCONDUCT OF JURORS—CONCEALING KNOWLEDGE OF CASE.

A new trial was granted where it was shown that after the cause was submitted, and the jury had retired to the jury-room, one of the jurors separated from his fellows, and that afterwards the remaining members of the jury were called to the court-room, admonished, and allowed to separate, and the absent juror remained away without charge or admonition from the court for about two hours, and until the jury reassembled; and where it was also shown that another juror had been informed concerning one of the principal disputed facts in the case, which knowledge he failed to disclose when he was examined as to his qualifications, but, after

testimony on the fact had been given, he remarked outside of court that he knew more about the fact than the witnesses did: *held*, that the order granting a new trial ought not to be disturbed.

(Syllabus by the Court.)

Error from district court, Wabaunsee county; JOHN MARTIN, Judge.

Overmeyer & Safford and *Geo. G. Cornell*, for plaintiffs in error. *A. H. Case*, *F. S. Stumbaugh*, and *E. N. Gunn*, for defendant in error.

JOHNSTON, J. This is a proceeding in error brought to reverse an order of the district court of Wabaunsee county setting aside a verdict and granting a new trial. The plaintiffs in error, who were plaintiffs below, brought the action to recover the S. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 24, township 11, range 12 E., being an 80-acre tract of land situated in Wabaunsee county. The trial, which was had with a jury at the October term, 1884, resulted in a verdict in favor of the plaintiffs. The defendant filed a motion for a new trial, alleging as reasons therefor every statutory ground for which a new trial may be had. This motion was heard on December 23, 1884, and a new trial was granted; and this is the ruling complained of.

We cannot say that the court erred in its ruling. It is seldom that a case is presented which would justify the court in reversing an order granting a new trial. The trial court is invested with a large discretion in disposing of applications for a new trial, and it is generally held that, to warrant a reversal, it requires a clearer showing of an abuse of discretion in granting a new trial than in refusing one. It was recently said in this court that such an order will not be reversed unless the court "can see, beyond all reasonable doubt, that the trial court has manifestly and materially erred with reference to some pure, simple, and unmixed question of law, and that except for such error the ruling of the trial court would not have been made as it was made, and that it ought not to have been so made." *City of Sedan v. Church*, 29 Kan. 190. See, also, *Brown v. Railroad Co.*, Id. 186, and cases there cited.

The particular ground or grounds upon which the court places its decision cannot be learned from the record, as it is recited that the application was sustained for the reasons stated in the motion. Exceptions were taken by the defendant during the trial to the rulings of the court on the admission of evidence, and in charging the jury. Among the reasons stated why a new trial should be granted was the misconduct of the jury, and irregularity in the proceedings of the court and jury, by which the defendant was prevented from having a fair trial. Affidavits were filed in support of these allegations. In one affidavit it is shown that after the case was submitted to the jury, and the jury had retired to the jury-room in charge of the bailiff, a member of the jury applied and was allowed to go from the jury-room to the water-closet, and, when he returned, the jury had left the room and gone to the court-house, and when the juror arrived there he found that court had adjourned for supper, and he was therefore not present when the jury was admonished and separated, and was separated from the jury for about two hours without any charge or admonition from the court.

The plaintiffs were the surviving heirs of John Campbell, deceased, and one of the matters in controversy was with reference to a marriage contract said to have been made between John Campbell and the defendant. The plaintiffs claim that the defendant conveyed the land in controversy to John Campbell, and that the title was in him at the time of his death, but that the deed was never recorded; and numerous acts and statements of Campbell and the defendant concerning the land were given in testimony with a view of showing that the land was actually conveyed. On the other hand, Mrs. Hindman denies that she ever deeded the land to Campbell, and she claims that the only transaction between Campbell and her was that in 1878 she leased the land to him for a time; and in the same year a marriage contract

was made between them, whereby it was agreed that this land should stand as security for the fulfillment of her promise, and a tract which he owned as security for compliance on his part, which contract was afterwards destroyed by mutual consent; and that whatever was done by Campbell, or under his direction, on the premises, was done under the lease, and in anticipation of their future marriage, under the marriage contract. Under the testimony and the instructions, the marriage contract became a very important feature of the case.

On the motion for a new trial it was shown that one of the jurors who sat in the case had had several conversations with Campbell concerning his relations with the defendant; one of them on the day he died, in which Campbell had stated that he had had trouble with Mrs. Hindman, and, although engaged to marry, he would never marry her. Campbell asked the juror's advice as to how he might get rid of Mrs. Hindman, and the juror advised him in that respect. He also told the juror of the marriage contract, stating what its terms were. After several witnesses had given in their testimony, and a recess had been taken by the court, the juror told the trial judge of his knowledge, and that he knew more about the marriage contract than the witnesses did; but the trial proceeded, and the juror continued to sit in the case. This juror was probably disqualified to try the case. The fact that the juror first named separated from his fellows after the case had been submitted, and had remained away from them for two hours without having been admonished by the court, may not in itself have been sufficient to set aside the verdict; but when it is considered in connection with the conduct of the second juror, and with the action of the court in allowing him to continue in the case until the verdict was rendered, and the other rulings made and excepted to, sufficient grounds for granting a new trial were probably shown. At least, there is enough to prevent this court from reversing the order granting a new trial. In the new trial to be had both parties can have an opportunity to try the case on its merits before a jury that will take the testimony as given by the witnesses, and who will not assume to know the facts better than the witnesses who relate them.

Under the rules established by the decisions of this court, we cannot say that there was error in the ruling of the district court granting a new trial, and hence its order and judgment will be affirmed.

(All the justices concurring.)

(37 Kan. 227)

BEAUBIEN and others v. HINDMAN.

(*Supreme Court of Kansas*, October 8, 1887.)

1. APPEAL—FINDINGS OF FACT BY TRIAL COURT WILL NOT BE DISTURBED.

A finding of fact made by the trial court is equivalent to a verdict of a jury, and will not be disturbed on appeal if there is sufficient evidence to justify it, although it may be contrary to the judgment of the appellate court.

2. SAME—OBJECTION NOT RAISED BELOW.

An alleged error, the matter of which does not clearly appear to have been brought to the attention of the trial court, will not be reviewed on appeal.

Error from district court, Wabaunsee county; JOHN MARTIN, Judge.

Oermeyer & Safford and *Geo. G. Cornell*, for plaintiff in error *A. H. Case*, *F. S. Stumbaugh*, and *E. N. Gunn*, for defendant in error.

PER CURIAM. In this case, Catherine Hindman alleged that she was the equitable owner of, and in the possession of, the undivided five-eighths of the N. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 24, township 11, range 12, in Wabaunsee county; that in January, 1881, she employed John Campbell, as her agent, to purchase and procure for her a deed to the land from Eugene Bourassa, who was at that time owner thereof; that she delivered to Campbell \$400 with

which to make the purchase; that, in pursuance of his employment, Campbell purchased the land, but on February 4, 1881, obtained a deed in his own name from Eugene Bourassa, in violation of his trust; that afterwards, with her money, he purchased a tax-sale certificate upon the property; after his death a tax deed thereon was executed in his name; that the tax deed was recorded September 28, 1882; that subsequently Mary A. Murphy and Triphena Whitaker, the heirs of John Campbell, executed and delivered to Mary C. Beaubien, a deed of the premises; that all of the parties, at the time of these transactions, well knew that the plaintiff was the equitable owner of, and in the exclusive possession of, the land, and were well acquainted with her rights and equities therein. Plaintiff prayed that her title might be established to the property; that the defendants holding the legal title to the same might be declared trustees for her; and that her title to the land be quieted as against them. The case was submitted to the trial court without a jury. The court, after hearing the evidence and the arguments of counsel, found, generally, that Catherine Hindman was the equitable owner of the land in dispute, and granted the prayer of her petition. The defendants excepted, and bring the case here. It is contended in their behalf that the finding and judgment of the court are clearly against the weight of the evidence, and for that reason that the judgment should be reversed.

It has always been held by this court that a finding of fact by the court is equivalent to a verdict by a jury; and, further, that this court will not disturb the finding if there is sufficient evidence to justify it; and this is the case although the finding of the court be contrary to the judgment of the appellate court. *Ruth v. Ford*, 9 Kan. 17; *Walker v. Eagle Manuf'g Co.*, 8 Kan. 397; *Railway Co. v. Kunkel*, 17 Kan. 145; *Beal v. Coddling*, 32 Kan. 107, 4 Pac. Rep. 180. An examination of the whole record convinces us that there was sufficient evidence before the trial court to sustain its finding, and, however much we may be dissatisfied with the conclusion of that court, we cannot reverse the finding or judgment.

Again, it is urged that the court committed error in not granting partition, as prayed for in the supplemental answers. It is said that the supplemental answers were not replied to, and therefore that they were taken as confessed. The record does not give the dates of the filings of the various pleadings. But, after all of the answers are set forth therein, the record shows the plaintiff below filed a reply to the answer of the defendants and also to the answer of the guardian *ad litem*; so it seems that a reply was filed after all of the answers. In any event, we do not think it clearly appears from the motion for a new trial that the question of partition was suggested to the court after its general finding had been made. Error is never presumed, but must be affirmatively shown; and this court, where the pleadings support the judgment, will not review an alleged error of the trial court, if the attention of that court has not been called thereto.

Therefore the judgment of the district court will be affirmed.

(37 Kan. 292)

SMITH v. JONES.

(*Supreme Court of Kansas. October 8, 1887.*)

1. TAXATION—ACTION BY HOLDER OF TAX TITLE—LIMITATION.

An action brought by a tax-title holder against one who has been in possession for more than two years, claiming ownership under a later tax sale, is barred by the limitation provided in subdivision 3, § 16, Civil Code, unless the action is commenced within two years after the plaintiff's tax deed is recorded.

2. SAME—FILING TAX DEED FOR RECORD IMPARTS NOTICE.

When the tax deed has been duly filed for record with the register of deeds, it imparts notice of what it contains to all the world, and, in contemplation of law, is recorded.

(*Syllabus by the Court.*)

Error from district court, Lyon county; CHARLES B. GRAVES, Judge.
Peyton, Sanders & Peyton and J. A. Smith, for plaintiff in error. *Ed. S. Waterbury*, for defendant in error.

JOHNSTON, J. This action was brought by F. E. Smith to recover from Ellis Jones the possession of the W. $\frac{1}{4}$ and the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 22, township 20, range 11, situated in the county of Lyon and state of Kansas, and judgment on the second and final trial was given in favor of the defendant. The plaintiff claimed under a sale of the land for taxes, made to T. Johnson on May 5, 1874, for \$9.76, being the taxes thereon for 1873; and an assignment of the tax-sale certificate from Johnson to Noyes Spicer on May 6, 1874; a tax deed to Noyes Spicer, executed May 6, 1880, and recorded on May 8, 1880; and a quitclaim deed from Spicer and wife to himself, executed August 22, 1883. The taxes assessed against the land for the year 1884 were not paid, and at a sale held on September 7, 1885, it was again offered for sale, and, there being no bidders, it was bid off by the county treasurer, in the name of the county, for the amount of taxes charged against it; and the taxes for the two subsequent years, not being paid, were entered up against the land. On September 6, 1877, Ellis Jones, the defendant, paid into the county treasury the sum of \$44.06, which was the amount required for the redemption of the land, at which time he received a certificate of sale, and on September 23, 1878, a tax deed was executed by the county clerk to him for the land. Jones went into possession, and began improving the land, in September, 1878, and has been continuously in possession of the land since that time.

Among other defenses, the defendant urged that the plaintiff could not maintain his action, because it was not commenced within two years after the tax deed under which he claimed was recorded. The contention of the defendant is that the limitation provided in section 16, Civil Code, which reads: "Actions for the recovery of real property, or for the determination of any adverse right or interest therein, can only be brought within the periods hereinafter prescribed, after the cause of action shall have accrued, and at no time thereafter. * * * *Third*. An action for the recovery of real property sold for taxes within two years after the date of the recording of the tax deed,"—applies, and effectually bars the plaintiff's recovery.

He also insists that the five-years limitation provided in section 141 of the tax law applies, and has run in favor of the tax deed executed to him in September, 1878. It is unnecessary to determine the applicability of the five-years limitation provided in the statute last mentioned, as we think the two-years statute provided in the Code bars a recovery by the plaintiff. His action was not begun until about four years after the tax deed was executed and recorded. During this time, and earlier, the defendant was in the actual possession of the land. The defendant was not there as a trespasser, but was in actual possession under a claim of ownership in the land. We need not inquire whether his claim of title was strong or weak, because "possession, with claim of ownership, is not only evidence of title, but it is of itself title in a low degree," and one which may in time ripen into a perfect title. *Hollenback v. Ess*, 31 Kan. 87, 1 Pac. Rep. 275. The defendant was therefore in a position to contest the plaintiff's right to recover. The plaintiff must recover upon the strength of his own title, and not upon the weakness of that asserted by Jones. To maintain his action he must establish, not only his paramount title to the land, but also that he has brought his action within the time allowed by the law. By virtue of the defendant's possession and claim, the plaintiff's cause of action, if he had one, was maintainable immediately on the recording of his tax deed. He was a tax-title holder out of possession, seeking to recover upon the strength of a tax title. The limitation insisted on is applicable to all such persons; and an action cannot be

maintained for the recovery of the land unless it is brought within two years after the recording of the tax deed under which he claims. *Thornburgh v. Cole*, 27 Kan. 490; *Myers v. Coonradt*, 28 Kan. 215.

The plaintiff raises a question in regard to the recording of the tax deed. He claims that it cannot be regarded as recorded, because the register of deeds made an error in recording it. The deed recited a sale made to T. Johnson on May 5, 1874, and an assignment to Noyes Spicer on May 6, 1874; but, as recorded, it recites that the sale occurred on the fifteenth day of May, 1874. No change was made except to write "fifteen" where "five" should have been written. He now says that, as the record shows the assignment to have occurred before the sale, the recorded deed is void on its face, and would not impart notice, and cannot be treated as recorded within the statute on that question. We cannot agree with this claim. The rights of parties are not so easily destroyed, and cannot be sacrificed by the official delinquency of the register of deeds. The statute upon the subject provides that from the time of filing the instrument with the register of deeds for record it will impart notice to all persons of the contents thereof. Comp. Laws 1879, c. 22, § 20. The duty of recording the deed devolves by law upon the register of deeds, and when the grantee causes it to be filed with that officer he has done all that the law requires of him. He has done that which is to impart notice to all the world of what the deed itself contains. This notice is not to be brushed away by the incompetent or fraudulent action of the officer in wholly or partially failing to spread it on the record.

The legislature has recently provided that all tax deeds thereafter issued shall be void unless they are recorded within six months from the date of their issuance, and that all tax deeds theretofore issued shall be void unless they are recorded within one year from the taking effect of the act. Sess. Laws 1886, c. 31. Will the plaintiff contend that a tax deed which is deposited with and filed by the register within the prescribed time would be rendered void by the willful or negligent omission of the officer to copy it at length upon the record books? Will he insist that a mere inaccuracy in transcribing the deed would destroy it? We think not. Under the statute referred to, the notice arises on the filing of the deed for record, and does not depend on the act of the officer in writing it out at length on the books provided for that purpose.

In contemplation of law, the tax deed in question was recorded when it was received and filed by the register of deeds. The inaccuracy in transcribing it did not prevent it from thereafter being notice to all the world, nor prevent the statute of limitations from running against an action to recover the land under a tax deed so recorded. As having some application, see *Nattinger v. Ware*, 41 Ill. 245; *Merrick v. Wallace*, 19 Ill. 486; *Craig v. Dimock*, 47 Ill. 308; *Kiser v. Heuston*, 38 Ill. 252.

There must be an affirmance of the judgment.

(All the justices concurring.)

(37-Kan. 353)

TENNEY and others v. SIMPSON.

(Supreme Court of Kansas. October 8, 1887.)

PARTNERSHIP—TRUST—CONVEYANCE OF LAND TO PARTNER—DISSOLUTION.

Where S., having the exclusive right by previous written agreement with the owner of a certain piece of land to purchase the same, entered into a parol agreement with T. and B., in pursuance of which B. furnished the purchase money for the land, T. gave his notes therefor to B., and the deed by consent of the parties was executed by the owner to B. as a security for the repayment of the purchase money to B., and the land was purchased by S., T., and B. on speculation, and for the purpose of sale and profits only, and not for permanent use; and, after the payment of the purchase money and of the costs and expenses out of the proceeds of the sale, the profits were to be divided between the partners, S., T., and B., as follows: S. was to have four-tenths, T. three-tenths, and B. three-tenths; and, after

a portion of the land was sold, and the purchase money and costs and expenses paid, T. and B. terminated the copartnership, refused to sell any more land, and refused to permit S. to have any further connection therewith: held that, when the deed was executed to B. he held the property in trust for the copartnership; and afterwards, when the copartnership was terminated, he held it in trust for the individual members of the copartnership, S. being entitled to four-tenths thereof.

(Syllabus by the Court.)

Error from district court, Wyandotte county; W. R. WAGSTAFF, Judge. This case was tried before a referee, who made the following report:

"IN THE DISTRICT COURT OF STATE OF KANSAS IN AND FOR WYANDOTTE COUNTY.

"S. N. Simpson, Plaintiff, v. William C. Tenney, M. Shepard Bolles, Henry Shepard, and Richard F. Bolles, Defendants.

"REPORT OF REFEREE.

"This is an action wherein the plaintiff claims that certain lands known as the Splitlog Purchase, bought in 1878, through united efforts of plaintiff and defendants, was deeded to defendant M. Shepard Bolles, to be held by him in trust for plaintiff and defendants after certain payments should be made to him, in proportion of four-tenths to plaintiff S. N. Simpson, three-tenths to defendant William C. Tenney, and three-tenths to defendant M. Shepard Bolles, acting for himself, Henry Shepard, and Richard F. Bolles, known as Boston parties.

"In August, 1878, plaintiff procured from Mathias Splitlog, an Indian, the owner of the land first described in plaintiff's petition, the option or right to purchase in his own name, during the following sixty days, said land at \$200 per acre, paying at the time to Splitlog \$100, which was to be forfeited at the expiration of said sixty days, if plaintiff failed to pay said purchase price. The agreement granting to plaintiff this 'option' was in writing, acknowledging the receipt of \$100 from plaintiff, was read in presence of plaintiff and defendant William C. Tenney, and was signed by Splitlog in their presence. Plaintiff, not having the money with which to consummate the purchase, entered into negotiations with defendant William C. Tenney, whereby it was agreed between them that Tenney should go east for the purpose of securing money with which to pay the purchase price for said real estate; the profits arising from such purchase to be divided between plaintiff, defendant, and parties furnishing stipulated purchase price.

"Tenney went to Boston; secured the services of M. Bolles & Co., brokers; and through their influence obtained a promise of the said purchase price from defendants M. Shepard Bolles, Henry Shepard, and Richard F. Bolles, known as Boston parties, upon stipulated terms, written by M. Shepard Bolles in Boston, though not signed by him, which stipulation was brought by defendants and Henry Shepard and Richard F. Bolles to Kansas City in November, 1878, who came west to examine said land and its title; and having examined said land in company with plaintiff and said Tenney, and being satisfied as to its title, they required said Tenney to agree to said stipulations, which he did in writing indorsed upon said stipulation; and thereupon made provision by which he should receive \$6,300 with which to pay Splitlog. This was done November 23, 1878; and, before these sixty days above referred to had expired, the \$100 paid Splitlog had been forfeited, plaintiff had paid Splitlog \$50, and had thereby secured an extension of the 'option' for thirty days longer, which was also forfeited, and plaintiff had, by payment of \$50, obtained an extension of said 'option' for thirty days longer. All this money paid for these 'options' was furnished by Tenney to Simpson, and was taken into consideration in connection with the actual cost of the land, together with some other expenses in fixing upon the sum of \$6,300.

"The stipulation referred to is known as 'Exhibit A' attached to deposition of Richard F. Bolles. It provided that the deed for said land should be made to defendant M. Shepard Bolles, who should give a bond for quitclaim deed when said land should be paid for in full; that defendant William C. Tenney should execute his notes to defendant M. S. Bolles,—one for purchase price, which, with forfeited options and other expenses, amounted to \$6,300, payable in two years, with interest at ten per cent., payable semi-annually; two notes for \$1,000 each, payable in one and two years, without interest; these notes represented guarantied profits to said eastern parties for their investment in said real estate; that said Tenney should execute two notes for \$500 each, payable in five and seven months respectively, without interest, to M. Bolles & Co., brokers, to secure payment to them for their services in procuring money for purchase price from defendants known as Boston parties. M. Shepard Bolles was to quitclaim such streets and alleys as might be agreed upon to the city of Wyandotte; one-fourth of the money received from sales of land was to be retained by said William C. Tenney, and the remaining three-fourths were to be remitted to said M. S. Bolles, to be applied by him on notes of said Tenney to M. S. Bolles, as he [Tenney] might direct. The profits resulting from the purchase and sale of said land, after deducting all costs, expenses, and interest, were to be divided as proposed by said Tenney, as follows: Four-tenths to Mr. S., so called, who by the evidence is shown to be the plaintiff; three-tenths to W. C. Tenney, defendant; and three-tenths to defendant M. S. Bolles, who by the evidence is shown to represent himself, Henry Shepard, and Richard F. Bolles, known as Boston parties.

"This stipulation was signed by William C. Tenney, November 23, 1878, in presence of defendants Henry Shepard and Richard F. Bolles, and over his name was written: 'I agree to the above articles on the above conditions.'

"Acting under the provisions of said stipulations, and parol agreements with said Tenney, S. N. Simpson, on the third day of December, 1878, surrendered his rights under the agreement made by Splitlog to him, and caused Splitlog and wife to execute and deliver a warranty deed to said land to defendant M. Shepard Bolles; and, acting under the same provisions, said W. C. Tenney executed his promissory note of the same date to M. S. Bolles, trustee, or order, for \$6,300, payable, with interest, as required in said stipulation, and executed one \$1,000 note to said M. S. Bolles, trustee or order, and another \$1,000 note to said M. S. Bolles, payable as required in said stipulation, and two notes for \$500 each, payable in five and seven months, respectively, to M. Bolles & Co., as required in said stipulation.

"The evidence shows that these notes were signed by W. C. Tenney because M. S. Bolles, representing himself and the two other Boston parties, and who managed that branch of the business, desired to open accounts with but one person here in connection with the land. On the eleventh day of December, 1878, a few days after the execution of said deed, M. S. Bolles wrote a letter to Tenney, a copy of which is known as 'Exhibit E,' attached to deposition of M. S. Bolles, explaining the condition under which he held the land so conveyed to him. He there says that he holds the 'Splitlog Purchase' as trustee, to secure those who have furnished money, and that after the purchase money and all other liens against the property should be satisfied, then that he held the property for the benefit of all parties concerned, profits of sales there made to be divided as follows, viz.: Seven-tenths to be remitted to W. C. Tenney for himself and his associate, who is shown by the evidence to be plaintiff S. N. Simpson, and three-tenths to be retained by him for Boston parties, and in that letter he defines the word 'profits' as meaning the net gain, after charging all costs, expenses, and interest to the land.

"While negotiations were going on in Boston between Tenney and Boston parties for the purchase money, the correspondence and telegrams from Tenney to Simpson show that Tenney considered Simpson, with his option from

Splitlog, as a pivotal factor in closing the purchase of the land; and that he regarded the consent of Simpson to any changes in arrangements before that time had between them as to divisions of profits as indispensable before he could terminate his negotiations with the Boston parties, and after his return to Kansas City, from his letter to M. S. Bolles, (Exhibit D to deposition of M. S. Bolles, dated October 2, 1878,) wherein he refers to plaintiff as Mr. 'S.' and as his associate, it becomes manifest that the relation of plaintiff to the purchase of this land must have been known by M. S. Bolles, acting for himself and other Boston parties, and this conclusion is confirmed by said stipulation, written by M. S. Bolles, referring to said letter of October 2, 1878, and brought by defendants Henry Shepard and R. F. Bolles to Kansas City, and signed and agreed to by Tenney in their presence, November 23, 1878.

"After the purchase of the land a portion of it was platted and laid out as Riverview and Bolles Addition to Riverview, and a large number of lots were sold under the special supervision of plaintiff. Proceeds of sales were turned over to W. C. Tenney, who made warranty deeds to purchasers, receiving quitclaim deeds to himself from M. S. Bolles for lots so conveyed by him to purchasers, under the general management of W. C. Tenney, who kept the books and supervised the business affairs of the enterprise in the interest of all parties concerned, and under the special supervision of plaintiff in platting and laying out the land, and in making sale of the property, and turning over the proceeds to W. C. Tenney, the business was conducted until June 15, 1883, when a settlement was made on the basis of the stipulation written by M. S. Bolles, heretofore referred to. From the proceeds of sales of lots the \$6,300 note, and the two notes of \$1,000 each, were paid as required in said stipulation; as four-tenths profits arising from said sales plaintiff was paid \$2,866.28; as three-tenths of said profits defendant Tenney was paid \$2,149.71; and as a part of their three-tenths of profits the Boston parties were paid, through M. S. Bolles, \$2,000; Simpson and Tenney each paid one-half of the two notes for \$500 each, executed by Tenney to M. S. Bolles & Co. as heretofore stated.

"After June 15, 1883, and before the commencement of this action, defendant Tenney refused to make any further settlement with plaintiff, and refused to permit further sales of lots to be made. It is said that the purchase money for the land was furnished upon the sole credit of Mr. Tenney, as his notes were taken for the same. From all the facts before me, I conclude the purchase money, with forfeited options and expenses amounting to \$6,300, was furnished by the Boston parties on the faith they had in the land as an investment, under the written stipulations of M. S. Bolles, and that the notes for the same, and \$2,000 guaranteed profits, were taken from defendant Tenney for convenience of M. S. Bolles in having but one person with whom to keep an account in reference to this land, and for the reason that it was desired that no question should ever be raised as to how much they should receive, in return for the investment, before any profits should accrue in favor of plaintiff or Mr. Tenney. That question was settled by the stipulation and the notes. It was not \$6,300 purchase money alone that was taken into consideration when said stipulation was written by M. S. Bolles, and agreed to by Mr. Tenney. The influence of Simpson in obtaining the 'option,' the \$500 to be paid by him to M. Bolles & Co., and his personal services to be rendered in the future; the services of Mr. Tenney in Boston and elsewhere,—all these considerations were placed on the scales with the purchase money, and the parties to this action have relieved me of a difficult problem to solve by determining the relative value to be four-tenths for Simpson, three-tenths for Tenney, and three-tenths for Bolles, representing Boston parties.

"It is said that plaintiff is not entitled to relief until the land is sold, and profits are ready for distribution. The refusal of Tenney after June 15, 1883, and before the commencement of this action, to settle with Simpson, and to permit further sale of lots, and the fact that the refusal of Tenney was the

refusal of the Boston parties, as the evidence shows that Tenney acted as their agent in matters connected with their interest in the land, leads me to conclude that the plaintiff is entitled to relief in this action. It is said that the profits spoken of meant net gain after sales are made. The profits in this transaction are not necessarily made up of results of sales, but consist of whatever property may remain after purchase money, expenses, costs, interest, and liens on property are paid.

"In making legal conclusions in this case, it is necessary to determine the intention of the parties thereto. We have no written contract signed by all the parties to guide us; what they said and their acts previous to and at the time of the execution of deed give abundant light as to their intention. Exhibit A to deposition of R. F. Bolles, Exhibit D to deposition of M. S. Bolles, with many other facts existing previous to the execution of the deed, lead me to conclude, from the acts, conduct and words of the parties to this action, that it was their intention that the execution of the deed from Splitlog and wife to Bolles should result in a trust for all parties to this action, after payments heretofore referred to should be made. Exhibit E to deposition of M. S. Bolles, and the acts, conduct, and words of all parties to this action for nearly five years after the execution of said deed, corroborate the facts existing before its execution, and confirm my conviction, and compel me to conclude that this deed conveyed said real estate to M. Shepard Bolles in trust for all parties to this action; said trust resulting to the parties after payments heretofore mentioned were made, in proportion of four-tenths to S. N. Simpson, three-tenths to defendant William C. Tenney, and three-tenths to M. Shepard Bolles, Henry Shepard, and Richard T. Bolles.

"At the settlement June 15, 1883, the following is a statement as to profits:

M. S. Bolles, for himself and Boston parties, received,	\$2,000 00
William C. Tenney received,	2,149 71
S. N. Simpson received,	2,866 28

"At the commencement of this action there were in Tenney's hands proceeds of sales since June 15, 1883, unsettled:

In cash,	\$240 58
In notes afterwards collected,	272 35

Total, \$512 63

"Of this amount M. S. Bolles should be paid for himself and Henry Shepard and Richard F. Bolles, in order to give them three-tenths up to June 15, 1883, equalizing their profits with other parties, \$149.71. This would leave in Tenney's hands, to be divided as per stipulation, \$363.22. But since the commencement of this action Tenney has paid:

Expenses,	\$591 51
There are unpaid taxes of 1884,	192 69
Amount due for deposition, <i>Bolles v. Splitlog</i> ,	25 00
Amount due atty.'s fees, <i>Bolles v. Co. Treas.</i> ,	25 00

Total, \$834 20

Deducting amount on hand, after paying deficiency, to make

Bolles' profits as stipulated,	\$363 22
And there is indebtedness against land of	470 98
Four-tenths of which must be paid by Simpson,	188 39
Three-tenths of which must be paid by Tenney,	141 29
Three-tenths of which must be paid by Boston parties,	141 29

"I therefore find that the deed to M. Shepard Bolles by Mathias Splitlog and wife for thirty and sixty-three hundredths acres described in plaintiff's petition, conveyed said land to him in trust for plaintiff and defendants in accord-

ance with findings above made, and that the portion remaining unsold and unaccounted for in exhibit No. 5 in the evidence of W. C. Tenney should be divided between the parties to this action, and should be held and owned by them in severalty, in proportion of four-tenths for plaintiff S. N. Simpson, three-tenths for defendant W. C. Tenney, and three-tenths to M. S. Bolles, Henry Shepard, and R. F. Bolles, subject to payment of \$188.39 by S. N. Simpson as a lien upon his portion of said land, subject to payment of \$141.29 by W. C. Tenney as a lien upon his portion of said land, and subject to payment of \$141.29 by M. Shepard Bolles, Henry Shepard, and R. F. Bolles, as a lien upon their portion of said land.

"December 1, 1885.

W. T. JOHNSTON, Referee."

Exhibit E, above referred to, reads as follows:

"BOSTON, December 11, 1878.

"*William C. Tenney, Kansas City, Mo.*—DEAR SIR: As trustee I hold the 'Splitlog Purchase' of land to secure those who have furnished money; and after the purchase money, and all other liens against the property, have been satisfied, then I hold the property for the benefit of all concerned, the profits of sales then made to be divided as follows: 70 per cent., or seven-tenths, to be remitted to you for yourself and associate, 30 per cent., or three-tenths, to be held by me for those in interest here. By 'profits' I mean the net gain after charging all costs, expenses, and interest to the land. No charge against the land for expense or cost of any kind to be allowed without the items and amounts are first approved by me.

"Yours truly,

M. SHEPARD BOLLES."

Stevens & Stevens and John Hutchings, for plaintiff in error. *Alden & McGrew and J. B. Scroggs*, for defendants in error.

VALENTINE, J. In the latter part of the year 1878, Samuel N. Simpson, William C. Tenney, and M. Shepard Bolles—the latter representing himself and Henry Shepard and Richard F. Bolles—formed a copartnership to purchase and sell on speculation a certain piece of real estate, consisting of 30 and 63-100 acres, situated near Wyandotte city, in Wyandotte county, Kansas, and belonging to Mathias Splitlog. Simpson at that time, and prior thereto, by a written contract with Splitlog, had the exclusive right to purchase the property; but he did not have the money with which to do so, and for this reason he entered into the copartnership aforesaid. The price to be paid for the land was \$200 per acre. Under this partnership arrangement, and in pursuance thereof, M. Shepard Bolles furnished the money with which to pay for the property, and also furnished some other money to pay incidental expenses, amounting in the aggregate to \$6,300. He took a promissory note from Tenney to himself for this amount, and also took two other notes from Tenney to himself for \$1,000 each, for guaranteed profits on the property, and also took two other notes from Tenney to M. Bolles & Co. for \$500 each, for the services of M. Bolles & Co. in procuring the foregoing money. The entire notes, in the aggregate, amounted to \$9,300. By agreement of the partners the deed for the land was executed by Splitlog to M. Shepard Bolles, for the purpose—*First*, of transferring the title to the property from Splitlog to one of the partners in interest, to-wit, M. Shepard Bolles; and, *second*, to secure the payment of the aforesaid promissory notes. The deed was executed on December 3, 1878. The profits of this speculation or transaction, after paying the purchase money, and all the costs and expenses connected with or concerning the partnership, were to be divided as follows: Four-tenths to Simpson, three-tenths to Tenney, and three-tenths to M. Shepard Bolles, for himself and those whom he represented. All these matters are set forth in much greater detail in the special findings made by the referee and reported to the court below. Bolles, and the parties whom

he represented, resided in Boston, Massachusetts; while Tenney and Simpson resided in Kansas.

After the purchase of the foregoing land, a portion of the same was platted into lots, streets, alleys, etc., and a large number of the lots were sold under the special supervision of Simpson; and Bolles then executed quitclaim deeds therefor to Tenney, and Tenney executed warranty deeds to the purchasers. All this was in accordance with their previous partnership agreement. From the proceeds of these sales, all the foregoing notes to M. Shepard Bolles, and all the expenses connected with the partnership business, were paid; and Simpson and Tenney paid the two \$500 notes to M. Bolles & Co., each paying one-half thereof.

After this, and after June 15, 1883, and not before, but before this action was commenced, Tenney, acting for himself and the Boston parties, refused to permit any further sales, or to permit Simpson to have any further connection with the property. This action was commenced on January 17, 1884, by Simpson against the other parties, to-wit, William C. Tenney, M. Shepard Bolles, Henry Shepard, and Richard F. Bolles, to have Simpson's interest in the property declared, and for partition of the property. Upon the findings of the referee the court below rendered judgment in favor of Simpson, and that the property be partitioned, giving to Simpson four-tenths thereof; and to reverse this judgment the defendants, as plaintiffs in error, bring the case to this court for review. They claim that Simpson has no interest whatever in the property. They claim that, by virtue of the deed from Splitlog to M. Shepard Bolles, the entire title to the property was transferred and is vested in M. Shepard Bolles alone; that no legal or valid *express trust* has ever been created in favor of Simpson, for the reason that no writing creating the same has ever been executed; and that no *resulting trust* has ever been created in favor of Simpson, for the reason that Simpson did not make any actual payment of the purchase money for the property to Splitlog, nor agree to pay the same, nor incur any absolute obligation therefor, but that the same was wholly and entirely paid by the other parties. And they further claim that no trust of any kind has ever been created or has arisen by operation of law in favor of Simpson,—no constructive trust, no implied trust.

We think the plaintiffs in error (defendants below) misconceive the law of this case. It may be true that no valid express trust has ever been created in this case; and it is certainly true that no resulting trust, nor any implied trust, can be created except upon a sufficient consideration; but the consideration need not in any case pass directly from the *cestui qui trust* or beneficiary to the grantor of the land. *Rose v. Hayden*, 35 Kan. 106, 10 Pac. Rep. 554; *Kendall v. Mann*, 11 Allen, 15; *Runnels v. Jackson*, 1 How. (Miss.) 358; *Soggins v. Heard*, 31 Miss. 426; *Honore v. Hutchings*, 8 Bush, 687; *Page v. Page*, 8 N. H. 187; *Kelly v. Johnson*, 28 Mo. 249; *Millard v. Hathaway*, 27 Cal. 140, 141; *Sandfoss v. Jones*, 35 Cal. 481; *Buck v. Pike*, 11 Me. 9; *Lounsbury v. Purdy*, 18 N. Y. 515; and other cases hereafter cited. Besides, the transaction in the present case was a partnership transaction, and in such cases real property may usually be considered in nearly the same manner as personal property; and the real intention of the parties with reference thereto, their contracts, promises, or mutual understandings, will govern without reference to whether they have been reduced to writing or not. *Marsh v. Davis*, 33 Kan. 326, 6 Pac. Rep. 612; *Morrill v. Colehour*, 82 Ill. 619; *Knott v. Knott*, 6 Or. 142; *Collins v. Decker*, 70 Me. 23; *York v. Clemens*, 41 Iowa, 95; *Clark's Appeal*, 72 Pa. St. 142. In such cases the statute of frauds and kindred statutes have no application.

In 2 Story, Eq. Jur. § 1207, the following language is used: "In cases, therefore, where real estate is purchased for partnership purposes and on partnership account, it is wholly immaterial, in the view of a court of equity in whose name or names the purchase is made and the conveyance is taken,

whether in the name of one partner or of all the partners, whether in the name of a stranger alone, or of a stranger jointly with one partner. In all these cases, let the legal title be vested in whom it may, it is in equity deemed partnership property not subject to survivorship, and the partners are deemed the *cestuis que trust* thereof."

In the case of *Morrill v. Colehour*, 82 Ill. 619, it is held as follows: "Where land is purchased by several for the purpose of sale and the acquisition of profits only, and not for permanent use, it will be regarded in equity as personal property among the partners in the speculation; and one of the parties may release his interest in the same verbally, and the same will not be within the statute of frauds."

Turning our attention for the present to pure resulting trusts, without reference to partnership transactions, we have the following:

Mr. Pomeroy, in his work on Equity Jurisprudence, uses the following language: "Resulting trusts, therefore, are those which arise where the legal estate in property is disposed of, conveyed, or transferred, but the intent appears, or is inferred from the terms of the disposition, or from the accompanying facts and circumstances, that the beneficial interest is not to go or be enjoyed with the legal title. In such a case a trust is implied or results in favor of the person for whom the equitable interest is assumed to have been intended, and whom equity deems to be the real owner. This person is the one from whom the consideration actually comes, or who represents or is identified in right with the consideration. The resulting trust follows or goes with the real consideration." 2 Pom. Eq. Jur. § 1031.

Also, in the following cases, it has been held as follows:

"A resulting trust in land in favor of a third person may be established by parol evidence, although the deed recites that the consideration was paid by the grantee, and it was in fact paid by him, provided that it was distinctly agreed before the purchase that the sum paid should be considered as a loan from the grantee to such third person; but the proof upon this point must be full and clear." *Kendall v. Mann*, 11 Allen, 15.

"G. advanced a sum of money to purchase land for the benefit of J., with an agreement that the titles should be taken in the name of G., and the land conveyed to J. upon the payment of the money within a certain time, which J. failed to perform. Held, the facts constitute a resulting trust in favor of J. Payment of the money and conveyance of the land decreed." *Runnels v. Jackson*, 1 How. (Miss.) 358.

"Where P. bought land, and took a deed in the name of L., and L. advanced the purchase money, and took the notes of P. for the same, and agreed to convey the land to P. on being repaid the money advanced, and interest, it was held that the money thus advanced by L. might be considered as a loan to P., and the land as purchased with the money of P. so as to raise a resulting trust." *Page v. Page*, 8 N. H. 187.

"Hutchings and Honore, in 1861, jointly purchased thirty acres of land near Chicago, Illinois. Hutchings advanced the entire purchase price, took a conveyance to himself, and executed a writing in which, among other things, 'it is agreed between said parties that when said land is sold said Hutchings is to have first his six thousand dollars so advanced, and ten per-cent. interest, and the profits over and above said sum are to be equally divided between said parties. * * * This arrangement is to continue eighteen months, when, if the property has not been sold, said Honore is to pay one-half the sum so advanced, with the accrued interest, or said Hutchings is to be the sole owner of the same.' The land was not sold within the eighteen months, and Honore failed to pay any part of the sum so advanced. In 1869, Hutchings sold the land for one hundred thousand dollars, and refused to pay any part thereof to Honore. Honore sued Hutchings for one-half of the net profits, after deducting purchase price, interest, etc. Held, that a trust resulted in favor of

Honore to the extent of one-half of the land jointly purchased. This interest he pledged to Hutchings to secure the repayment to him of one-half the purchase price advanced, etc.; and Hutchings held the legal title to one-half of the land in trust for Honore; and the latter is entitled to one-half of the net profits realized upon the resale of the same." *Honore v. Hutchings*, 8 Bush. 687.

"An oral agreement under which the defendant advanced money for the plaintiff to pay certain installments under a contract for the purchase of land, the defendant being named in the contract as the purchaser, but really acting for the plaintiff in pursuance of the agreement, held to be valid, and not within the statute of frauds." *Walton v. Karnes*, 67 Cal. 255, 7 Pac. Rep. 676.

See, also, the cases of *Millard v. Hathaway*, 27 Cal. 140 *et seq.*; *Barroilhet v. Anspacher*, 68 Cal. 116, 8 Pac. Rep. 804; *Ward v. Matthews*, (Cal.) 14 Pac. Rep. 604; *Soggins v. Heard*, 31 Miss. 426; *Boyd v. McLean*, 1 Johns. Ch. 590-593; *Eldridge v. Jenkins*, 3 Story, 181, 284.

Mr. Pomeroy, in his work on Equity Jurisprudence, also uses the following language: "Where two or more persons together advance the price, and the title is taken in the name of one of them, a trust will result in favor of the other with respect to an undivided share of the property proportioned to his share of the price." 2 Pom. Eq. Jur. § 1038.

In this present case the partnership consisted of Simpson, Tenney, and M. Shepard Bolles; and the property was really purchased by and for the partnership, and for the purpose of surveying and platting it into town lots, and making it an addition to the city of Wyandotte, and selling the lots for profit; and there was no intention or understanding on the part of any one of the partners that the property should be purchased for the permanent use of any one of them, or for permanent use at all. Bolles, it is true, furnished the purchase money, but he really furnished it to and for the partnership, and as a loan to the partnership, and it was really paid to Splitlog by and for the partnership, and the deed was executed to Bolles because he was one of the partners, and as a security for the repayment of the purchase money to him. The deed answers as an absolute conveyance for the purpose of transferring the property from Splitlog to the partnership; but, so far as it was intended as a security for the money loaned, it was only a mortgage. *McDonald v. Kellogg*, 30 Kan. 170, 2 Pac. Rep. 507, and cases there cited. At this time Simpson was the only person who had any right to purchase the property, and he did not release this right, or consent that the deed should be executed to any other person than himself, until all the partnership arrangements were perfected and consummated. And these partnership arrangements, and this release, were certainly a sufficient consideration on the part of Simpson for all the rights or interests in the property which he has at any time claimed. His right, to the exclusion of all others, to purchase the property, was of itself and alone a thing of value, and a sufficient consideration for all that followed. *Railroad Co. v. Wilcox*, 14 Kan. 259, 268. But that was not the only consideration. There were the partnership agreements on the part of Simpson; the contemplated personal services on his part to be performed in the future; and the further fact that Simpson was to pay one of the \$500 notes, which he did in fact pay.

On December 11, 1878, M. Shepard Bolles admitted in a letter to Tenney that he held the property "as trustee;" that he held it "to secure those who have furnished money," and that when "the purchase money and all other liens against the property have been satisfied" he would then hold it "for the benefit of all concerned;" and the profits would then go as follows: Seventenths to Tenney and his "associate," meaning Simpson, and the other threentenths to himself and his Boston associates. Also the written stipulation furnished by the Boston parties, and signed by Tenney on November 23, 1878,

before the deed from Splitlog to M. Shepard Bolles was executed, shows that "Mr. S.," whom the oral evidence shows was Simpson, was to have four-tenths of the profits after paying the aforesaid purchase money, costs, expenses, etc.; and the evidence shows that Simpson was permitted to deal with the property, and expend time, labor, and money with reference thereto for nearly five years before his said interest in the property was questioned. Among other things, he was actually permitted to pay \$500, one-half of the commission to procure the purchase money. Therefore, did not Simpson have an interest in the purchase money, and has not an implied trust arisen in his favor? Valid express trusts are such, and such only, as are created by the express terms of a written instrument. Implied trusts are such as arise by implication or operation of law. The interests which have arisen or been created in favor of Simpson in the present case come very nearly being a *written express* trust; but, holding that they are not, then they are clearly an *implied trust*. Implied trusts include a vast number of trusts not included in Mr. Pomeroy's definition of resulting trusts. For instance, such trusts as Mr. Pomeroy himself designates as constructive trusts. In the present case we think that the trust which has arisen in favor of Simpson is both a resulting trust and a constructive trust. It is true that, by section 6 of the act relating to trusts and powers, such trusts, as formerly resulted where one person paid the purchase money and the property was conveyed to another, have been abolished except in certain cases, designated in sections 7 and 8 of said act, among which are "where it shall be made to appear that by agreement, and without any fraudulent intent, the party to whom the conveyance was made, or in whom the title shall vest, was to hold the land, or some interest therein, in trust for the party paying the purchase money, or some part thereof." The trust in favor of the partnership, and in favor of Simpson, may be upheld under this clause just quoted. It is claimed, however, that it was not "made to appear" in the court below that the mode of purchase and conveyance in the present case was "without any fraudulent intent." We think it was; or, at least, it was, as far as Simpson is concerned. He had no intention of defrauding any person, and certainly not of defrauding the other parties. The evidence shows that the deed was executed to M. Shepard Bolles instead of to all the parties, or to either of the others, for the purpose that it might be a security to Bolles for the money advanced by him, and not with any fraudulent intent.

The plaintiffs in error (defendants below) have urged as a controlling matter the fact that Tenney gave his individual notes for the purchase money. But, when we come to consider the entire facts of the case, this should make no difference. It was not understood that Tenney should pay these notes individually, and he did not do so. On the contrary, it was understood that these notes should be paid out of the proceeds of the partnership property, and they were so paid. As to the two \$500 notes given as a commission to M. Bolles & Co. for procuring the purchase money, Tenney paid half, and Simpson paid the other half.

It is further urged that Simpson was not to have any interest in the land, but only an interest in the proceeds of the sale of lots. This is very technical, but giving it all the force to which it may be entitled, and still it can make no difference, under the further facts of the case; for, before the commencement of this action, the sale of the lots was discontinued, and the partnership dissolved at the instance of the other parties, and the partnership debts paid; and always, upon the dissolution of a partnership and the full payment of the partnership debts, the partners become tenants in common with regard to any and all real estate still belonging to the copartnership. 1 Washb. Real Prop. 423, sub. 4. Viewing this case in any light we may, it is clear that M. Shepard Bolles holds four-tenths of the property in controversy in trust for Simpson. When the deed was first executed to him he held the property in trust

for the partnership; Simpson's interest therein, after paying the debts, being four-tenths. When the partnership was terminated, he then held the property in trust for the individual partners in proportion to their respective interests in the partnership. He now holds four-tenths for Simpson.

The judgment of the court below will be affirmed.
(All the justices concurring.)

(37 Kan. 271)

SANDERS, Adm'x, etc., and others v. HALL.

(*Supreme Court of Kansas. October 8, 1887.*)

JUDGMENT BY DEFAULT—SETTING ASIDE—LEAVE TO FILE ANSWER.

A defendant who makes application within a few days after the time for answer has expired, and before judgment is rendered against him by default, to the court for leave to file an answer, and is told by the court that the case would not be reached at that term, and that time would be given him to answer, and in a few days thereafter a judgment is rendered against him, and an execution issued on that judgment, is entitled on a proper showing, and such terms as may be just, to have the judgment set aside, and leave given him to file an answer, and opportunity given to try the case on its merits.

(*Syllabus by Simpson, C.*)

Error from district court, Shawnee county; JOHN GUTHRIE, Judge.

Action in ejectment commenced by Hall against the plaintiff in error on the twenty-eighth day of November, 1879, in the Shawnee county district court. Trial, and judgment for the plaintiff on the twenty-second day of January, 1880. On the fifth day of March the defendants below filed their demand that said judgment be set aside, and a new and second trial be had, as provided by section 599, Code Civil Proc. Application heard on that day, and granted, against the objection of the plaintiff. Hall brought the case to this court, where it was decided "that in an action brought for the recovery of real property, and damages for its detention, another or second trial cannot be granted to the defendants, under the terms of section 599 of the Code, without any showing therefor, as a matter of right, where such defendant fails to demur, answer, or otherwise appear until after the judgment is rendered by default."

The action was originally instituted against Francis L. Sanders, Mary A. Sanders, his wife, and Bion Sanders, his son. Some time in December, 1879, and some 10 days before the answer-day named in the summons, Francis L. Sanders consulted an attorney in regard to the action, and employed him to appear and answer for the defendants, and stated to him all the facts, and was advised by the attorney that the defendants had a good defense to said action. The attorney neglected to file an answer within the time specified in the summons, and being very suddenly called to Washington on important business, requested another attorney to go into court, then in session, and get leave to answer. On either the seventh or eighth of January, 1880, the attorney did as requested, and was told by the judge that the case would not be called or reached during that term, and that the attorney of the parties would have time to answer after his return. Very soon after the rendition of the judgment on the twenty-second day of January, 1880, an execution was issued against the defendants below, and on the ninth day of February they made an application to the court to set aside the judgment and recall the execution. The court made an order directing the execution returned, and all proceedings stayed, until the eighth day of March, 1880.

On the fifth day of March, 1880, the defendants gave notice of an application to the court for leave to answer within a reasonable time, on such terms as the court would impose, and the use of affidavits in support thereof. On the tenth day of April, 1880, leave was granted, but the defendants were required to pay all the costs of the action that had accrued up to that time. The verified answer was filed on the tenth day of April, 1880, and on the twenty-first day of April, 1880, they paid all the costs, including the costs of

the filing of their answer. Before the time expired for the plaintiffs to file a reply to the answer of the defendants, the plaintiffs applied to the defendants' attorney for an extension of time in which to file a reply, and a stipulation to that effect is in the record. The case of *Hall v. Sanders*, 25 Kan. 538, was decided at the January term, 1881, the opinion being filed at the June sitting of that year, but the mandate was not filed in the district court until the thirtieth of January, 1883.

In the mean time Francis L. Sanders had died. Mary A. Sanders had been appointed administratrix of the estate, and on the twelfth day of March, 1883, the action was revived against her as administratrix. On the sixteenth day of March, 1883, the defendants offered to pay all costs accrued in the action to date, and filed a motion to vacate and set aside said judgment of the twenty-second of January, 1880, and tendered with said motion a verified answer. Notice is also given of the use of affidavits, orders, etc., on the hearing. This motion was not heard until January, 1885, for the reason that during that time the district judge had been of counsel, and these motions had been heard by his successor in office. On the twenty-fourth day of February, 1885, the district court overruled the motion to set aside the judgment, and allow the defendants to file answer. They excepted and bring the case here.

L. J. Webb and *L. S. Webb*, for plaintiffs in error. *W. P. Douthitt*, for defendant in error.

SIMPSON, C. This was an action in ejectment. The petition was filed on the twenty-eighth day of November, 1879, and judgment by default taken on the twenty-second day of January, 1880. Some time in the month of December, and before the answer-day named in the summons, Francis L. Sanders, one of the defendants in the court below, employed an attorney to defend the action against her and her co-defendants, stating to him all the facts, and receiving from him an assurance that the defendants had a good defense upon the merits to said action. On the sixth day of January, the attorney employed by Francis L. Sanders was suddenly called to Washington on important business, and, before leaving, requested a brother attorney to go into court, then in session, state the facts, and ask leave to file an answer for the defendants. On the seventh or eighth day of January, the attorney went into court, called the attention of the court to the case, and requested leave to file an answer, and was informed by the judge that the case would not be for trial at that term, and that the attorney employed would have time to answer after his return from Washington. On the twenty-second, judgment was taken by default against the defendants, and on the ninth day of February an execution was issued on the judgment. On that day, the attorney employed being still absent, the other attorney filed in the clerk's office a written demand for another or second trial of the action, and presented this motion to the court, and made such a showing that the court made an order reciting that, a motion having been filed to set aside the judgment in said action, it is ordered and directed that the execution issued in the action be returned, and that further proceedings be stayed thereon until the eighth day of March, 1880. On the fifth day of March, the court sustained the demand of the defendants for another or second trial, and made an order granting a new or second trial of this action in accordance with section 599, Code. To this ruling of the court exception was taken, and the plaintiff given until the twentieth day of March to present his bill of exceptions; the defendants at the same time giving notice of a motion for leave to file an answer. They filed their motion on the same day, and it was heard on the tenth day of April. The court granted them leave to file an answer *instantly*, for good cause shown, and required them to pay all costs to that date. The answer of the defendants was filed on the tenth day of April, and on the twenty-first of the same month they paid all the costs, as required, amounting to the sum of \$13.50. In the mean

time the plaintiff had taken the case to this court, and no further proceedings were had in the district court until the thirtieth day of January, 1883, when a mandate was presented, and spread upon the journals of the district court, reversing its order granting the defendants a second or new trial. See *Hall v. Sanders*, 25 Kan. 538.

On the twelfth day of March, 1883, the death of Francis L. Sanders is suggested, and, by stipulation, an order is entered reviving the judgment against Mary A. Sanders, administratrix of the estate of Francis L. Sanders, deceased, in her official capacity as such administratrix. On the sixteenth day of March, 1883, the defendants filed their motion to set aside and vacate the judgment rendered against them by default on the twenty-second day of January, 1880, with leave to file an answer, and with an offer to pay all costs accrued in the action to date, and also presented a verified answer. Notice was given the attorneys of record of the plaintiff that this motion would be heard on the sixteenth day of April, and that the affidavits of certain persons would be read in support thereof. This notice was duly served on the sixteenth of March. The Honorable JOHN MARTIN, judge of the district court of Shawnee county from almost the first day of February, 1883, until the second Monday in January, 1885, refused to hear said motion, because he had been of counsel, and the hearing was postponed from time to time until the Honorable JOHN GUTHRIE became judge, in January, 1885. The motion was then heard before him, some time in January, and taken under advisement by him, and on the twenty-fourth day of February, 1885, he denied said motions, and each one of them; to which ruling the defendants excepted, and bring the case here for review.

We have very carefully considered the questions involved, and have with great care examined all the facts and circumstances, and are of the opinion that it would be an abuse of that wise discretion vested in the district court to prevent a failure of justice, to deny to the plaintiffs in error a fair opportunity to be heard upon the merits. There are no laches that can be attributed to them; and, while it is a fact that the attorney employed permitted the time for answer to expire without filing, he made an application for leave to file, within a very reasonable length of time thereafter, and was certainly misled by the statement of the judge that the case would not be for trial at that term, and that he would have time to answer after his return from Washington. This fact is not controverted, but is strengthened, by the prompt action of the judge in the order for a recall of the execution, and the stay of further proceedings, and his subsequent order allowing the defendants to file an answer upon the payment of all costs. All these things occurring so soon after he had made this statement to the attorney, who first made application for leave to file an answer out of time, seems almost absolutely conclusive that the defendants were to be protected by that promise of the judge, and were to be given an opportunity to contest the case on its merits. In giving the plaintiffs an opportunity to present their defense, we are only doing what the court below, who was conversant with all the facts, tried to do, and only failed because its order to that effect was powerless by reason of the case at that time being beyond its control. Had the same judge remained upon the bench, it is absolutely certain that, when the case went back from this court, he would have set aside the judgment, and given the plaintiffs in error leave to plead to the petition. This is assumed because of his unauthorized action in that regard, based, we have no doubt, upon his recollection of what had transpired. We now do what he vainly tried to accomplish; we having the power, and the circumstances not only justifying, but seemingly requiring, this exercise of the authority.

It is recommended that the ruling of the court below, denying the motions, be reversed, and the causes remanded to the district court of Shawnee county, with instructions to sustain the motions, to vacate the judgment, and allow

the plaintiffs in error to file an answer to the petition, on the terms specified in the motions.

BY THE COURT. It is so ordered; all the justices concurring.

(37 Kan. 346)

DODSON v. COOPER.

(*Supreme Court of Kansas. October 8, 1887.*)

1. ATTACHMENT—WRONGFUL SEIZURE AND SALE—MEASURE OF DAMAGES.

Where it appears in an action brought by the plaintiff, as the owner of a stock of merchandise, to recover damages against a sheriff, who has levied upon and taken possession of the stock in good faith, as the property of a third party, that the plaintiff has purchased back the goods from a stranger, who bid them off at the sheriff's sale, the measure of his damages is the sum thus paid, (not greater than the market value;) and, in addition, such special damages as he has suffered from the unlawful taking, in the way of injury, depreciation, or otherwise, as may be proved.

2. FRAUDULENT CONVEYANCE—INNOCENT PURCHASER—RIGHTS OF CREDITORS.

Where an insolvent and failing merchant makes a sale of all his goods and merchandise for the purpose of defrauding his creditors, and the purchaser thereof has no actual or constructive notice of the fraud at the time of his purchase, and executes a bond to the failing merchant to convey certain real estate as part of the purchase price of the goods, but subsequently, and before the execution of the conveyance recited in the bond, has actual notice of the fraud, *held*, that such purchaser is not entitled to reimbursement, as against attaching creditors, for the real estate actually conveyed to the fraudulent insolvent after notice.

(*Syllabus by the Court.*)

Error from district court, Butler county; H. C. SLUSS, Judge.

On December 18, 1884, R. H. Cooper brought his action against H. T. Dodson for \$10,000 damages for the wrongful conversion of a general stock of merchandise, consisting of hats, caps, boots, shoes, carpets, notions, etc., of the value of \$6,000, which the plaintiff alleged he was the owner of, on November 27, 1884, at the time the same was seized and taken possession of by the defendant. The answer alleged—*First*, a general denial; *second*, that at the time of the alleged conversion Dodson was the sheriff of Butler county, and that on November 27, 1884, certain writs of attachment came into his hands in favor of the following attaching creditors of one Horace Blakely, to-wit, Bates, Reed & Cooley, Lockwood, Englehart & Co., H. T. Simons & Morse, and J. V. Farwell & Co., and that the said Dodson levied the same upon the goods, wares, and merchandise described in plaintiff's petition, all of which was the property of said Horace Blakely. The answer further alleged that R. H. Cooper and Blakely entered into a conspiracy to make a sham and pretended sale of the goods to Cooper to defeat the claims of creditors and especially the claims of the attaching creditors above mentioned. To this a reply containing a general denial was filed. Subsequently an amendment to the second cause of defense was made. To this a demurrer was filed, which the court sustained. Trial had at the September term of the court for 1885, before the court with a jury. The jury returned a general verdict for the plaintiff, and assessed the amount of his recovery at \$5,336.18.

The jury also made the following special findings of fact: "(1) Was the sale of the stock of goods by Blakely to Cooper made with the intent on the part of said Blakely of defrauding his creditors, or hindering or delaying them in the collection of their debts? *Answer.* Yes; in our judgment he did. (2) If the above question is answered 'Yes,' then did Cooper have actual notice of such intention on the part of Blakely? *A.* No. (3) What time of the day or night was the sale consummated? *A.* Night of November 25, 1884, between the hours of nine and twelve o'clock. (4) Were the facts and circumstances surrounding the sale such as to put a prudent man upon inquiry as to the object Blakely had in making the sale? *A.* No. (5) On what day was

the trade finally consummated? A. November 25, 1884." "(9) Did Cooper before buying the goods from Blakely make inquiry of any person or persons other than Blakely to ascertain whether Blakely was making the sale to defraud, delay, or defeat his creditors? A. No. (10) Was an inventory of the stock of goods taken by Cooper before the sale was made? A. No. (11) Was the sale made in the usual and ordinary course of business? A. Not in the majority of cases. (12) Was the sale made in an unusual manner, and at an unusual hour? A. It was made in an unusual manner, but not at an unusual hour. (13) At the time of the levy of the respective attachments of Bates, Reed & Cooley and Lockwood, Englehart & Co., by the defendant, had the bond for a deed which has been offered in evidence been delivered to Horace Blakely? A. To the best of our recollection, it had been. (14) At the time the attachments were levied on the stock on November 27, 1884, had Cooper given Blakely deeds for the land or town property which was to be part of the consideration? A. To the best of our recollection, he had not. (15) At the time of the trade, what was the amount of the mortgage on the north-east quarter ($\frac{1}{4}$) of section thirty-five, (35,) township twenty-five, (25,) range six, (6,) in Butler county, Kansas? A. Three hundred dollars (\$300.) (16) What was the value of the interest in said land which Blakely received from said Cooper? A. Six hundred and sixty dollars, (\$660.) (17) What was the amount of the mortgage on south-west quarter ($\frac{1}{4}$) section 10, township twenty-three, (23,) range seven, (7,) at the time of the trade between Cooper and Blakely? A. Seven hundred dollars, (\$700.) (18) What was the market value of the house and lot in Eldorado, Kansas, which Blakely received from Cooper in said trade? A. Five hundred dollars, (\$500.) (19) Did Cooper pay Blakely any money at the time of the trade? A. He did, in the shape of a bank check. (20) If last question is answered 'Yes,' state when said payment was made, and how much was received by Blakely from Cooper. A. On the night of November 25, 1884, two thousand dollars, (\$2,000,) check. He also received a note of five hundred dollars (\$500) said night. (21) What was the market value of the south-west quarter section No. ten, (10,) township twenty-three, (23,) range seven, (7,) east, at the time of the trade between Cooper and Blakely? A. Eight hundred dollars, (\$800.)"

The defendant filed a motion for a new trial, which was overruled, and judgment was entered upon the verdict in favor of the plaintiff and against the defendant for five thousand three hundred thirty-six dollars eighteen cents, together with all the costs. The defendant excepted, and brings the case here.

Smith & Solomon, A. L. Redden, E. N. Smith, and A. L. L. Hamilton, for plaintiff in error. *C. A. Leland, Geo. Gardner, and W. E. Stanley,* for defendant in error.

HORTON, C. J. On November 27, 1884, writs of attachment in favor of certain creditors of Horace Blakely were placed into the hands of H. T. Dodson, sheriff of Butler county, for service. Upon that day he levied the writs on a general stock of merchandise, as the property of Blakely, but claimed to have been purchased by R. H. Cooper in good faith, and for a valuable consideration, prior to the attachments. Dodson, for the attaching creditors, contended that Cooper and Blakely entered into a conspiracy to make a pretended sale of the goods from Blakely to Cooper, to defraud the creditors of Blakely. Subsequently Dodson, as sheriff, sold the stock of goods as the property of Blakely, and Cooper brought suit to recover the value thereof, alleging that they had been wrongfully seized and converted by Dodson. Judgment was rendered in favor of Cooper for \$5,336.18 and costs. Upon the trial, Dodson offered to prove that Cooper bought all the goods levied upon, at the sheriff's sale, for \$2,300, excepting those taken to satisfy the claim of Bates, Reed & Cooley, valued at \$950.18. This evidence was rejected. The court instructed the jury that, if they found the issues for

Cooper, they would assess his damages at the amount of the value of the goods at the time they were taken by Dodson. Complaint is made of the rejection of the evidence offered, and to the giving of the instruction as to the measure of damages.

We think the complaint well made. The instruction given would not have been prejudicial if Cooper had not bought back the property in controversy. *Simpson v. Alexander*, 35 Kan. 225, 11 Pac. Rep. 171. But a different rule applies in such a case as this, where the owner gets back his property after the wrongful taking or conversion.

Field says: "In an action for the conversion of property, the fact that the property has been returned to plaintiff may always be shown in mitigation of damages. And, generally, where there is a wrongful taking, and the property has been redelivered to the owner or party entitled to possession of the same, the measure of damages is the expenses necessarily incurred by reason of the tort; the value of the time required to recover it; the value of the use of the property; and the amount of the injury thereto, if any." Field, Dam. § 110.

Sutherland says: "Wherever the owner gets back his property after any wrongful taking or detention, the expense of procuring its return is the measure of damages, in the absence of special damages, and where the property itself has not been injured nor diminished in value. In other words, the wrongdoer is *prima facie* liable for the value of property at the time he tortiously took it or converted it, with interest; but if it has been returned and accepted by the owner, its value when returned, or if the owner has incurred expense to recover it, then its value, less such expense, will be deducted by way of mitigation from the amount which would otherwise be the measure of damages. Where one recovers his property again, which had been unlawfully taken from him, he is considered as having received it in mitigation of damages, upon the principle that he has thereby received partial compensation for the injury suffered." 1 Suth. Dam. 239. See, also, *McInroy v. Dyer*, 47 Pa. St. 118; *Ewing v. Blount*, 20 Ala. 694; *Hunt v. Haskell*, 24 Me. 339; *Sprague v. Brown*, 40 Wis. 612.

In *Ewing v. Blount* the action was trover for the conversion of a slave. At the time of the trial the plaintiff had recovered possession of the slave. The court said: "If the owner has regained the possession of the goods, he cannot recover their value, and is only entitled to the damages he has sustained by the wrongful deprivation of his possession, and such damages should be commensurate with the injury." *Pierce v. Benjamin*, 14 Pick. 356; *Curtis v. Ward*, 20 Conn. 204.

Sprague v. Brown was an action for the conversion of an iron safe of the value of \$300. The safe was seized upon execution, and sold as the property of the execution debtors, who were not the owners thereof. The plaintiffs in that case obtained the return of the safe under a purchase from a party who bought it at the sheriff's sale. It was held, "plaintiffs having purchased back their goods from a stranger, who bid them off at the execution sale, the measure of their damages is the sum thus paid, (not greater than the market value;) in addition to which they might have recovered any special damages suffered from the unlawful taking, if any such had been alleged and proven."

If we understand the evidence correctly, the testimony of Cooper shows that for the stock of merchandise levied upon he paid Blakely about \$2,000 in money, and turned over to him real estate estimated at \$4,800. The jury, however, found that the value of the real estate, less the incumbrances thereon, was only \$1,260. On the date of Cooper's alleged purchase, he executed a bond to Blakely for certain real estate as part of the purchase price of the stock of merchandise. As there was some doubt about his ability to convey this real estate, the bond was placed in escrow until November 27, 1884, when it was taken up and destroyed, and a new bond, reciting other real estate, ex-

ecuted and delivered to Blakely. This bond covered the real estate which was conveyed subsequently by Cooper to Blakely. The bond provided for the conveyance of the realty on or before March 25, 1885.

There is some conflict in the evidence whether the second bond was delivered to Blakely before or after Cooper had actual knowledge of the attachment proceedings. The jury found, however, that this bond was delivered prior to the levy of the attachments, but the conveyances for the land were not executed until after the stock of merchandise was levied upon, and after Cooper had actual notice of the fraud of Blakely. One of the deeds was acknowledged November 28, 1884, and the other two January 23, 1885. Even if Cooper was a *bona fide* purchaser of the stock of merchandise, yet if he did not execute the deeds for the real estate, which was a part of the consideration therefor, until after he had actual notice of the attachments, the conveyances were delivered at his peril. He cannot be protected for the value of the land, for which he gave deeds to Blakely after full notice of the fraud. The jury found that the sale of the stock of merchandise by Blakely to Cooper was with the intent on the part of Blakely to defraud his creditors, and to hinder and delay them in the collection of their debts. This fraud seems to be conceded by all the parties.

It is well settled that no one but a purchaser for a valuable consideration, actually passed before notice of the fraud, can, as against attaching creditors, claim title to the property which has been fraudulently disposed of. *Bush v. Collins*, 35 Kan. 535, 11 Pac. Rep. 425. Cooper had only given a bond for the conveyance of the real estate at the purchase, and, when notice of the fraud of Blakely was given him, he need not have carried out the terms of the bond, because the consideration therefor wholly failed. The bond was not a negotiable instrument.

Again, an examination of the special findings of the jury show that they are conflicting, uncertain, and somewhat inconsistent with the general verdict. *Harvester Works Co. v. Cummings*, 26 Kan. 367; *Railway Co. v. Peavey*, 34 Kan. 472, 8 Pac. Rep. 780.

While the jury found by the general verdict and one of the special findings that Cooper had no actual notice of the fraud of Blakely at the time he made the purchase, and further found that the facts and circumstances concerning the sale were not such as to put a prudent man upon inquiry as to the object Blakely had in making the sale. They did find that the trade between Blakely and Cooper was consummated on November 25, 1884, between the hours of 9 and 12 P. M.; that Blakely made the sale to defraud his creditors; that no inventory of the stock of merchandise was taken by Cooper before the sale was made; that the sale was not made in the usual and ordinary course of business, and that it was made at an unusual hour. Further, the findings of the jury show that Cooper only agreed to pay one-half of the value of the stock of goods which he purchased. It looks very much as if Cooper bought the stock with such knowledge as would put a prudent man upon inquiry, notwithstanding the special finding of the jury to the contrary. *Gollob v. Martin*, 33 Kan. 253, 6 Pac. Rep. 267; *Singer v. Jacobs*, 3 Mc. Cr. 638.

Various other errors are alleged, but, as a new trial must be had, we do not think it necessary to comment thereon. We do not intend, however, to approve all of the proceedings of the trial court not herein referred to.

The judgment of the district court will be reversed, and a new trial ordered. (All the justices concurring.)

(37 Kan. 337)

BURKE v. JOHNSON.

(Supreme Court of Kansas. October 8, 1887.)

ATTACHMENT—RIGHTS OF EQUITABLE OWNER—NOTICE.

On April 8, 1884, J. purchased from A. certain lands and personal property thereon, belonging to A., and paid thereon a part of the purchase money, and gave his promissory note for the remainder, payable one day after date, and received a contract from A. to convey the legal title to him upon payment of the note for the balance of the purchase money. On April 9th, B. commenced an action in attachment against A., and attached the property as the property of A.; and afterwards, on the same day, J. paid the balance of the purchase money, and received a deed of conveyance from A. to the property. At the time of the attachment B. had no notice of the sale by A. to J.; and at the time of the payment of the note for the balance of the purchase money, and the receiving of the deed to the property, J. had no actual notice of the action of B. against A., and of the attachment of the property. *Held*, that J., at the time the property was attached, was the equitable owner thereof, and that the naked legal title was held by A. only as surety for the payment of the balance of the purchase money due thereon, and that the property was not subject to attachment by B. as the property of A.; and the fact that B. had no notice of the purchase by J. could make no difference. And *further held*, that the payment by J. of the balance of the purchase money, and the receiving a deed of conveyance of the property from A., without actual notice of the attachment, and acting in good faith in the entire transaction, gave him the legal as well as the equitable title to the property.

(Syllabus by Clogston, C.)

Error from district court, Johnson county; W. R. WAGSTAFF, Judge.

This action was brought by Frank Burke against T. E. Armstrong, and an order of attachment was issued therein, and the property in controversy attached as the property of Armstrong. J. B. Johnson, the defendant in error, interpleaded, claiming the property attached. Armstrong made default, and judgment was rendered against him, and in favor of the plaintiff, for \$5,200. The cause of the interplea was submitted to the court, a jury being waived. Findings of fact and conclusions of law were made, which are as follows:

"FINDINGS OF FACT.

"(1) That on the first day of April, 1884, the said T. E. Armstrong was the owner in fee of the lands and tenements in controversy, as well as the owner of the goods, chattels, stock, and personalty in controversy; and that on said day he gave written power and authority to one S. F. Coons to make sale of said real and personal property, all and singular.

"(2) That on the eighth day of April, 1884, said S. F. Coons, as 'Frank Coons,' executed and delivered to the said J. B. Johnson the following written contract of sale and to convey, all and singular, the said real and personal property, to-wit:

'SPRING HILL, KANSAS, April 8, 1884.

" 'Mr. J. B. Johnson has this day paid me the sum of eighteen hundred dollars, (\$1,800,)—forty dollars (\$40) in cash to Mr. Armstrong in person, and his note due to Mr. Armstrong for seventeen hundred and sixty dollars, (\$1,760,) due one day after date—in full of purchase price of the farm now owned by T. E. Armstrong, of 113 acres, in Spring Hill township, Johnson county, Kansas, called the "Frank Burke Farm." Also for all the stock and farming implements now on the farm, consisting of 28 hogs, with a lot of sucking pigs; 7 cows and heifers, and 1 bull; 1 four-year-old mare colt, and 1 four-year-old horse colt; a lot of chickens and turkeys; a lot of corn in crib, and some in the field; a lot of oats in crib and in stack; 2 farm wagons and some old harness; a combined mower and reaper; 1 corn-planter; 1 iron harrow; 1 riding cultivator; 1 walking cultivator; 3 walking plows, and other agricultural implements. Mr. Johnson to take possession of the farm and stock, etc., forthwith, and he is to have a deed to the land (as soon as I can

get it) from Mr. Armstrong, of Kansas City, Mo. Johnson is to pay the mortgages now against the land.

[Signed]

“ ‘T. E. ARMSTRONG,

“ ‘By FRANK COONS, Agent.’

“(3a) That the said ‘Burke Farm,’ or lands and tenements which by written authority, executed by said Armstrong to said Coons on April 1, 1884, was authorized to sell, and which were intended to be, and were, sold, to said Johnson by the said Coons, in virtue of the written contract of April 8, 1884, consists of and are as follows, to-wit: The south-east quarter of the north-west quarter, and the south-west quarter of the north-east quarter, and the south-west quarter of the south-east quarter of the north-east quarter of section number fifteen, (15,) in township number fifteen, (15,) of range number twenty-three, (23,) in Johnson county, state of Kansas; also, outside lots Nos. 35, 36, 37, 38, and 39, and all that part of lot number forty (40) lying south of the north line of the said ‘Frank Burke Farm,’ in the town or city of Spring Hill, Johnson county, State of Kansas.

“(3b) That, pursuant to said contract of sale and to convey, the said J. B. Johnson took possession of said premises, and hath been in actual possession thereof ever since.

“(3c) That on April 10, 1884, said J. B. Johnson took actual possession of all of said real and personal property.

“(4) That the consideration for such sale and purchase was as follows, to-wit: *First*, cash \$40, then paid by said J. B. Johnson to said Armstrong; *second*, a promissory note given by said Johnson for the sum of \$1,760, payable to said T. E. Armstrong [only] one day after its date, and dated April 8, 1884, being the day on which the said \$40 cash payment was made; *third*, the assumption of payment by said Johnson of certain mortgage incumbrance then on and against said lands and tenements, amounting to \$1,700, and accrued interest thereon.

“(5) That on the eighth day of April, 1884, the said Burke instituted a civil suit, in this court, against the said Armstrong, to recover the sum of \$5,200 unliquidated damages; and that an order or writ of attachment issued in said action against the real and personal property of said Armstrong, which said writ purports to have been issued by the clerk of this court, in said action, on the eighth day of April, 1884, and is under the seal of this court, and which said writ of attachment is made returnable in ten days from its date; and the sheriff's return thereon indorsed shows that he received said writ on the eighth day of March, 1884, and that on the ninth day of April, 1884, at two and one-half o'clock A. M., he levied the same upon all the real and personal property in controversy; and that on the eleventh day of June, 1884, said Burke obtained judgment against said Armstrong in said action upon constructive service, which judgment is now in force, and wholly unsatisfied.

“(6) That at the time of making the said levy there was a man (and his wife) occupying the building or dwelling-house upon said premises, with whom the sheriff then left a duly-certified copy of the order or writ of attachment. Said occupant's name is Kohn Kuchner.

“(7) That at the time of the issuance of said writ of attachment, as well as at the time of the levy thereof, the said Burke had no notice, actual or constructive, (other than the law may give or imply in such cases,) of the said sale and purchase between the said Armstrong and Johnson.

“(8) That at the time of making said purchase, and receiving said contract of sale and to convey said premises, and the payment of said sum of \$40, and giving the note for said sum of \$1,760 to said Armstrong by said Johnson, the said Johnson had no notice, actual or constructive, nor any knowledge whatever, that said Burke had any ‘claim’ or ‘rights’ or equities in, of, or to the property in controversy, realty or personalty, nor any indebtedness of Armstrong to said Burke.

"(9) That at the time the said Johnson took up said promissory note, and paid the \$1,760 balance of purchase money to said Armstrong, and accepted the deeds to said premises, at Paola, Kansas, at about noon on the ninth day of April, 1884, the said Johnson had no actual knowledge or actual notice of any attachment having been levied upon said real and personal property, or either thereof, by said Burke or any other person, and he had no 'constructive notice' thereof other than the law implies from the records of this court showing that an order of attachment had been issued in said action.

"(10) That the deeds to and for said real property from said Armstrong and wife to said Johnson, pursuant to said written contract of sale and to convey, were delivered by said Armstrong to said Johnson at Paola, Kansas, at about noon of the ninth day of April, 1884, at which time and place the said Johnson paid said sum of \$1,760 to said Armstrong.

"(11) That, since the delivery of said deeds, the said Johnson has paid all interest as it became due upon said mortgages, and hath paid all taxes lawfully assessed against said real and personal property.

"CONCLUSIONS OF LAW.

"(1) By reason of the execution and delivery of the written contract of sale and to convey said realty by said Armstrong, by his agent Coons, and the payment of the purchase price by money and promissory note, and assumption of the payment of all mortgages, incumbrances, thereon then existing, by said Johnson, as well by said Johnson's possession of said premises, the entire equitable title passed to said Johnson, on the said eighth day of April, 1884, in, of, and to said lands and tenements.

"(2) That the legal title—the naked fee—in, of, and to said realty remained in said Armstrong, in trust for said Johnson, from the delivery of said contract of sale and to convey, from April 8, 1884, until the deeds therefor were delivered to said Johnson, by said Armstrong and wife, on the ninth day of April, 1884, at Paola, Kansas.

"(3) That from the time of the delivery of said written contract of sale and conveyance to Johnson, as above stated, the said Armstrong had no leviable interest or estate in, of, or to said property, as against the rights of said Johnson.

"(4) That said written contract of sale so delivered to said Johnson on the eighth day of April, 1884, passed the ownership of the personal property therein described unto the said Johnson as of that date.

"(5) That said Johnson's rights and equities in and to the real and personal property in controversy are superior (and prior in time) to the rights and equities therein and thereto of the said Burke; that said Burke's lien, if any he hath, is subsequent in point of time, and inferior in point of equity; and Burke having failed to garnish Johnson for the \$1,760 balance of purchase money due, (and paid after the hour of the attachment levy,) the said Burke has not any lien upon said fund.

"(6) The court finds for the interpleader, J. B. Johnson, and against the plaintiff, Frank Burke, and that the said J. B. Johnson is entitled to recover his costs against the said Burke in this behalf expended."

Motion for new trial was made, on the ground that the conclusions of law were not sustained by the findings of fact. The motion for a new trial was overruled, and judgment given for the defendant. Plaintiff brings the case here for review.

I. O. Pickering and G. C. Clemens, for plaintiff in error. *A. Smith Devenny, John T. Little, and S. T. Seaton*, for defendant in error.

CLOGSTON, C. But one question is presented; that is, are the conclusions of law sustained by the findings of fact? This question must be determined by an examination of the title to the property at the time the attachment was

levied; and, if Armstrong at that time had a leviable interest in the property, then the judgment should be reversed. The facts as found by the court show that the legal title to the property remained in Armstrong, subject to the interest and rights of Johnson under his contract of purchase. This contract transferred to Johnson the equitable right to the property, subject alone to a lien of Armstrong's for the remaining unpaid purchase money. This lien amounted to a security only; and when this purchase money was paid he could be compelled to convey the legal title to the equitable owner of the property. *Jones v. Lapham*, 15 Kan. 544; *Stevens v. Chadwick*, 10 Kan. 407; *Orrick v. Durham*, 79 Mo. 177; *Woodward v. Dean*, 46 Iowa, 499.

This doctrine has been fully settled by this court. In *Holden v. Garrett*, 23 Kan. 98, this question is discussed. In that case, the question was, is a judgment a lien on property, where the legal title is held by the judgment debtor, and the equitable title or interest is held by the mortgagee, so as to defeat the mortgagee's interest in the property. It was held in that case that the judgment was not a lien upon the bare, naked, legal title; the equitable title being held by another. The statute provides that judgments shall be liens upon the real estate of a debtor within the county. It was said: "This evidently contemplated actual, and not apparent, ownership. The judgment is a lien upon that which is his, and not that which simply appeared to be his. How often the legal title is placed in one party, and the equitable title—the real ownership—is in others. Now, if the judgment is a lien upon all that appears, it will cut off all the undisclosed equitable rights and interests. To extend the lien to that which is not, but appears of record to be, the defendant's, is to do violence to the language. 'Real estate of the debtor,' means that which is in fact of or belonging to the debtor." See *English v. Law*, 27 Kan. 242; *Ranson v. Sargent*, 22 Kan. 516; *Harrison v. Andrews*, 18 Kan. 541; *Forwarding Co. v. Mahaffey*, 36 Kan. 152, 12 Pac. Rep. 705.

In this case, the attachment binds the property of the debtor from and after the levy. The writ directs the officer to attach "the lands, tenements, goods, and chattels, stock, rights, and credits, moneys and effects, of the defendant in his county, not exempt by law;" and when so attached a lien is created. Now, is this lien, under this order of attachment, greater than that created by judgment? Surely not. A judgment is a lien upon all the property of the debtor subject to the payment of his debts, and so is the attachment a lien upon the property of the debtor for the same purpose.

Plaintiff insists, however, that, at the time of the levy of the attachment, he had no notice, actual or constructive, of the purchase by Johnson of the property. We think no notice was necessary. The plaintiff in error lost nothing by want of such notice. He had parted with nothing; was not a purchaser in good faith, relying upon the constructive notice that persons without actual notice may rely upon. He was trying to enforce a claim; and with notice, or without, it left him in the same condition. If he had been a purchaser in good faith, relying upon a legal title to the property, he would be protected.

Plaintiff again insists that his attachment at least bound the property and the defendant in error to the extent of the unpaid balance of the purchase money; and that because Johnson, the defendant, paid the remaining purchase money after the levy of the attachment, and after he had constructive knowledge of such levy, the plaintiff is entitled to a lien and judgment against the property to the extent of that unpaid purchase money at the time of the levy. The court found that, at the time of the payment of this purchase money, the defendant had no actual knowledge of the levy of the attachment; that he paid the money in good faith upon his contract, and accepted the title. Under such circumstances, the attachment could not bind the purchase money. The land was not subject to attachment as the property of Armstrong, and consequently did not import such constructive notice that would bind John-

son in the payment of this money. *French v. Debow*, 38 Mich. 708. If he had actual notice of the levy of the attachment upon the property, and of Armstrong's fraud, and, with this knowledge, paid the purchase money, he would not be protected. See *Bush v. Collins*, 35 Kan. 535, 11 Pac. Rep. 425; *McDonald v. Gaunt*, 30 Kan. 693, 2 Pac. Rep. 871; *Gollob v. Martin*, 33 Kan. 252, 6 Pac. Rep. 267.

Counsel ask what remedy they are to pursue in case the attachment will not bind the property or the purchase money, and the money cannot be reached by garnishment. In answer, we can only say that all we have to deal with is the facts here presented. What the remedy would be under a given state of facts will not be determined in advance. All we do say, and all we are called upon to say, in this matter, is that the attachment created no lien upon the property, and could not operate to restrain and hold the unpaid purchase money in the hands of the defendant. Good faith on the part of Johnson in the completion of the contract is fully shown by the findings of the court. Counsel, however, insists that the conclusions drawn from these findings are not correct; that the fact of the hurried manner of the purchase; the manner of its sale in bulk, including the farm and personal property; the haste of the transaction; and the consideration paid,—were sufficient to place Johnson upon his guard, and notice of Armstrong's fraudulent intent. If these things are badges of fraud, and of such a character as to set aside this transaction, we think that it would unsettle the real-estate transactions, or many of them, in Kansas. This property was regularly left in the hands of a real-estate agent for sale; had remained in his hands for some days. He had offered it for sale. It had become known in the neighborhood. Johnson's attention was called to it by a neighbor. He went and found the agent and owner, visited the land, examined the records to see that the title was good; made an offer for the premises, including the stock and farming implements thereon, and this offer was accepted, and the contract drawn on the same day; part of the consideration paid, and the transaction completed, on the next day. We see no evidence of fraud in this. Apparent good faith characterized every transaction connected with it, so far as the defendant was concerned. The evidence fully shows this, and, further, that the property had been purchased by Armstrong from the plaintiff in bulk, and purchased as an entire transaction, and by Armstrong sold in the same way. And now, because of the fraudulent transaction on the part of Armstrong in the purchase of this property from the plaintiff, and perhaps the sale of it for that reason to Johnson, we are asked to set aside the sale; notwithstanding the fact that good faith is shown on the part of the defendant, and that there are no circumstances connected with the transaction calculated to excite suspicion of a prudent man, or warn him of the fraudulent intent connected therewith.

It is recommended that the judgment of the court below be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

(37 Kan. 332)

FLINT v. DULANY and others.

(Supreme Court of Kansas. October 8, 1887.)

1. PLEADING—ANSWER—GENERAL DEMURRER—SEVERAL DEFENSES, ONE GOOD.

An answer setting up several defenses, demurred to on the ground that it does not state sufficient facts, will be held sufficient, where the demurrer is not directed against any particular defense, and any one of the defenses alleged is good.

2. SAME—JOINDER OF DEFENSES—RELIEF AGAINST TAX TITLE.

An action was begun by one holding a tax title to land to quiet the title to the same against the original owner, and, on service by publication only, he obtained a judgment. Within three years the judgment was properly vacated on the application of the defendant, under the provisions of section 77 of the Code. When he was let in to defend, the defendant filed an answer setting up—First, a general de-

nial; second, facts showing the plaintiff's title in the land to be invalid; and the third count alleged that after the judgment was first rendered, and before it was vacated, the plaintiff sold the land, and appropriated the proceeds to his own use, and he prayed for a recovery of the value of the land. Held, on demurrer, that the right to the relief prayed for in the third count of the answer was properly joined with the other defenses alleged.

(Syllabus by the Court.)

Error from district court, Anderson county; A. W. BENSON, Judge.

Fabius M. Clarke, for plaintiff in error. *Johnson, Poplin & Johnson*, for defendants in error.

JOHNSTON, J. On the twenty-first day of February, 1881, Charles L. Flint brought an action in the district court of Anderson county against Dulany and McVeigh, William Wickel, and a number of other persons, and in his petition he alleged that he was the owner of several tracts of real estate in Anderson county, and held them by virtue of certain tax deeds which had been executed by the county clerk of that county, which deeds had been duly recorded. He averred that the defendants claimed some title or interest in the lands, and that the action was brought to quiet his title to the land as against each and all of the defendants. An affidavit was filed on behalf of the plaintiff, alleging that each of the defendants resides out of the state of Kansas, and service of summons could not be made on them within the state, and that the action was brought for the purpose of determining the right and interest of the plaintiff in real property. On this affidavit service was made by publication, and on the thirteenth day of September, 1881, default being made by the defendants, a decree was rendered quieting the title to the lands mentioned in the plaintiff, and barring the defendants from setting up any title, estate, or interest to them. On September 4th, and within three years after the decree had been entered, William Wickel filed a motion, asking that the judgment and decree rendered against him on September 13, 1881, be opened up, and that he be let in to defend for the reason that there was no service other than by publication in a newspaper, and that he had no actual notice of the pendency of the action in time to appear and make his defense. Notice was given to the plaintiff, an answer filed, and proof made of the statements made in the motion; and thereupon the court, both parties being present, sustained the motion by opening the judgment, and allowed Wickel to defend. No exception was taken to this order. The answer filed by Wickel was, first, a general denial of the allegations contained in the plaintiff's petition. He further answered by alleging that, at the time of the rendition of the decree in the action, he was the owner of the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 34, township 21, range 21, situate in Anderson county; that the lands were wild and unimproved, and had never been in the actual possession of the plaintiff; and that the tax deed and the proceedings upon which it was based were void, and that the sale was made for taxes not authorized by law; that the sale upon which the tax deed was executed "was made while and when there was an open sale of said lands for taxes to said Anderson county which had not been redeemed from, and the certificate thereof had not been assigned; and the taxes for which said lands were sold, and upon which said tax deed was issued, were subsequent to said open sale to the county, the certificate of which had not been assigned." For a further answer and cause of action, the defendant alleged that the plaintiff, after procuring the judgment and decree, which was based alone on service by publication in a newspaper, had sold the land, and that the same was reasonably worth the sum of \$480. He prayed judgment against the plaintiff declaring his tax deed void, and that he had no claim or lien on the lands, and also for a recovery from the plaintiff of the sum of \$480, the value of the land sold by plaintiff under the judgment and decree which had been vacated. The plaintiff demurred to the answer upon two grounds: *First*, that the causes of action therein were im-

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properly joined; and, *second*, that the facts stated were insufficient to constitute a cause of action or defense. The demurrer was overruled by the court, and a trial had which resulted in a judgment and decree in favor of the defendant. The plaintiff brings the case here upon a transcript of the record, relying for error mainly on the rulings of the court upon the demurrer.

The answer, which is challenged by the demurrer, sets forth several grounds of defense to the plaintiff's action, which was simply one to quiet title. The ground of demurrer that the answer did not state sufficient facts was general, and not directed against any particular defense. If, therefore, any one of the defenses is good, the demurrer was properly overruled. The general denial of the answer of itself constituted a complete defense, and furnished sufficient reason for the ruling of the court on that ground of demurrer. Apart from this, it was substantially averred in the answer that the plaintiff's tax deed, under which he claimed, was void because it was based on a sale made after the land had been bid off for the county, and before it had been redeemed, and also before the certificate of sale to the county had been assigned. This also constituted a defense, as the statute prohibits the sale of land bid off for the county at a tax sale until it has been redeemed, or shall be sold by the county, or the tax certificate which has been issued to the county has been assigned. Tax Law, § 122. The argument that the allegation is defective because it failed to state that the sale to the county was a valid one is not well founded. The unqualified statement that the sale was made implies that it was a complete and valid one; but the fact that the general denial constituted a good defense effectually disposes of that ground of demurrer.

The other exception is the alleged misjoinder, where the defendant set forth a sale of the land by the plaintiff after the judgment was entered in his favor, and before it was vacated. It is averred that the lands were and are reasonably worth \$480, and he asks a judgment against the plaintiff for that amount. The original judgment was properly vacated by the court under section 77 of the Code. It appears to have been rendered without other service than by publication in a newspaper, and the application having been made within the proper time, and it having been satisfactorily shown that the defendant had no actual notice of the pendency of the action, the defendant was entitled to have it vacated. On its face the judgment that was vacated was a valid one, and hence the title to the land sold could not be disturbed or affected by the vacation, or by the proceedings in the case subsequent to the vacation. Code, § 77; *Ogden v. Walters*, 12 Kan. 295. The plaintiff, therefore, became liable to the defendant for the value of the land, and the only question remaining is whether this right of belief could be obtained in the action. We do not regard the exception to be well founded. The policy of our Code is to avoid a multiplicity of suits, and to settle in one action the whole subject-matter of any controversy between the parties. In addition to general and special denials, the defendant may set up any new matter constituting a defense, counter-claim, set-off, or right to relief, concerning the subject of the action. Code, §§ 94, 95. With respect to joinder of actions, it is provided that causes of action may be joined where they arise out of the same transaction, or "transactions connected with the same subject of action." Code, § 83. In the count objected to, the defendant sets forth a right to relief concerning the subject of the action, and the transaction upon which he relies for a recovery is directly connected with the subject of the action. The principal controversy or subject of action was the land which the plaintiff sold under the judgment first obtained. He claimed to be the absolute owner of the land by virtue of a tax deed, and he asked to have the pretensions or adverse claims of the defendant held void, and upon constructive service he obtained a judgment and sold the land. The defendant procured the judgment to be vacated, as he had a right to do, and alleged, in his answer, after being let in to defend, that the title set up by the plaintiff was invalid, and he asked the court to so

declare. The land sold by the plaintiff was in fact the subject of the action, and the title to which cannot under the statute be disturbed by the opening of the judgment. The transaction out of which the defendant's right arose is not only connected with the subject of the action, but it arose on a sale of what forms the subject of the action under the judgment rendered in the action itself. There is no repugnance or inconsistency in the several grounds of defense set out by the defendant, and the new matter alleged affects all the parties, and no others, and the defendant's right to relief thereon seems to be properly and necessarily involved in the complete determination of the controversy. The fact that the defendant's right to relief arose after the petition was filed does not support the claim of misjoinder. The statute is not only liberal in the allowance of amendments, but it expressly provides that a supplemental petition, answer, or reply, alleging facts material to the case, occurring after the former petition, answer, or reply, may be filed, upon notice, and upon such terms as the court may prescribe. Code, § 144.

We find no error in the record, and will therefore affirm the order and judgment of the district court.

(All the justices concurring.)

(37 Kan. 282)

BRANNER, Guardian, etc., v. THOMAS, Jr., Sheriff, etc., and another, Treasurer, etc.

(Supreme Court of Kansas. October 8, 1887.)

TAXATION—WHAT SUBJECT TO—AGREEMENT FOR SALE OF LAND.

Where an agreement is executed to sell real estate upon conditions precedent, and no notes given for the purchase money; and it is stipulated that time is the essence of the agreement; and neither the legal nor equitable title to the land is transferred thereby, *held*, that the agreement is not subject to taxation.

(Syllabus by the Court.)

Error from Shawnee county; JOHN GUTHRIE, Judge.

John S. Branner, guardian of the persons and estates of Anthony N. Brown and other minors, brought this action on July 24, 1885, against Chester Thomas, Jr., sheriff of Shawnee county, and A. J. Huntoon, treasurer of that county, to restrain and enjoin them from the collection of taxes levied upon certain agreements for the sale of real estate. One of the said agreements is as follows:

"This agreement, made and entered into by and between John S. Branner, guardian of the persons and estates of Anthony N. Brown, minor child of Nicholas Brown and Millie Brown, both now deceased, and Millie Klein and Josie Klein, minor children of Jacob Klein and Millie Klein, both now deceased, of Shawnee county and state of Kansas, of the first part, and Samuel F. Davison, of the county of Shawnee and state of Kansas, of the second part, witnesseth that the said party of the first part, as such guardian, by virtue of the orders of the probate court of Shawnee county, in the state of Kansas, made and dated on the eighteenth day of May, A. D. 1880, and the sixteenth day of December, A. D. 1880, hereby agrees to sell unto the said party of the second part, his heirs and assigns, upon the strict performance of the conditions of this contract as hereinafter stated, all of the right, title, and interest of all of said minor children in and to all of the following described real estate, situate in the county of Shawnee and state of Kansas, to-wit: Lots numbered thirty-six, (36,) thirty-eight, (38,) and forty, (40,) on Klein avenue north, in Klein's addition to the city of Topeka, according to the plat made and filed, and now of record in the office of the register of deeds of Shawnee county, Kansas,—in accordance with an order of the said probate court, dated May 18, A. D. 1880; for and in consideration of the sum of five hundred and fifty dollars, (\$550,) that being more than three-fourths of the appraised value of

said real estate; upon the terms and conditions hereinafter mentioned, to-wit: That said party of the second part covenants and agrees to pay unto the said party of the first part, or his successors in office, for the said real estate, the said sum of five hundred and fifty dollars, (\$550,) as follows, to-wit: Forty-five dollars (\$45) cash in hand, the receipt of which is hereby acknowledged, and five hundred and five dollars (\$505) to be paid on or before December 7, 1886, with interest thereon from date until paid at the rate of ten per cent. per annum; interest payable annually.

"And the said party of the first part, as such guardian, on receiving said sum and sums of money, at the time and in the manner hereinbefore mentioned, agrees to convey, or cause to be conveyed, the said interest of said minors in and to said real estate, to said party of the second part, his heirs or assigns, in conformity with the provisions of the act of the legislature of the state of Kansas, entitled 'An act concerning guardians and wards,' approved February 29, 1868, and 'An act respecting executors and administrators, and the settlement of the estates of deceased persons,' approved February 28, 1868; subject, however, to all taxes and assessments that become due thereon after this date, all of which taxes the party of the second part agrees to pay when the same become due.

"But if the said party of the second part shall fail to perform any or either of the agreements herein on his part, at the time and according to the conditions herein stated, time being of the essence of this contract, then this agreement shall, at the option of said party of the first part, and the consent of said probate court, be forfeited and determined from thenceforth and forever; and any and all money which may then have been paid on said agreement, and all improvements which may be upon said real estate, shall be retained by the said party of the first part for and in consideration of the use and rent of said premises up to the time of such forfeiture; and the said party of the first part shall thereupon be entitled to the possession of said premises. And the said party of the second part hereby waives all notice to quit or demand for the possession of said premises, or any part thereof, and hereby authorizes the party of the first part, or his agents, to enter and take possession thereof, and remove all persons therefrom, without any recourse whatever to any proceedings at law or in equity.

"And it is further agreed that said party of the second part shall, within sixty days after the erection of any building or buildings upon said property, or any part thereof, cause the said building or buildings to be insured in some responsible insurance company for an amount not less than the purchase price of said lots, for the benefit of said party of the first part; which policy or policies of insurance shall be immediately assigned to said first party as an additional security for the purchase price of said lots. And if said second party shall, within the time required, fail to effect such insurance, or to assign such policy or policies to said first party, then such first party shall have the right to obtain such insurance, and the amount paid therefor shall be charged to said second party, and shall be paid by him before he shall be entitled to receive a deed for said property.

"This agreement is made subject to any lawful order or orders that may hereafter be made by the probate court for Shawnee county in relation to sale of said real estate. And the parties hereby agree to faithfully observe and perform any and all such orders in relation thereto as may be lawfully made by said probate court.

"In witness whereof, the said parties have hereunto set their hands and seals this seventh (7th) day of December, A. D. 1881.

"JOHN S. BRANNER. [Seal.]

"S. F. DAVISON. [Seal.]

"*State of Kansas, Shawnee County—ss.:* Be it remembered that on this second day of April, A. D. eighteen hundred and eighty-three, before me, the

undersigned, a notary public in and for said county and state, came John S. Branner, guardian, and Samuel F. Davison, who are personally known to me to be the same persons described, and who executed the foregoing agreement for deed, and they duly acknowledged the execution of the same.

"In testimony whereof, I have hereunto subscribed my name, and affixed my official seal, on the day and year last above written.

[Seal.]

"ARCHIBALD A. AUSTIN,

"Notary Public, Shawnee County, Kansas.

"My commission expires September 8, 1884."

On August 27, 1885, the defendants demurred to the petition, alleging that the same did not state facts sufficient to constitute a cause of action. On December 28, 1885, the demurrer was heard, and sustained. The plaintiff excepted, and brings the case here.

Wm. R. Hazen, for plaintiff in error. *Charles Curtis*, for defendants in error.

HORTON, C. J. The agreement for the sale of the real estate described in the petition confers neither the legal nor the equitable title upon Davison. It is simply an agreement to sell real estate upon conditions precedent, and sets forth a conditional sale only. In the contract, it is stipulated, in substance, that time is the essence thereof; that the failure to perform any of its conditions shall render the contract null and void; and that, by such failure, the party holding under the contract shall forfeit to the other party all the money paid thereon, and all improvements made on the premises, and all right to compensation therefor, and that he shall cease to have any interest therein. *Commissioners Douglas Co. v. Railway Co.*, 5 Kan. 615; *Parker v. Winsor*, Id. 362; *McNamara v. Culver*, 22 Kan. 661; *Eckert v. McBee*, 27 Kan. 232. When land is sold and conveyed, and notes given for the purchase money, the vendee may be taxed for the land, and the vendor for the notes received for the purchase money; but where the vendor still owns the land, and also owns it conditionally, as in this case, we do not think that he can be taxed upon the land contract. See *Wilcox v. Ellis*, 14 Kan. 588; *Railroad Co. v. Wilcox*, Id. 259. The maxim that equity considers that when land is sold on credit, and the deed is to be made when the purchase money is paid, that the land at the time of the purchase became the vendee's, and the purchase money the vendor's; that the vendor becomes the trustee of the vendee with respect to the land, and the vendee the trustee of the vendor with respect to the purchase money,—is not applicable here.

Davison has the option to purchase. Under the agreement, he has the possession of the land, and pays therefor the taxes and certain interest. But the legal title has not passed to him, because no deed or other conveyance has yet been made; and the equitable title has not passed, because the land has not been paid for, and because, on account of the provisions for forfeiture, it is clearly the intention of the parties, as indicated in the contract, that such title shall not pass until the land is paid for. Davison has a contingent or conditional equity to the land, but he is in danger of forfeiting the same; and, if forfeiture occurs, his contingent or conditional equity ceases. If we could consider the agreement a mortgage merely, then, as personal property, it would be taxable. As the agreement cannot be construed into a mortgage, nor as creating a debt, but being a conditional sale only, we must hold that it is not subject to taxation. If it be claimed that the agreement is a credit, and therefore taxable, the claim is defeated by the definition given to "credit" by the tax law, as follows: "The term 'credit,' when used in this act, shall mean and include every demand for money, labor, or other valuable thing, whether due or to become due, but not secured by lien on real estate." Comp. Laws 1885, p. 945. *Lappin v. County Com'rs Nemaha Co.*, 6 Kan. 403. We do not think the agreement creates a debt, but if any demand for money is

created thereby, it is secured on real estate, and therefore not "credit" within the statute.

The judgment of the district court will be reversed, and the cause remanded, with direction to the court below to overrule the demurrer filed to the petition.

(All the justices concurring.)

(37 Kan. 263)

CRUST v. EVANS and others.

(*Supreme Court of Kansas. October 8, 1887.*)

1. NEW TRIAL—SUFFICIENCY OF MOTION FOR—OBJECTION RAISED ON APPEAL.

Where a motion for a new trial, perfect in every respect except that it is not signed by the party or his attorney filing it, is heard and overruled in the district court within less than three days after the verdict is rendered, and no objection is made in the district court because of any formal defects of the motion, *held*, that no such objection can be made for the first time in the supreme court, and the motion will be considered sufficient.

2. EVIDENCE—DECLARATIONS—Hearsay.

In an action between C. and E., E. claimed that C. fraudulently purchased and procured the title to a certain piece of land which E. claimed he had the right to purchase; and, in order to prove the fraud of C., E. introduced the testimony of various witnesses to prove the statements of the owner of the land, made in the presence and hearing of such witnesses, but not in the presence or hearing of C., and made after the sale and conveyance of the land to C., and after the owner had parted with his title; and this testimony was introduced with the permission of the court, but over the objections and the exceptions of C. *Held*, error.

(*Syllabus by the Court.*)

Error from district court, Johnson county; J. O. PICKERING, Judge.

John T. Burris, for plaintiff in error. *F. R. Ogg*, for defendants in error.

VALENTINE, J. Nearly all the errors assigned in the present case are errors of law occurring at the trial; and such errors, in order to be properly saved for the supreme court, require that a motion for a new trial, properly embodying them, should be made, filed, heard, and overruled in the trial court. The defendants in error claim that the errors assigned in the present case cannot be considered by the supreme court, for the reason that no proper motion for a new trial was ever filed in the district court. The record shows that the verdict of the jury was rendered on December 1, 1885; that a motion for a new trial was in fact filed on the same day; that it was heard and overruled on December 3, 1885; and that judgment was rendered in favor of the defendants in error, defendants below, and against the plaintiff in error, plaintiff below, on the same day. This motion, as it appears in the record, is complete and perfect in every particular, except that it is not signed by the plaintiff or his attorney. It shows, however, upon its face, that it was made by and for *B. M. Crust*, the plaintiff, and the journal entry of its final disposition shows that, on the hearing of the motion, the plaintiff, *B. M. Crust*, "appeared in person, and by his attorney, *John T. Burris*;" that the other parties also appeared in person, and by their attorneys; that the motion was entertained and heard by the trial court in the same manner as other motions for new trials are usually entertained and heard by trial courts; and all this without the slightest objection being made to either the motion or to the hearing. The first objection made to the motion is now made in the supreme court. If the objection had been made in the district court, the plaintiff or his attorney would undoubtedly have corrected the motion by signing it; and undoubtedly he would have had the right to do so. The motion was heard and overruled in less than three days after the verdict of the jury was rendered, and therefore, at the time of the hearing, the plaintiff had the right, even without the leave of the court, to sign the motion, or to file another motion, embodying

the same grounds as the original, and the grounds for the new trial were amply set forth in the motion in this case. The point made by the defendants is wholly untenable. As all the parties and the court below treated the motion as sufficient, this court will also treat it as sufficient.

The plaintiff's petition set forth a cause of action in the nature of ejectment. The defendants' answer contained a general denial, and also set up an equitable defense. It appears that on December 20, 1869, and prior thereto, the land in controversy belonged to On-ko-wath-kuk-bob, an Indian belonging to the Black Bob band of Shawnee Indians; that on that day he conveyed the same by deed, through the chiefs of his tribe, to J. Henry Blake, which deed was afterwards and on April 15, 1884, duly approved by the secretary of the interior; that on December 4, 1883, the land was conveyed by Blake by warranty deed to Milton E. Clark, and that on April 2, 1884, the land was conveyed by Clark by warranty deed to the plaintiff, B. M. Crust. The land was worth at the time about \$2,000, but by an agreement between certain settlers on the Black Bob Indian lands, and the parties who held the legal title thereto, the lands were to be conveyed to the actual settlers for about \$10 per acre. Under such agreement, this particular piece of land was to be conveyed for \$880; and both the plaintiff and the defendants claimed, and still claim, to be entitled under this agreement to procure the land and the deed therefor at that price; but, as before stated, Clark conveyed the land to the plaintiff, and the plaintiff paid him therefor \$880. One of the principal questions involved in this case, and the principal one litigated at the trial, was whether the deed from Clark to the plaintiff was procured by the fraud of the plaintiff or not. Probably the defendants were better entitled, under the agreement, to have the land sold and conveyed to them than the plaintiff was to have the land sold and conveyed to him, but the plaintiff in some manner procured the sale and conveyance to himself, possibly fraudulently, possibly rightly; and which, is the main question involved in the case. The defendants, in order to show that the plaintiff procured the sale and conveyance to himself fraudulently, introduced the testimony of various witnesses to show what Clark had said about the matter on various occasions, at different times, and on divers days after the execution and the delivery of the deed. None of these statements of Clark were made in the presence or hearing of the plaintiff Crust; and all the testimony concerning them was permitted to be introduced over the objections and the exceptions of the plaintiff. Of course this was error; and it was material error; and, to make it still more potent in its effect upon the jury, the court erroneously instructed the jury as follows: "You have the right to take into consideration the statements made by Clark soon after the delivery of the deed to Crust conveying the land in controversy, together with all the other evidence in the case, in order to determine whether or not the deed conveying the land in controversy was obtained by fraud."

There is no theory upon which the foregoing evidence could rightfully be introduced, or upon which the foregoing instruction could rightfully be given. After Clark sold and conveyed the property to Crust, he (Clark) could no longer bind Crust or affect his rights by any statements which he (Clark) might make concerning Crust, or concerning the deed, or concerning the property conveyed.

We have said that probably, under the agreement between the settlers and the parties holding the legal title to the Black Bob lands, the defendants had the better right to purchase the land in controversy; but nevertheless Crust in fact purchased the same, and procured the conveyance thereof to himself, and thereby obtained the legal title thereto; and Clark seems to be satisfied. And, from the case as now presented, it seems to be at least doubtful whether the defendants can possibly make out a sufficient equitable title to overcome Crust's legal title. This question, however, as the case is now presented, cannot be determined by us.

The judgment of the court below will be reversed, and cause remanded for a new trial.

(All the justices concurring.)

(37 Kan. 316)

HARRIS v. PRATT.

(*Supreme Court of Kansas. October 8, 1887.*)

1. BANKRUPTCY—REGISTER'S DEED OF ASSIGNMENT—ACKNOWLEDGMENT.

Where a deed of assignment is executed by the register in bankruptcy to the assignee of a bankrupt, under section 14 of the Bankrupt Law of 1867, no acknowledgment thereof is necessary.

2. SAME—DEED AS EVIDENCE.

Where an assignee in bankruptcy conveys land belonging to a bankrupt estate by an order of the bankrupt court, and the certificate of acknowledgment of the officer taking the same shows that the assignee personally appeared before the said officer, and that his signature is subscribed to said conveyance, and that he acknowledged the same to be his act and deed, *held* not error to admit said deed in evidence without further proof.

(*Syllabus by Clogston, C.*)

Error from district court, Wabaunsee county; R. B. SPILMAN, Judge.

Plaintiff in error commenced this action to partition the N. E. $\frac{1}{4}$ of section 10, township 12, range 13, in Wabaunsee county, Kansas; claiming to be the owner of the undivided one-half, and alleged that the defendant was the owner of the other half. The defendant in answer thereto claimed to be the owner of the entire tract of land, and alleged his possession of the same. Trial by the court, jury being waived, at the March term, 1885. The court made the following findings of fact and conclusions of law:

"FINDINGS OF FACT.

"(1) That on the twenty-third day of May, 1877, Charles Orme and Thomas E. Phillips were joint owners of the real estate described in the petition and answer filed in this case, to-wit, the north-east quarter of section ten, (10,) township twelve (12) south, range thirteen (13) east, in Wabaunsee county, state of Kansas.

"(2) That on the twenty-third of May, 1877, the said Charles Orme and Thomas E. Phillips were adjudged and declared bankrupts by John W. Ray, one of the registers in bankruptcy of the district court of the United States for the district of Kansas, at the city of Indianapolis, in said district.

"(3) That on the eleventh day of June, 1877, the said John W. Ray, by a deed of assignment executed by him as register in bankruptcy, conveyed unto James H. Ruddell, as assignee in bankruptcy of the said Charles Orme and Thomas E. Phillips, bankrupts, all the estate, both real and personal, of said bankrupts, which deed of assignment was duly recorded on the first day of December, 1877, in the records of Wabaunsee county, Kansas, in Book L. on page 290.

"(4) That the said James H. Ruddell, as assignee in bankruptcy of the said Charles Orme and Thomas E. Phillips, acting under various orders of the United States district court of Indiana, on the first day of December, 1877, sold the real estate aforesaid, to-wit, the north-east quarter of section ten, (10,) township twelve, (12,) south, range thirteen (13) east, in Wabaunsee county, Kansas, as part of the estate of said bankrupts, unto George P. Anderson, as trustee, which sale was on the thirteenth day of December, 1877, confirmed by said court, and the said assignee directed to make said George P. Anderson, as trustee, a proper deed of said real estate; and that accordingly the said James H. Ruddell, as assignee as aforesaid, on the twenty-seventh day of December, 1877, executed to the said George P. Anderson, as trustee, a deed of said real estate, which deed was duly recorded on the first day of April, 1878, in the records of Wabaunsee county, Kansas, in Book L, on page 396.

"(5) That on the thirtieth day of October, 1882, the said George P. Anderson, as trustee, for the consideration of six hundred dollars, (\$600,) conveyed said real estate by deed unto A. V. Auter, which deed was duly recorded on the twenty-third day of December, 1882, in the records of Wabaunsee county, Kansas, in Book S, page 107.

"(6) That on the twenty-fourth day of February, 1883, the said A. V. Auter, in consideration of twelve hundred dollars (\$1,200) actually paid, conveyed said real estate by deed unto Alfred Pratt, the defendant, which deed was duly recorded on the twenty-sixth day of June, 1883, in the records of Wabaunsee county, Kansas, in Book S, page 291.

"(7) That on the eighth day of April, 1880, the said Charles Orme, one of said bankrupts, and Hannah, his wife, executed unto the said George P. Anderson, as trustee, a quitclaim deed for said real estate, which deed was recorded on the twenty-fourth day of November, 1880, in the records of Wabaunsee county, Kansas, in Book P, page 160.

"(8) That on the thirtieth day of October, 1883, in consideration of forty dollars (\$40) actually paid, by said plaintiff, Thomas E. Phillips, one of said bankrupts, and Margaret, his wife, executed and delivered unto Herbert H. Harris, the plaintiff, a quitclaim deed for said real estate, which was recorded on the seventh day of November, 1883, in the records of Wabaunsee county, Kansas, in Book T, page 340.

"(9) That between the seventh and fourteenth days of November, 1883, the said plaintiff, being then the owner of a fenced tract of land adjoining said real estate on the east side, took possession of and inclosed a part of said real estate adjoining his fence, about 80 rods square, with a barb wire fence for a corral.

"(10) That in the spring of 1884 said defendant, Alfred Pratt, took possession of and inclosed the whole of said real estate, including what had already been inclosed by the plaintiff, and was in possession of the same at the time of the commencement of this action.

"(11) That the said George P. Anderson, A. V. Auter, and Alfred Pratt have paid the taxes on the whole of said real estate from 1877 to 1883, inclusive.

"(12) That the actual value of said real estate on the seventh day of November, 1883, was sixteen hundred dollars, (\$1,600.)

"CONCLUSIONS OF LAW.

"(1) That by the adjudication in bankruptcy, and proceedings thereunder, the assignment to James H. Ruddell, as assignee, and said assignee's deed to George P. Anderson, as trustee, the said Charles Orme and Thomas E. Phillips were divested of all right, title, or interest in said real estate; and that the subsequent conveyances of George P. Anderson, as trustee, to A. V. Auter, and of A. V. Auter and wife to Alfred Pratt, vested a perfect title to said real estate in the said defendant Alfred Pratt.

"(2) That the said plaintiff, Herbert H. Harris, acquired no title to said real estate, or any part thereof, by virtue of said quitclaim deed to him from Thomas E. Phillips and wife.

"(3) That at the commencement of this action the said defendant, Alfred Pratt, was the owner in fee-simple of the whole of said real estate."

And thereupon rendered judgment for the defendant. The plaintiff brings the case here for review.

H. H. Harris, for plaintiff in error. *A. Bergen*, for defendant in error.

CLOGSTON, C. The only question presented for consideration is the admission of certain deeds and proceedings in bankruptcy in evidence, over the ob-

jection of the plaintiff below. If the deeds and proceedings admitted were improperly admitted, the judgment ought to have been for the plaintiff instead of for the defendant. The deeds objected to were—*First*, the deed of assignment of the bankrupt estate of Charles Orme and Thomas E. Phillips by John W. Ray, register in bankruptcy, to James H. Ruddell, assignee; and, *second*, a deed by the said James H. Ruddell, assignee, to George P. Anderson, trustee. The objection to these deeds is that they were not properly acknowledged, either under the laws of the state of Kansas or the state of Indiana. The first of these deeds was made by the register in bankruptcy to the assignee, and made under and by virtue of the bankrupt law then in force, which provides that the deed of assignment by the register in bankruptcy shall be signed by him with his seal attached. No provision is made for an acknowledgment of this deed, and none is required. The register is an officer of the bankrupt court, and as such officer the law directed him to convey the bankrupt estate under his signature and seal. Rev. St. U. S. 1878, §§ 5044-5049. The second deed, made by the assignee of said estate to George P. Anderson, was acknowledged before a notary public. The objection to this acknowledgement is that the notary in his certificate does not show that the assignee was personally known to him to be the person who signed the conveyance. The acknowledgment is as follows:

"Before me, a notary public in and for the said county, this twenty-seventh day of December, 1877, personally appeared James H. Ruddell, assignee in bankruptcy of Charles Orme and Thomas E. Phillips, whose signature is subscribed to the foregoing conveyance, and acknowledged the same to be his act and deed. Witness my hand and notarial seal this twenty-seventh day of December, 1877. BENJ. D. WALCOTT, Notary Public."

Now, while this certificate does not say in so many words that the grantor was personally known to him to be the person who signed the conveyance, yet it does state that the assignee personally appeared before him, and that his signature was to the conveyance. We think this was a substantial compliance with our statute. Again, it must be remembered that this was a sale made under the direction of and to be confirmed by the bankrupt court. There could be no mistake in the identity of this grantor in this conveyance.

Plaintiff also insists that the proceedings in bankruptcy, in correcting an error or mistake in the confirmation of the sale of this land by the assignee in bankruptcy, by making said confirmation show that the sale of the N. E. $\frac{1}{4}$ was confirmed instead of the S. W. $\frac{1}{4}$, ought not to have been admitted over his objection, for the reason that he had purchased the N. E. $\frac{1}{4}$ before the correction, and that at the time of his purchase of this land he had no notice, either constructive or actual, that the N. E. $\frac{1}{4}$ had been sold by the assignee. The objection is not tenable. The plaintiff had full knowledge of what was disclosed by the records, and an examination of the records of Wabaunsee county would have shown that the title and all the interest therein of Orme and Phillips, bankrupts, had been conveyed by the register in bankruptcy to the assignee of said bankrupts. This was sufficient notice to place him upon inquiry, and, if this inquiry had been followed up, the bankrupt proceedings would have shown that this land was actually sold, and also would have shown the error in confirmation of the sale. Again, plaintiff's title was by quitclaim deed from Phillips. This deed carried with it whatever notice Phillips had of the transaction, as well as the claim of every person to the land, whether of record or not. A quitclaim deed conveys only such title as the grantor has, subject to all outstanding equities. *Johnson v. Williams*, 37 Kan. —, 14 Pac. Rep. 537.

Plaintiff also insists that the claim of defendant to this land was barred by reason of the two-years statute of limitations provided by the bankrupt law. We do not think the statute can be invoked in favor of the plaintiff. At the time of the sale of this land by the assignee, and for a long time thereafter,

this land was unoccupied. There was no adverse claimant or possession, and this proceeding was had within two years after plaintiff claimed title.

It is recommended that the judgment of the court below be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

(27 Kan. 243)

RAPER and another v. HARRISON.

(Supreme Court of Kansas. October 8, 1887.)

1. REPLEVIN—DEMAND.

Where a defendant in a replevin action places his defense upon title in himself, and the right of possession incident thereto, and does not rely on want of demand by the owner, and it appears that a demand would have been vain and unavailing, if made, no proof of demand and refusal is required.

2. PLEDGE—DELIVERY.

To constitute a pledge, an actual delivery of the property to the pledgee is essential.¹

(Syllabus by the Court.)

Error from district court, Shawnee county; JOHN GUTHRIE, Judge.

H. H. Harris, for plaintiff in error. *A. H. Case*, for defendant in error.

JOHNSTON, J. T. J. Harrison brought an action before a justice of the peace to recover the possession of a cow from W. B. Raper and Lela Z. Raper, alleging that she was of the value of \$35, was wrongfully detained by them, and that he was entitled to her immediate possession. An appeal was taken from the judgment of the justice to the district court, and a trial in that court with a jury resulted in a verdict in favor of Harrison. Harrison had rented a portion of a farm owned and operated by the plaintiffs in error. He claimed, and offered testimony to show, that early in the year he borrowed \$25 from them, to be paid from the proceeds of the crop, and told them that he would allow the cow in question to stand as security for its repayment. He further claimed that in their dealings he discharged the debt for which the cow was to stand as security, and that, notwithstanding this, the plaintiffs in error had wrongfully taken the cow from his possession. The claim of the plaintiffs in error was that they purchased the cow outright for \$25, only agreeing that he might have the privilege of purchasing her back until the first of November following, by paying the amount of the purchase money, and the value of her use; but that the defendant never repurchased the cow, and therefore had neither ownership nor right of possession in her.

The only complaint made is of the charge of the court. One ground of error is the refusal of the court to charge that a demand by Harrison was essential to the maintenance of the action. It came out in the testimony of the plaintiffs in error that on one occasion, when they went after the cow, Harrison told them to take her. This testimony, however, is wholly at variance with that of the defendant in error, and even with their own conduct. As a general rule, a demand is a prerequisite to an action of replevin, where the possession is permissive; but a defendant may, by his conduct, obviate the necessity of such demand. If it clearly appears from the attitude and conduct of the defendant that a demand would not have affected the rights of the parties, as the issues are presented, and, further, that the defendant would not have surrendered the property on demand, then proof of demand would have been fruitless and foolish, and the law will not require it. It is very obvious that the plaintiffs in error did not base their right to the possession of the cow on the permission alleged to have been given by Harrison in No-

¹Concerning the kind of delivery necessary to constitute a valid pledge of property, see *Bank v. Manufacturing Co.*, (Ga.) 3 S. E. Rep. 411, and note.

vember. From all the testimony, it appears quite improbable that any consent was given by him; but, however that may be, it is clear that they did not rely on the want of demand as a defense. Their attitude and conduct throughout the trial was inconsistent with the theory that they would have surrendered the cow on demand. They defended on the ground that Harrison made an absolute and unconditional sale of the cow in the spring, by which they acquired the right of possession. This was the issue which they made, and upon which they offered their testimony. Their defense was based on a claim wholly inconsistent with the rights and ownership of Harrison, and at no time did they indicate a willingness to yield possession if the demand had been made. Having placed their defense on title in themselves, and not on the alleged consent of Harrison, and it being manifest that demand would have been vain and unavailing, they cannot now insist upon a want of demand for their failure to surrender the property, and therefore the refusal of the court to charge that a demand was essential to the maintenance of the action was not erroneous. *Smith v. McLean*, 24 Iowa, 322; *Newell v. Newell*, 34 Miss. 385; Wells, Repl. § 374.

The fifth instruction, which is the subject of criticism, was: "I further instruct you that if you find, from the evidence, that the plaintiff delivered the possession of this property to the defendants for the purpose of securing the repayment of \$25, this is a valid pledge. But there can be no pledge without a delivery of the possession of the property; and the question whether this property was delivered by the plaintiff to the defendants, or either of them, is a question of fact for you to find from the evidence." The objection is to the declaration that possession is essential to the validity of the pledge. This objection is groundless. There is a marked difference between a mortgage and a pledge, but counsel for plaintiffs in error apparently confound them. A pledge is defined to be a deposit of personal property as security for a debt, to be kept by the creditor until default or until the debt is discharged. A mortgage of personal property is good if the mortgagor retains possession; but the authorities all agree that, to constitute a pledge, there must be an actual delivery of possession to the pledgee, and to preserve his pledge he must retain possession. Jones, Pledges, § 23, and cases cited.

We have examined the other objections to the charge, including the supposed assumption of fact by the court, and find nothing so misleading or erroneous as to require a reversal. The judgment of the district court will be affirmed.

(All the justices concurring.)

(37 Kan. 256)

RADWAY v. ELLIS.

(*Supreme Court of Kansas*. October 8, 1887.)

APPEAL—EVIDENCE WILL NOT BE REVIEWED.

Where an action has been fairly submitted to a jury on conflicting evidence, which does not greatly preponderate in favor of either party, and judgment is rendered upon the verdict of the jury, it will not be disturbed by this court when the only objection to it is that the verdict was against the weight of the evidence.

(*Syllabus by Holt, C.*)

Error from district court, Lincoln county; S. C. HINDS, Judge.

Trial had at the March term, 1885, and judgment for defendant. The material facts are stated in the opinion.

A. G. Hardesty and *W. A. S. Bird*, for plaintiff in error. *Cummins & Minx* and *Vance & Campbell*, for defendant in error.

HOLT, C. This was an action in the district court of Lincoln county, by plaintiff in error against defendant in error, upon a promissory note for \$500, signed by defendant. The petition is in the usual form, and the answer sets

up two defenses: *First*, that the note was never legally delivered to the plaintiff; and, *second*, the consideration of said note had failed. The case was tried to a jury, at the March term, 1885, and a verdict rendered for the defendant. Motion for a new trial overruled. Judgment on the verdict. Plaintiff below brings the case here.

The facts, as they appeared on the trial, are briefly these: The plaintiff had some interest in a lot in St. Mary's, Kansas, which the defendant wished to buy, and he entered into a contract whereby he was to pay \$500 for the lot when the plaintiff should give him a good deed to the same, and furnish him with an abstract showing a perfect title in fee-simple in plaintiff. Before the plaintiff signed the deed, the defendant moved into the house on the lot. The plaintiff executed a deed to the lot, with a special warranty, but failed to furnish an abstract of title showing a perfect title in himself. In fact, he failed to furnish any abstract at all, but the defendant procured one, showing the title to be in a party other than the plaintiff. The defendant at this time had on deposit in the store of George F. Anderson, a merchant of St. Mary's, \$1,500 in cash, and, when he ascertained that the plaintiff did not have a perfect title to the lot in question, offered to loan him the money to perfect his title. He signed the note for \$500, and left it with Anderson to be delivered. There is some question about the delivery of the note. The defendant received from Anderson a deed from Radway and wife, and placed it upon record in the office of the register of deeds of Wabaunsee county, Kansas. Afterwards the defendant abandoned the lot in question.

Upon the trial of the case testimony was introduced tending to establish all the facts herein before set forth. There was no issue raised in the pleadings, nor objection offered to the introduction of evidence that the defendant had not proffered to reconvey to the plaintiff what estate he may have acquired under the deed he received. The case was tried upon the theory that the contract for the property for which the defendant bargained was not fully complied with, and therefore the defendant could dispute the entire consideration of the note given for the same. In the plaintiff's motion for a new trial he alleges as one ground that the verdict was against the weight of the evidence. From the record in the case, that is the only question we are called upon to consider, as the other errors set forth in the petition in error were not raised in the motion for a new trial.

We believe that there was some testimony tending to establish every fact necessary to uphold the verdict. The case was fairly submitted to the jury; it was their province to pass upon the evidence; they did so; the court rendered judgment upon their verdict; and under the well-established rule of law in this state the judgment should not now be disturbed by this court. *Railway Co. v. Coldwell*, 5 Kan. 82; *Abeles v. Cohen*, 8 Kan. 180; *Railway Co. v. Montelle*, 10 Kan. 119; *Railroad Co. v. Chase*, 11 Kan. 47; *Bridge Co. v. Murphy*, 13 Kan. 36; *Railway Co. v. Kunkel*, 17 Kan. 145; *George v. Green*, 18 Kan. 430; *Bellew v. Ahrburg*, 23 Kan. 287; *Theilen v. Hann*, 27 Kan. 778; *Rea v. Codding*, 32 Kan. 107, 4 Pac. Rep. 180.

It is recommended that the judgment of the court below be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

(37 Kan. 235)

BENNETT and another v. KROTH.

(Supreme Court of Kansas. October 8, 1887.)

WITNESS—FEES—RECOVERY AGAINST DEFENDANT IN CRIMINAL CASE.

Where a defendant is tried for a felony, and acquitted, a witness who appeared at the trial on his behalf, in obedience to a subpoena, may recover compensation of the defendant in an action brought against him for services performed at his request.

(Syllabus by Holt, C.)

Error from district court, Jackson county; R. CROZIER, Judge.

Hayden & Hayden, for plaintiffs in error. *Hoaglin & Crawford* and *John T. Morton*, for defendant in error.

HOLT, C. The petition filed by the defendant in error, plaintiff below, is in the usual form for services rendered. It states that plaintiff was in attendance upon the district court for five days, at defendants' request; that he was compelled to travel 32 miles in going to and returning from court. The defendants demurred to the petition because it did not state facts sufficient to constitute a cause of action. The demurrer was overruled by the court, and judgment rendered for plaintiff for the amount claimed in his petition. Nothing was stated therein concerning fees, though the claim was for the sum the fees would have been for attendance at court, and mileage, as provided by statute. Both parties agree that there is only one question in this case, and that is whether a defendant tried for a felony, and acquitted, is liable to his own witnesses. If he is, then this judgment should be affirmed; if not, it should be reversed. Plaintiff in error suggests that there are quite a number of other claims similar to this one, and, as it is a question of some public importance, we give it more careful consideration than the sum involved might at first seem to justify.

The defendants in their briefs say: "The constitution guaranties to every person accused of crime the right to meet the witnesses face to face, and to have compulsory process to compel the attendance of witnesses in his behalf. By this compulsory process, the state, in its sovereign capacity, commands the witnesses to appear and testify, not merely for the sake of the plaintiff or defendant, but for the investigation and adjudication of right. The service which the witness thus renders is merely the discharge of a public duty which he owes to the state; and, unless some statutory provision is made for his compensation, he must render such service gratuitously." They further say that costs and fees are regulated exclusively by statute, and are unknown at common law. And, because there is no statute compelling a defendant to pay costs when he is acquitted, therefore the defendants are not liable in this action. This court has held "that costs are unknown at common law, and are only given by statutory direction." *State v. Campbell*, 19 Kan. 481. It is well enough, therefore, for us to understand what is meant by "costs." They are the statutory allowance to a party to an action for his expenses in conducting such action. They have reference only to the parties, and the amounts paid, or presumed to have been paid, by the party seeking to recover such expenses.

The basis of the claim in this cause is not founded upon any claim for costs in the action of *State v. These Defendants*, but is a question whether the plaintiff, who was requested to appear in court by the defendants, as alleged in his petition, can recover of them for his services. Ordinarily, of course, at common law, he could, for services rendered at their request. We wish to decide this question, however, on the theory that the plaintiff was regularly subpoenaed to appear in court as a witness for the defendants, and not at their personal request, as might fairly be inferred from the petition. If the defendants' theory is correct, we have this singular construction of the law: When a defendant personally requests a party to appear in court as a witness in his behalf, he will be liable to such witness for services rendered. But, when he requests him to appear through the proper officers of the court, then the fact that the officers brought his witness into court would relieve him of such liability. We cannot believe there is any such distinction.

We agree with the defendants that the state, in the exercise of its sovereignty, may require certain services of its citizens without compensation; and this state does to this day bring its witnesses into court, in certain causes where it is a party, without becoming liable to them in any event for witness fees. It is said that it is as much the duty and interest of the state to see to

it that an innocent man charged with crime is acquitted, as it is to convict and punish a criminal; and therefore it is contended that in cases like the one we are now considering, because the state is relieved of the burden of paying costs, the defendant ought not to pay his own witnesses. An argument might be fairly drawn from the above premises that it would be proper for the state to pay the witness of a defendant who has been falsely charged with, and unjustly prosecuted for, an alleged crime. Such an argument would be properly addressed to the legislature, but it has no place in the courts.

Our statute relieves the state in this case of all liability in express terms. It would not be liable, probably, if there were no such statutory provision. But it is insisted, because the defendants cannot recover their costs of the state, the witnesses for the defendants ought not to recover of them; or, in other words, if for any reason B. could not recover of A. for damages A. had inflicted upon him, therefore B. would not be liable to C., though B. had called upon him for aid against A. This is neither good law nor logic. While the state is equally interested in the acquittal of the innocent as the conviction of the guilty, the long-established practice in the courts does not carry out the theory contended for. The state employs and pays an attorney to select the witnesses for the state, and prosecute the action, while the defendant employs his own counsel, and calls the witnesses in his own behalf. The defendant has a personal interest in his own behalf, differing from that of other citizens of the state. He is given by the law an ample opportunity to protect himself, and it is his province, prompted by self-interest, to do so. So he calls upon those whom he believes may help him. They do so at his request; he should pay them for their services.

The provision of our constitution guarantying compulsory process to every one charged with crime does not extend to the payment of the fees of the witnesses for the defendant, nor does it relieve him of his liability to them. *Carpenter v. People*, 4 Scam. 197. The state, by this provision, gives every facility for a fair and impartial trial to all citizens alike, high and low, rich and poor; and, in order to give a defendant the full benefit thereof, provides, by statute in harmony with it, that inability to pay his fees in advance shall not impair his means of defense. This clause of our constitution has no more application to paying the defendant's witnesses than in selecting them. After the defendant has filed his *præcipe* for witnesses, the state guaranties to the defendant the use of all its powers in bringing them into court. This is its scope and effect, and nothing more.

But, in our view of the case, we need not decide what may be the duties of the citizen to the state, nor of the state to one of its citizens who is called as a witness into its courts, nor even to one who has been charged with crime, and tried and acquitted. It is the question of liability of one party to another,—these defendants to their witness, whom they called to their aid. It does not change the relations, duties, or obligations of these parties, so far as the liability of these defendants to plaintiff for compensation is concerned, because he upon whom they called, in order to render the aid desired, came into court as a witness in their behalf; nor does it affect that liability because the state, in defendants' interest, could have made that call imperative. We believe that the rule that he who requires and receives services from another should pay him therefor applies to this action, and should govern our decision. We presume it will be conceded that a witness would be liable to the defendant for any damages occasioned by his failure to attend court when regularly subpoenaed. Ordinarily, it would be fair to infer that, because of this contingent liability of the witness to the defendant if he failed to perform certain services, there ought, on the other hand, to be some compensation if he did perform them.

We have carefully examined all the authorities cited in the brief of both parties. Many of them relate to costs or fees in civil actions; others to the

taxation of costs in actions pending; while others were decided with reference to the statutes of the state where the decision was rendered. The only authority we find in point is *State v. Whithed*, 3 Mur. 223. The point decided was submitted in the original case; not in an action by the witness against the defendant. It was this: Where a defendant had been tried and acquitted, would he be liable for costs, and, if so, what costs? The court, in deciding the case, said: "The defendant is bound to pay his own costs, for he incurs them by calling on those whose services he thinks he needs, and he must pay them for labor done at his request." In that state, as in this, there was no statute concerning the liability of the defendant to his own witnesses, when he had been charged with a crime, and acquitted.

We believe the judgment of the court below should be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

(37 Kan. 636)

SNOW v. MITCHELL.

(*Supreme Court of Kansas*. October 8, 1887.)

JUDGMENT—DEFENSES NOT INTERPOSED IN ACTION.

No defense can be set up against a judgment which might with proper diligence have been interposed in the action in which the judgment was rendered.
(*Syllabus by the Court*.)

Error from district court, Bourbon county; C. O. FRENCH, Judge.

Ware, Biddle & Cory, for plaintiff in error. *Bawden & Coon*, for defendant in error.

VALENTINE, J. This was an action brought in the district court of Bourbon county, Kansas, October 15, 1884, by S. P. Snow against C. W. Mitchell, for the recovery of \$2,206, and interest and costs. The basis of this action is a judgment rendered in the district court of Arapahoe county, Colorado, on March 3, 1881, for \$2,200.08, and \$6 costs, in favor of Lucius Snow and against C. W. Mitchell, which judgment was duly assigned on June 5, 1884, by Lucius Snow to the plaintiff, S. P. Snow. The basis of the Colorado judgment was a judgment rendered on November 30, 1877, in the circuit court of the United States for the district of Kansas, for the sum of \$1,558.69, with 12 per cent. interest, and \$34.40 costs, in favor of Lucius Snow and against C. W. Mitchell and Samuel Sherrill. The basis of the judgment rendered in the United States circuit court for the district of Kansas was a promissory note for \$1,360, executed by the said Mitchell and Sherrill to the plaintiff, S. P. Snow, dated January 23, 1875, and assigned to Lucius Snow. Both the United States circuit court for the district of Kansas, and the district court of Arapahoe county, Colorado, had jurisdiction of the defendant, Mitchell, personally, and also had jurisdiction of the subject-matter of the action. On December 29, 1884, the defendant, Mitchell, filed an answer in this case in the district court of Bourbon county, which answer is in substance as follows: (1) A general denial, except as to such facts as are elsewhere admitted in the answer. (2) The plaintiff's claim was based on a promissory note made by Samuel Sherrill, and delivered to the plaintiff, S. P. Snow, for the sum of \$1,360, dated January 23, 1875. Sherrill purchased of the plaintiff certain real estate, and executed his several promissory notes for the purchase price thereof, and the note of \$1,360 was one of the notes so executed. About April, 1875, the plaintiff, S. P. Snow, requested the defendant, Mitchell, to indorse this note for the special benefit of this plaintiff; and without any consideration whatever this defendant wrote his name across the back of this note. When suit was brought on this note in the circuit court of the United States by Lucius Snow, he, the defendant, was advised by his attorneys that, by reason of the assignment of the note to Lucius Snow, he, the de-

fendant, could not plead that he indorsed the note without consideration therefor, and made no defense to the action. When suit was brought on the judgment in Arapahoe county district court, Colorado, although believing that S. P. Snow was the real party in interest, he, the defendant, was again advised by his attorneys that, by reason of the assignment, he could not interpose the defense of want of consideration for the indorsement, and no defense was made to the action. He has learned since said judgments were rendered that Lucius Snow never owned said note; that the suits were brought in his name solely and for the express purpose of preventing this defendant from making any defense thereto; and that both of said judgments were obtained through fraud, and by a party who had no interest in the subject-matter of the action. The plaintiff demurred to this answer upon the ground that it did not state facts sufficient to constitute a defense to the plaintiff's action, which demurrer was overruled by the court, and the plaintiff excepted, and as plaintiff in error brings the case to this court for review.

We think the court below erred. The only defense set forth in defendant's answer is that the judgment which constitutes the basis of the plaintiff's action was founded upon another judgment, which was founded upon a promissory note which was indorsed by the defendant without consideration. Now, the fact that the note was indorsed without consideration can constitute no defense to this action. It might have been a defense in the action in the United States circuit court if it had been properly interposed in that action. But it was not interposed in that action; and, when judgment was rendered in that action, this indorsement without consideration ceased to be a defense in that or in any other action. No defense can be set up against a judgment which might with proper diligence have been interposed in the action in which the judgment was rendered.

The judgment and order of the court below will be reversed, and cause remanded, with the order that the demurrer to the defendant's answer be sustained, and for such other and further proceedings as may be proper in the case.

(All the justices concurring.)

(37 Kan. 296)

DAVIS v. CANNADY, Sheriff, etc., and another.

(*Supreme Court of Kansas.* October 8, 1887.)

APPEAL—DISCRETION OF TRIAL COURT IN APPORTIONMENT OF COSTS.

Where an application is made to the district court to enjoin a judgment rendered by it, and at the hearing of the application a perpetual injunction is allowed enjoining the judgment, for the reason that it was rendered in vacation, and it is adjudged that each party pay the costs made by such party. *held*, where the record does not contain, or purport to contain, all the evidence offered at the hearing, this court cannot say that the court below abused its discretion in apportioning the costs between the parties.

(*Syllabus by Clogston, C.*)

Error from district court, Woodson county; L. STILLWELL, Judge.

D. W. Finney, defendant in error, commenced an action in the district court of Woodson county, Kansas, against James J. Davis, plaintiff in error. The case was referred to a referee, and a full hearing had at Iola, Allen county, Kansas, before him. His report, together with the evidence and exhibits, was sent to the judge of the district court of that district, then at Osage Mission, Neosho county. Afterwards said report was confirmed and judgment rendered thereon at Erie, in Neosho county, and an execution was issued upon said judgment by the clerk of the district court of Woodson county, and the sheriff executed the same by levying upon and advertising for sale the property of the plaintiff in error. This action was brought by the plaintiff in error to enjoin J. W. Cannady, sheriff of Woodson county, and D. W. Finney, defendants in error, from further proceeding under and

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by virtue of said execution. Said application for an injunction was continued from time to time, and by an order of the court said defendants were restrained from proceeding under said execution until the eleventh day of March, 1885, when the application came on for hearing before the district court of Woodson county, and on said hearing the restraining order was made perpetual, according to the prayer of said petition, upon the ground only that the judgment upon which execution was issued was rendered in vacation, and the court ordered and adjudged that the costs made by each party be taxed to them. To the rendition of the judgment for costs plaintiff duly excepted, and now brings the case here for review.

Knight & Foust, for plaintiff in error. *W. H. Slavens and H. D. Dickson*, for defendants in error.

CLOGSTON, C. The record in this case shows only the petition, affidavits and exhibits attached thereto, and the judgment thereon. This judgment shows that a hearing was had before the court. What evidence was given at that hearing the record does not disclose. It may have been submitted upon the petition, and the affidavits attached thereto, but the record does not so show. The court found that the judgment was void for the reason that it was rendered in vacation. The circumstances under which this judgment was rendered in vacation are not shown. If the evidence had been preserved and brought up with this record, we then might have known something more of its history. There must have been some reason or circumstance under which this judgment was rendered in vacation by the court. As to why the report was confirmed and this judgment rendered, is all left to conjecture. Section 591 of the Code is as follows: "In other actions the court may award and tax costs, and apportion the same between the parties on the same or adverse sides, as in its discretion it may think right and equitable." This is one of the class of actions in which the court had the right to exercise this discretion, and how can we say that it abused that discretion, when the record discloses so little of the history of the case? Before we would be warranted in so finding, there ought to be a clear showing of such abuse.

It is recommended that the judgment of the court below be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

(37 Kan. 399)

BARONS v. ANDERSON.

(*Supreme Court of Kansas*. October 8, 1887.)

1. JUSTICE OF THE PEACE — CONTINUANCE — MISTAKE IN TIME FOR TRIAL — VACATING JUDGMENT.

Where an action pending in justice's court is continued by consent to 1 o'clock P. M. of a certain day, but the justice makes an entry of the continuance in his docket which may be read 10 o'clock A. M. of the same day, instead of 1 o'clock P. M., and the justice, through his mistaken belief that the cause does stand for hearing at 10 o'clock A. M., at the request of the plaintiff, and in the absence of the defendant, tries the action, and renders judgment against the defendant, such judgment, on motion of the defendant, may be vacated, because of its rendition before the action stood regularly for trial, and a new trial granted, on reasonable notice of such motion being given to the plaintiff.

2. SAME—NOTICE OF MOTION FOR NEW TRIAL.

Where an action is continued by consent to 1 o'clock P. M. of a certain day; but through the mistake of the justice, taken advantage of by the plaintiff, is tried, and judgment rendered against defendant in his absence, at 10 o'clock A. M. of the same day; and after judgment has been rendered, and before the hour of 1 o'clock P. M. of the same day, the attorney for the defendant tells an attorney for plaintiff that he will be at the justice's court at 1 o'clock P. M., and does go there, makes a motion to vacate the said judgment, and for a new trial; and, while so doing, the partner of one of the attorneys for plaintiff comes to the justice's office, and is notified what is being done: *held*, these facts constitute a reasonable notice to plaintiff of the motion for a new trial.

3. SAME—MANDAMUS TO COMPEL JUSTICE TO ISSUE EXECUTION.

A justice cannot be compelled by *mandamus* to issue execution on a judgment rendered in an action before it stood regularly for trial, after such judgment has been vacated and a new trial granted.

(*Syllabus by Holt C.*)

Error from district court, Cloud county; W. HUTCHINSON, Judge.

The plaintiff made application to the judge of the Cloud district court for an alternative writ of *mandamus* against defendant, which was granted, and the writ issued. Afterwards, upon a trial, it was adjudged by the district court that a peremptory writ of *mandamus* be refused. The plaintiff below, the plaintiff in error here, asks for a review, and reversal of the judgment. There is quite an amount of evidence introduced, and on some questions there is a serious conflict, but from the testimony we believe these facts are fairly established:

This plaintiff was plaintiff in an action wherein the Clyde Mill Company was defendant, brought in the justice court of Mr. CHAFFEE, a justice of the peace for the county of Cloud. A change of venue was taken to justice's court of B. R. ANDERSON, Esq., the defendant herein, another justice of the peace of the same county. On the day agreed upon for the trial, both parties appeared, and an application was made for a continuance. At first it was suggested that the case be set down for trial at 10 o'clock A. M. on February 11, 1886, but, before an agreement was made, the agent of the plaintiff, Mr. Barons, suggested that the cause be set for 2 o'clock P. M., instead of 10 o'clock A. M. After a little further talk, it was agreed that the cause be set for trial at 1 o'clock on that day, in order that witnesses from the city of Clyde, in the same county, might reach the place of trial by the noon train. The justice of the peace, in putting down the time of the adjournment upon the docket, made an entry that might have read either 10 o'clock or 1 o'clock. A subpoena was written out by Mr. Sturges, attorney for the plaintiff, in which the time of trial was stated to be 1 o'clock P. M. Upon the eleventh day of February aforesaid, Mr. Sturges, the leading attorney for the plaintiff, was absent from the county, and she secured the services of L. J. Crans, Esq., an attorney who had no knowledge whatever of the agreement of the time of the adjournment. Mr. Crans, at the suggestion of the plaintiff, went to the office of the justice a little after 10, and announced himself ready for trial, and proceeded to try the case, after waiting one hour, and obtained a judgment of \$300 damages, and \$31 costs, against the Clyde Mill Company. J. W. Sheafor, who was an attorney with Mr. Sturges at the commencement of the action, appeared also as attorney upon the eleventh day of February, as shown by the docket, although he did not actively participate in the trial.

During the progress of the trial, Mr. Sheafor went from Squire ANDERSON's office to Squire CHAFFEE's, before whom the action was commenced, to examine some items of costs connected with the case. On his way back he met Mr. Laing, attorney for the defendant, who had been to his office to ask him if he wanted to try the case that afternoon on account of the absence of Mr. Sturges. Mr. Sheafor replied that he thought Mr. Crans had already obtained a judgment, and stated that Mr. Crans was the active attorney in the case. He told Mr. Laing, at this time, that he had had the impression that the case was adjourned until 1 o'clock. Mr. Laing told him he should be on hand at that time. At 1 o'clock Mr. Laing appeared, and filed his motion to set aside the judgment, and supported it by affidavit. During the time that these proceedings were being had before Squire ANDERSON, Mr. M. V. B. Sheafor, partner of the Mr. Sheafor who appeared in the case, came in. He was told by Mr. Laing that he was taking steps to set aside the judgment. Mr. Sheafor replied that they had nothing further to do with the case. The justice of the peace set aside the judgment, and set the case down for trial for March 10th at 1 o'clock P. M. Mr. Laing, attorney for defendant, did not

notify Mr. Crans of the motion, but on the following day Mr. Crans came in and had a long discussion with the justice about the time that the case was set for trial,—whether it was 10 o'clock A. M. or 1 o'clock P. M. After 10 days Mr. Crans filed *præcipe* for execution. The justice refused to issue one. This action was brought to compel him to do so.

L. J. Crans, for plaintiff in error. *Theodore Laing*, for defendant in error.

HOLT, C. We have made a full statement of the facts, so that there can be no mistake in regard to the scope of the opinion filed in this case. Plaintiff in error contends that the judgment rendered by the justice of the peace was a valid, subsisting one; but, if there was irregularity in obtaining it, at most it was only voidable, and not void, and could not be set aside in the justice's court, but must be done, if at all, by a reviewing court. The defendant claims that it was a void judgment, that could be vacated at any time, and cites the case of *Briggs v. Tye*, 16 Kan. 285. This is not a parallel case with the one cited. There the summons was issued on the tenth day of July, and was made returnable on the fourteenth. Judgment was rendered on the tenth, the day the summons was issued. It is held in that case that the judgment was void because the justice of the peace had no jurisdiction over the defendant. In this case, however, both plaintiff and defendant had appeared in court, and the justice had exercised jurisdiction by continuing it.

That there was an irregularity in rendering the judgment before the hour set for trial there can be no question. The judgment was voidable, at least, and could have been set aside on motion, after proper notice. A justice before whom a cause has been tried has the power to vacate a judgment, and grant a new trial, for the same reasons, in like causes, as provided in the Code of Civil Procedure, (section 3, c. 152, Sess. Laws 1885; section 110, c. 81, Comp. Laws 1885.) By the provisions of the Code, a judgment may be vacated because of its rendition before the action stood regularly for trial. Civil Code, § 569.

But the plaintiff further says, while not conceding the authority of the justice to vacate the judgment rendered in this cause in any event, that the defendant, in the action of *Plaintiff v. Clyde Mill Co.*, did not give the plaintiff the reasonable notice provided for by section 111, c. 81, Comp. Laws 1879. And, no such notice having been given, the order vacating the judgment was *coram non judice*, and therefore void. We believe the plaintiff had sufficient notice, for the reason that the proper time to have tried this cause was 1 o'clock P. M., February 11th, and she should have been at the trial at that time. That time was first set at the suggestion of the agent of the plaintiff, who was a witness, also, at the trial at 10 o'clock. It was fully understood by the attorney for the plaintiff who was absent, and it was the impression of one of the attorneys for the plaintiff, who was an attorney at the time the continuance was obtained, though not present at that time, and was also present as attorney for plaintiff during part of the trial at 10 o'clock. The entry of the hour of trial at 10 o'clock was a mistake, and was a mistake that the plaintiff knew, or ought to have known. The knowledge of her agent who was present, and the positive knowledge of her attorney who was absent at the trial, and the impression of one of the attorneys at the trial, is certainly enough to establish the presumption that she knew that the proper time for hearing the cause was 1 o'clock P. M., instead of 10 o'clock A. M. Again, after the judgment was rendered, and before 1 o'clock, an attorney for the defense notified one of the attorneys for the plaintiff that he should be on hand at 1 o'clock to attend to the case; and during the time that he was actually engaged in the preparation and hearing of the motion for a new trial, he notified the partner of one of the attorneys who was present in the morning that he was having the judgment vacated. It is worthy of note that in the

controversy in the district court, whether the action of *Barons v. Clyde Mill Co.* was set for trial at 10 o'clock A. M. or 1 o'clock P. M. neither the plaintiff nor her agent were called upon to give any evidence as to their knowledge of the hour of trial.

We think, if the mere mistake of entering erroneously upon the justice's docket the time when an action would have been for trial is sufficient to empower the justice's court to try it, and render judgment, which could not be set aside except in a direct proceeding, the same justice's court would have been authorized, under the notice shown to have been given this plaintiff, to vacate its former judgment, grant a new trial, and thus correct its own mistakes. The order of the justice's court vacating its former judgment, and granting a new trial, now appears to be a valid and subsisting judgment. It has never been reversed, modified, or appealed from. It was rendered upon notice, and cannot, therefore, be attacked or questioned in this proceeding. If it is valid, it follows, as a matter of course, that the judgment of the district court is correct. By this order of the justice granting a new trial, the plaintiff was placed in the same condition she was in before the rendition of the judgment prematurely. She has lost no rights, nor has she gained any advantages by the mistake made by the justice. Every principle of fair dealing, and the proper administration of justice, were sustained by the decision of the trial court in refusing the peremptory writ of *mandamus*.

We believe in the orderly administration of justice, and believe that uniform and proper rules are necessary in conducting the courts, and would be the last to infringe upon or impair them; yet it is with pleasure that we brush aside the technical cobwebs that have been spun in this case. We are satisfied that, by this decision, this plaintiff and the Clyde Mill Company will each have their day in court, and an opportunity to have their differences fairly tried upon their merits. If the judgment rendered in favor of the plaintiff in the justice's court had been sustained, the Clyde Mill Company would have been deprived of that right without fault or negligence on its part.

It is recommended that the judgment of the court below be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

(37 Kan. 240)

AYERS and others v. BOARD OF CO. COM'RS OF TREGO Co. and others.

(Supreme Court of Kansas. October 8, 1887.)

1. STATUTES—TITLE—LEGISLATIVE JOURNALS.

Chapter 70, Laws 1883, is not unconstitutional or void on account of the discrepancies or irregularities in the description of the title to the bill contained in the legislative journals of 1883. *In re Hinkle*, 31 Kan. 712, 3 Pac. Rep. 531; *Weyand v. Stover*, 35 Kan. 545, 11 Pac. Rep. 355.

2. SAME—CONSTRUCTION.

Where the statute is plain and unambiguous, there is no room left for a judicial construction, so as to change the language employed therein.

(Syllabus by the Court.)

Error from district court, Trego county; W. H. PRATT, Judge.

E. A. McMath, for plaintiffs in error. *D. C. Nellis*, for defendants in error.

HORTON, C. J. Action brought by A. J. Ayers and 35 others against the board of county commissioners of Trego county, James Keiley, county treasurer, and George Baker, sheriff, to restrain the collection of taxes. Temporary injunction granted. Trial at November term, 1885, and judgment for defendants. To reverse this judgment the plaintiffs bring the case to this court. It is conceded by the plaintiffs and defendants that Gove county was a municipal township, first of Ellis county, and then by chapter 100, Sess.

Laws 1881, became attached to Trego county for judicial and municipal purposes. It seems to be admitted that the only semblance of legislative authority, under which the taxes were levied, is found in section 31, c. 72, Sess. Laws 1873. The plaintiffs claim that, if such power was ever conferred, it was taken away by chapter 70, Laws 1883, which repealed section 31, c. 72, Laws 1873; and was not again conferred until the enactment of chapter 8, Sp. Sess. Laws 1884. Defendants claim that chapter 70, Laws 1883, never became a law. They contend that the legislative action which produced that chapter was not in accordance with the rules established by the constitution of the state for making laws. They say that the bill which afterwards appeared as chapter 70 of the Laws of 1883 originated in the senate as number 120; that its title on first, second, and third readings was wholly different from that which appears as chapter 70, Laws 1883; that in the house, on its various readings, its title was wholly different from that which it had in the senate at any of its readings, or that with which it was baptized when finally passed; that the governor, when approving the bill, called in his executive clerk, and after labor decided to give "it a new name," and with such new name sent it back to the senate, which was the last act done with reference to the bill. Further, the defendants contend that "31" was put in section 7, c. 70, Sess. Laws 1883, by inadvertence, when the figure "9" was really intended therefor; that "31" is no part of section 7, and does not give the plaintiffs any cause to say that they ought not to have been taxed in 1884.

An examination of the Senate Journal of the year 1883 shows that senate bill number 120 was read on February 15, 1883, in the senate the third time, and, being subject to amendment and debate, Senator Motz moved to amend by striking therefrom all after the enacting clause, and introducing a new bill. The question being on the motion to amend, as made by Senator Motz, and a vote being had, the motion prevailed. Senator Sluss moved to amend by striking out "Sequoyah" wherever it appeared in the bill, and inserting in lieu thereof "Finney," so as to change the name of "Sequoyah" to that of "Finney," which motion prevailed. The bill then having been read the third time, the question was, shall the bill pass? The roll was called, with the following result: Yeas, 32; nays, 3. A constitutional majority having voted in favor of the passage of the bill, the bill was declared passed, and the title was on motion of Senator Motz amended to correspond with the provisions of the bill, and as amended agreed to. The bill is the same as published in Sess. Laws 1883, c. 70, and the title agreed to was the same as now appears in the published Laws of 1883. Senate Jour. 1883, 449-451.

The House Journal shows that on February 19, 1883, senate bill number 120 was passed, a constitutional majority having voted in favor of the same, and the title, being again read, was agreed to. House Jour. 1883, 642. We cannot say from the House Journal that there was any attempt made to describe the title to the bill with exact precision; but as the title to the bill was all right when it passed the senate, and as the Journal shows that the title to the bill was the last thing agreed to in the house, and as such title is not literally described in the House Journal, and as the title appears in proper form in the enrolled statute, we must assume, notwithstanding the irregularities of the title as set forth in the House Journal, that the bill was passed regularly and legally, and the title now appearing in the enrolled statute was agreed to regularly and legally. *Weyand v. Stover*, 35 Kan. 545, 11 Pac. Rep. 355; *State v. Francis*, 26 Kan. 731. "If there is any room to doubt as to what the journals of the legislature show, if they are merely silent or ambiguous, or if it is possible to explain them upon the hypothesis that the enrolled statute is correct and valid, then it is the duty of the courts to hold that the enrolled statute is valid." *State v. Francis, supra*.

Regarding the contention that "31" in section 7, c. 70, Laws 1883, should read "9," we need only reply that we have not the right to change the statute

where it is clear and free from ambiguity by any judicial interpretation. We have no authority to interpolate "9" in the statute in the place of "31," when "9" does not appear therein. As the statute is plain and unambiguous, there is no room left for construction. *In re Hinkle*, 31 Kan. 712, 3 Pac. Rep. 531. The repeal of section "31," c. 72, Laws 1873, by the legislature of 1883, was the result, perhaps, of hasty legislation. At its special session, the legislature attempted to repair the wrong by re-enacting substantially the provisions of that section. After its repeal, and prior to its re-enactment, said section "31" conferred no power to levy the taxes complained of. The repealing act was in force March 1, 1884. All municipal townships made by annexation of unorganized counties were then wholly wiped out. *In re Hinkle, supra*. The property of Gove county at that time was not liable to taxation for county purposes by Trego county.

The judgment of the district court will be reversed, and the cause will be remanded for further proceedings in accordance with the views herein expressed.

(All the justices concurring.)

(37 Kan. 246)

MOLITOR v. SHELDON.

(*Supreme Court of Kansas. October 8, 1887.*)

1. DEED—COVENANTS—USE OF STREET.

In a deed made by the original proprietor of an addition to a city, the plat of which was duly signed, acknowledged, certified, and recorded, of two town lots fronting on Main street of the addition, the deed containing a covenant for the quiet and peaceable possession of the lots, and all appurtenances, the use and enjoyment of the full width of the street upon which the lots abut is an appurtenance, within the covenant.

2. SAME—BREACH OF COVENANT.

The covenant for quiet and peaceable possession of the lots, and all the appurtenances, is not broken by the covenantor filing a plat of another addition adjoining the first on the west, on which the west 30 feet in width of the entire length of Main street in first addition is designated as Princeton road.

3. SAME.

The procurement by the covenantor of persons who purchased lots in the Second addition platted by him, that abut on Main street in the First addition, and on South Main street in the Second addition, to front their dwelling-houses on South Main street in the Second addition, and erect their objectionable out-buildings on the end of their lots fronting on Main street in the First addition, and across the street, and in front of the two lots, is not a breach of the covenant for the quiet and peaceable possession of said two town lots, and the appurtenances thereto.

(*Syllabus by Simpson, C.*)

Error from district court, Franklin county; A. W. BENSON, Judge.

John W. Deford, for plaintiff in error. *Wm. H. Clark*, for defendant in error.

SIMPSON, C. The theory upon which this action is sought to be maintained is that the acts complained of are a breach of the covenants of quiet and peaceable possession. The argument is that the plaintiff in error is the owner of and is occupying as a residence lots 27 and 29, in block 2, of Sheldon & Hamblin's addition to the city of Ottawa; that these lots front on a street 67 feet wide, designated on the recorded plat of that addition as Main street; that the plaintiff in error bought his lots, erected his dwelling-house and out-buildings, constructed his sidewalks, with reference to that street, and its width as designated on the plat; that the use and enjoyment of the full width of that street, as an appurtenance to these lots, has been disturbed by the act of Sheldon in platting another addition immediately west and adjoining, by which he has designated the west 30 feet in width of Main street as Princeton road, and thereby committed a breach of this covenant; and by inducing and requiring purchasers of lots, on the opposite side of

Main street from Molitor, to erect their dwelling-houses on the west, and their objectionable out-buildings on the east end of their lots; thus subjecting him to noxious smells, and depreciating the value of his property from twenty-five to fifty per cent. It may be and it is probably the law that the use and enjoyment of the full width of a street upon which lots abut or front is an appurtenance to the lots, and that they are within a covenant for quiet and peaceable possession of lots and their appurtenances; and, if this is true, the argument of the plaintiff in error extends too far. It may go to the full width of the street, but the most liberal construction would not stretch it across the lots abutting the opposite side of the street. The covenant ceases to be operative when the boundary line of the street is crossed. The certification and filing of the plat of the addition for record estop Sheldon from a denial that the street is 67 feet wide, and his deed to Isabelle Green, and its covenants that inure to the benefit of Molitor by subsequent conveyances, bind him to do no act that will interfere with appurtenances to the lots conveyed; the only one being, so far as the street is concerned, the free use and enjoyment of its full width. This covenant cannot be so liberally construed as to embrace the character of the buildings to be erected on the opposite side of the street, or to control the action of owners of other lots in facing or fronting their dwellings as they may choose.

On May 14, 1870, H. F. Sheldon and one G. W. Hamblin duly platted an addition to the city of Ottawa, adjoining the original plat of the city on the south, and designated a street 67 feet wide, called "Main Street." The addition was divided from the original plat by a street called "Seventh Street," and Main street in the addition runs from a point on Seventh street opposite the center of block 124, on the original plat, due south the entire length of the addition. In November 1870, Sheldon and Hamblin duly conveyed lots 27 and 29, in block 2, in their addition, to Isabelle Green, "with appurtenances and all the estate, title, and interest of the parties of the first part therein," with the usual covenants of warranty, quiet and peaceable possession, etc. The plaintiff in error holds his title and these covenants through certain mesne conveyances.

He acquired title in October, 1882. He immediately took possession, erected a good dwelling-house and out-buildings, dug a well, planted trees, constructed side-walks, and has resided thereon since sometime in 1883. At the time of his purchase and improvement, the land on the opposite side of the street had not been platted into town lots, but was a corn-field. Sheldon owned the ground on the west side of Main street opposite the residence of Molitor, and on the twelfth day of April, 1884, he and Robert Atkinson, who owned some land west of Main street, platted an addition to the city of Ottawa, and called it Sheldon & Atkinson's addition. On the plat of this addition, the west 30 feet in width of Main street in Sheldon & Hamblin's addition is designated as "Princeton Road." Out of this grows the contention of counsel for plaintiff in error of one of the breaches of the covenant that this designation of "Princeton Road" of the width of 30 feet, leaving Main street only 37 feet wide, is an ouster, or a disturbance of the right of Molitor to the use and enjoyment of the full width of Main street, as designated on the plat of Sheldon & Hamblin's addition. But this cannot be so, for the very evident reason that when Sheldon and Hamblin filed the plat of their addition for record, on the fourteenth day of May, 1870, designating Main street as 67 feet wide, the fee to the street immediately vested in the county, subject to the trust for public use, and from that moment Sheldon and Hamblin, or either of them, could do no act that could deprive any person owning lots abutting on said street, or the general public, from the use and enjoyment of the full width of the street. Hence the latter act of Sheldon, in filing the plat of Sheldon & Atkinson's addition, and attempting to designate a part of Main street in the plat of Sheldon & Atkinson's addition as

"Printeton Road," could not have in law the effect claimed for it by the plaintiff in error.

Another breach of the covenant is alleged to have occurred when Sheldon induced and required purchasers of lots in Sheldon & Atkinson's addition to erect their dwellings on the west and their out-buildings on the east end of their lots. South Main street in Sheldon & Atkinson's addition is a continuation of Main street on the original plat of the city, in a southerly direction. It is the first street west of Main street in Sheldon & Hamblin's addition, and is so near to it that there is only one tier of lots between Main street in the Hamblin addition, and South Main street in the Atkinson addition, the lots between them fronting on both streets. Persons who purchased these lots erected their dwelling-houses on the west end of their lots, so that their residences would face South Main street, a continuation of Main street on the original plat. This necessarily caused them to erect their stables, pig-pens, privies, etc., on the east end, and facing on Main street in Sheldon & Hamblin's addition. Is this a breach of his covenants? We think not. They cannot be so liberally construed as to embrace the character of buildings upon the opposite side of the street, or be held to govern the choice of owners of other lots as to how they would front their residences. Molitor, as we view this cause, is in the quiet enjoyment and peaceable possession of all that passed to him by reason of the conveyance to Isabelle Green, and the subsequent grantees, and can find no act of Sheldon that has had the legal effect to oust or disturb that enjoyment and possession. The learned judge who tried the case below says:

"I am wholly unable to see, from any view I take of the evidence, how it makes out a cause of action. I shall assume, for the purpose of this demurrer, that all the covenants, made by Mr. Sheldon and Mr. Hamblin to Isabelle Green, have passed by the conveyances read in evidence to Mr. Molitor, and that he is entitled to the full protection the covenants afford. I shall also assume that Main street, as designated in the original plat of Sheldon & Hamblin's addition, was 67 feet wide, and that when the addition was laid out, the parties purchased on the faith of a street being so opened and dedicated to the uses of the public. Thus we have an addition laid out several years ago, called 'Sheldon & Hamblin's Addition,' on one side of which there was a street designated as 'Main Street,' and 67 feet wide. Opposite to that addition, and to the westward of it, across this Main street, was a tract of vacant land. Mr. Molitor bought lots 27 and 29, in block 2, of Sheldon & Hamblin's addition, and at that time there was opposite to these lots a corn-field, or what had been a corn-field a year before,—a vacant tract of land, not subdivided into lots and streets and alleys. That is the evidence on that point. Some time later, Mr. Sheldon, the defendant here, in connection with Mr. Robert Atkinson, laid out upon this tract of vacant land another addition to the city of Ottawa, which they called 'Sheldon & Atkinson's Addition,' and through the new addition so laid out they projected a street which they called 'South Main Street.' This left between South Main street in the latter addition, and Main street in the former addition, certain lots extending from one street to the other. These lots fronted upon both streets, precisely as much upon Main street as upon South Main street. Sheldon and Atkinson, it appears, afterwards made conveyances of the lots so fronting upon the two streets to various parties, and, although it is not offered in evidence, it appears that parties purchasing entered upon the lots and erected their dwellings and out-buildings thereon. They have erected in the main, perhaps altogether, their dwelling-houses fronting west on South Main street, and the out-buildings on the other end of the lots, fronting on Main street. There is some evidence that the Adventist Church people purchased lots on the extreme southern end of block 2 of the new addition. I think it is something like a thousand feet away from and south of Molitor's property, and,

with the lot purchased for a church, they purchased some three or four other lots. At the time they purchased the lots they entered into an agreement with Sheldon, stipulating that they would front their church on South Main street, and the church was accordingly built on that street, but it does not appear that any out-buildings were erected. Afterwards, by mutual consent, the agreement with reference to the frontage of the buildings was rescinded, the deed was taken up and destroyed, and another deed given without such restriction, so that there is no agreement with reference to the other lots now in existence. It also appears that Mr. Sheldon conveyed to Mr. Bodley three lots without any such agreement.

"There is no evidence that I am able to discover of any agreement between Sheldon and Atkinson and the parties to whom they may have conveyed the lots as to which way they should front their buildings. I think that the evidence shows that the parties purchasing the lots which fronted on both streets have simply exercised an option; have exercised a right which they had, and erected their buildings in a way they saw fit. And I do not understand that any party who buys property in a city has a lawful right to say what sort of buildings shall be erected in his vicinity, or immediate frontage, except to prevent the erection of such buildings or structures as will be a nuisance. For instance, I own a lot on Elm street, in this city. If I, because of some peculiarity or some eccentric notions, should have erected my house fronting on the alley, and put my wood-sheds, barn, and privy fronting on the street, I presume that it would be very obnoxious to my neighbors; but, unless I allowed those structures to become a nuisance, they would have no lawful redress. I would be exercising a right which I had, to put my buildings where I pleased upon my lots. But the very moment they became a nuisance my neighbors would have a remedy in the law.

"Now, it is true that the covenants in the deed give the quiet and peaceable possession of the property in the manner, and for the particular purposes, intended in the grant. But here this man has the use, benefit, and enjoyment of his property precisely as when he purchased it. He has in his front a street 67 feet wide, and named 'Main Street.' Mr. Sheldon has no power to change the name of that street; that is entirely beyond his power. The street was dedicated to the public, and there is no power to change the name except in the city council, and that making and filing of a plat of another addition afterwards, in which that street is called 'The Princeton Road,' did not change the name of the street. And, besides, no party would lose the benefit and enjoyment of the street by change of the name Main street to the Princeton road; that would not interfere with anybody's property rights. It is suggested that this line of buildings erected on Main street has resulted in a depreciation of the property of the plaintiff, and of other parties living upon that street, because of their unsightliness, and because of the noxious smells. Now, if that be true, whenever these things become nuisances, then the parties who erected them will be liable for such damage as may result; but until they do become nuisances nobody is liable. Mr. Sheldon had an undoubted right to lay out the addition. He violated no law in so doing. And having laid it out, and sold the lots, it follows that if anybody is liable it is the parties erecting the buildings. But the evidence here utterly fails to show that Sheldon had anything to do with the building of the barns and privies whatever; and, if Sheldon had been a party to the erection of these out-buildings, he certainly would not be liable in this action for damages, unless it is shown that the buildings were nuisances.

"But in the first place the evidence fails to show that they are nuisances, and in the second it fails to show that Sheldon had anything to do with putting them there. Now, that Mr. Molitor has suffered an injury, I do not pretend to deny; but it is incident to a purchase of property anywhere. A. may go out to the south line of his city, and purchase five acres of land, with the view

of having plenty of room all around him, and being rid of the disagreeable features incident to a closely-packed population. He may erect a fine dwelling-house, and improve the purchase, till he has made it very valuable, and yet some day B. may purchase 10 acres of vacant land adjoining him, and lay it out into an addition, with blocks and streets and alleys, and may sell the lots to people who will erect a very inferior class of houses. All this may depreciate the value of A.'s property, and yet, if the inferior buildings do not become a nuisance, he has no legal remedy. A livery stable may be erected in front of his residence upon which he has expended much money, and nobody will deny that it diminishes the value of the property; but, unless it becomes a nuisance, I see no legal redress.

"The evidence in this case fails to show a cause of action, and the demurrer must be sustained."

We find no material error in the record, and therefore recommend that the judgment of the district court of Franklin county be affirmed.

By THE COURT. It is so ordered; all the justices concurring.

(37 Kan. 231)

COOPER and others v. DAVIS SEWING-MACHINE CO

(*Supreme Court of Kansas. October 8, 1887.*)

1. PLEADING—AMENDED ANSWER—REPLY—WAIVER.

Where a petition is filed, and the defendant answers thereto, and the plaintiff replies by a general denial; and afterwards the defendant files an amended answer, including the allegations in his first answer, and, in addition thereto, sets up new matter, and no reply is filed to this amended answer; and the parties go to trial thereon without objection; *held*, that all the allegations of the amended answer are put in issue by the reply of the plaintiff, except the new matter contained in the amended answer; and, if a reply by the plaintiff is necessary to the amended answer, the defendant waives such reply by proceeding to trial without objection, and as if a reply had been filed.

2. APPEAL—WILL NOT REVIEW EVIDENCE.

Where an objection is made that the amount of recovery is too large, and the judgment not sustained by sufficient evidence, the supreme court will not review the evidence, except to ascertain if some competent evidence was given in support of, or tending to establish and maintain, the issues upon which judgment was rendered.

(*Syllabus by Clogston, C.*)

Error from district court, Anderson county; A. W. BENSON, Judge.

The Davis Sewing-Machine Company commenced this action against the defendants, E. Cooper, Clark Decker, and J. C. Renzenberger, on several promissory notes made by E. Cooper, and also upon the guaranty bond given by all the defendants to guaranty the payment of all indebtedness between defendant Cooper and plaintiff in the sale of goods, and for which these notes were afterwards given. The defendants answered, setting up—*First*, a general denial; *second*, that the guaranty bond given by them had been taken up, and another guaranty bond given instead. And to this answer plaintiff filed a general denial. Afterwards the defendants filed an amended answer, setting up the same defense as before, and, in addition thereto, alleged that the plaintiff was in possession of several promissory notes belonging to defendant Cooper, and held as additional security for his indebtedness to the plaintiff, and alleged that plaintiff had collected thereon amounts unknown to the defendants, and asked for an accounting of said collections. No reply was filed to this answer. Afterwards plaintiff commenced another action against the defendants upon several promissory notes given by the defendants to the plaintiff, and also upon a guaranty bond executed by all the defendants to the plaintiff. To this action defendants answered—*First*, by general denial; and, *second*, alleging the possession by plaintiff of several promissory notes belonging to the defendant Cooper, held by the plaintiff as additional security; and

alleged that the plaintiff had received thereon sums of money, the amount being unknown to the defendants; and asked an accounting of said collections. No reply was made to this answer. Afterwards, by an order of the court, these two causes of action were consolidated; and at the September, 1885, term of the district court, the cause came on for trial before the court, a jury being waived; and judgment was entered for the plaintiff, and against E. Cooper, for \$1,477.27, and against defendants Decker and Renzenberger, on the guaranty bonds, for the sum of \$1,200. The defendants bring the case here for review.

Kirk & Hall, for plaintiffs in error. *Johnson, Poplin & Johnson*, for defendant in error.

CLOGSTON, C. The first question is, what errors are presented by the record? The motion for a new trial presents but two grounds therefor: *First*, "the judgment is contrary to law, and is not sustained by sufficient evidence;" *second*, "in the amount of recovery, the same being too large." Was the judgment contrary to law? It was founded—*First*, upon the promissory notes executed by the defendant Cooper, which is not denied; *second*, upon the guaranty bonds of all the defendants, which bonds guaranteed that Cooper would pay for all merchandise, machines, and goods received by him from the plaintiff. The conditions of these bonds the defendants did not claim were complied with, and upon a breach of the conditions of the bonds plaintiff had cause of action. So, by the admission of the indebtedness, the liability on the bonds was admitted.

But plaintiffs in error insist that as the amended answer to the first suit was not denied by a reply, that it must be taken as true. This is the general rule, and, if a reply was necessary, then the plaintiffs in error are correct, and no judgment should have been rendered upon the bond in the first suit. This answer alleges the taking up of the first bond, and the giving of a new one in its stead; which left but one guaranty bond in force upon which the defendants would be liable, and that bond being for only \$600. But we think the plaintiffs are in error in this claim. The amended answer was denied by the reply filed to the first answer, and in the new answer only such things were admitted as were not included in the first. The allegations in the first answer were the same in regard to the giving of the new bond, and the taking up of the old one, as in the second. This was controverted by a general denial, which was not withdrawn. This left admitted only that certain notes were held by the plaintiff, upon which it had made some collections, and asked for an accounting. This new matter must be taken as true unless denied. *Brookover v. Esterly*, 12 Kan. 149; *Kuhuke v. Wright*, 22 Kan. 467. The new matter contained in this answer is very indefinite. No description of the notes was given; how many; by whom given; the amount of each; when due; or the probable amount collected thereon,—nothing but a general allegation that some notes were held by the plaintiff as collateral security, and that upon these notes some amount had been received. If a reply was necessary, which we think doubtful, then such a reply was waived, for no objection was made on the trial to such failure. An accounting was then had as if a reply had been filed. See *Netcott v. Porter*, 19 Kan. 131, and cases therein cited.

This leaves but one question: Were the findings and judgment sustained by sufficient evidence, and is the amount of the recovery too large? This question involves a review of the evidence, and, after a careful examination, we find evidence tending to sustain the judgment of the court upon each and every item set out in plaintiff's petition. This court has often decided that, if there is any evidence which tends to sustain the findings and judgment, it will not review or reverse a case because a judgment is not sustained by the weight or preponderance of the evidence.

The question whether a new bond had been given by the defendants on the

agreement that the old one was to be taken up and canceled, was a disputed question, and there was strong evidence offered tending to show this fact, and some evidence by the plaintiff to show that it was given to secure plaintiff against loss on the further sales and advances to be made by it to the defendant E. Cooper, and that his indebtedness was largely increased after the giving of this new bond; tending to show that the defendant Cooper, as well as the plaintiff, regarded it as a security for these new advances and new indebtedness. But this question was one of fact to be determined by the court or jury trying the cause, and we cannot say that the amount of recovery was too large under this evidence.

It is recommended that the judgment of the court below be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

(37 Kan. 217)

WASHBURN v. BOARD OF CO. COM'RS OF SHAWNEE CO.

(*Supreme Court of Kansas. October 8, 1887.*)

CONSTITUTIONAL LAW—STATUTE AUTHORIZING TAX TO BUILD JAIL.

Chapter 74, Laws 1886, ("An act authorizing and directing the county commissioners of Shawnee county to levy an assessment to build a jail and jailer's residence," approved February 4, 1886.) is constitutional and valid.

(*Syllabus by the Court.*)

Error from superior court, Shawnee county; W. C. WEBB, Judge.

On March 23, 1886, the plaintiffs in error filed in the superior court of Shawnee county their petition, which, omitting the title, reads as follows:

"PETITION.

"The plaintiffs, A. Washburn, H. R. Clark, Thomas White, John Armstrong, H. D. Rice, H. H. Wallace, and J. C. Otis, who sue for themselves, and for all others similarly situated, bring this their action against the defendant, the board of county commissioners of Shawnee county, and for their cause of action against the defendant say that the plaintiffs are each residents, citizens, electors, and tax-payers of the county of Shawnee, and have both real and personal property subject to the payment of any county tax that may be levied in said county under the act hereinafter mentioned. The plaintiffs bring this suit as residents, citizens, electors, and tax-payers of the county of Shawnee, not only for themselves, but for all other residents, citizens, electors, and tax-payers of Shawnee county similarly situated, and who, by reason of their great number, cannot be made parties by name. The plaintiffs say that the legislature of the state of Kansas passed an act, which was approved and published, and which became a law, on February 5, 1886, and which act is in words and figures following, that is to say:

"HOUSE BILL No. 110.

"[First published February 5, 1886.]

"An act authorizing and directing the county commissioners of Shawnee county to levy an assessment to build a jail and jailer's residence.

"Be it enacted by the legislature of the state of Kansas:

"Section 1. That the board of county commissioners of Shawnee county are hereby authorized and directed to levy a special tax on all taxable property within said county, not exceeding six mills on the dollar, for the purpose of erecting and completing a jail and jailer's residence, and that the said levy shall be made at the time of making the next general annual levy of taxes: provided if, in the judgment of said board, it is deemed best for the interests of the county, they may contract for one-half the proposed work to be done in eighteen hundred and eighty-six, and the remaining one-half, or the whole work, to be completed in eighteen hundred and eighty-seven; in which

case they shall levy a special tax of one-half the amount agreed upon to be levied, not exceeding three mills on the dollar, for said purpose, in eighteen hundred and eighty-six, and a like amount in eighteen hundred and eighty-seven.

"Sec. 2. The said board shall employ a competent and qualified architect, of known skill and ability in his profession, who shall submit plans, specifications, and estimates for the said jail and jailer's residence, which being adopted by said board, they shall advertise for bids, either for the whole work, or for parts of said work, each bidder to file with his bid a bond with two sureties, worth, over and above all legal liabilities and exemptions, double the amount of the said bid, conditioned for the faithful performance of the work should the contract be awarded to him. The architect shall make all estimates on work performed and material furnished on all contracts, reserving to the county ten per centum in authenticating all estimates of work performed, or material furnished, until such contract shall be completed, inspected, and accepted by the said board.

"Sec. 3. As soon as practicable after the passage of this act, the contract for said jail and jailer's residence shall be let to the lowest responsible bidder, and estimates for work performed and material furnished shall be submitted monthly to the said board by the architect; whereupon the said board is hereby authorized to issue scrip, to be designated as "Shawnee County Jail Scrip," bearing seven per cent. interest per annum, which scrip shall be signed by the chairman of said board, and attested by the county clerk, and be redeemed by the county treasurer at his office, according to date of issue of said scrip, just as rapidly as money arising from the levy herein provided for shall accumulate in the county treasury.

"Sec. 4. This act shall be in force on and after its publication in the Daily Topeka Capital.

"Approved February 4, 1886.

"I hereby certify that the foregoing is a true and correct copy of the original enrolled bill now on file in my office, and that the same was published in the official state paper, February 5, 1886.

"E. B. ALLEN, Secretary of State."

"The plaintiffs further state that the defendant is about to employ an architect under the provisions of the before-mentioned act, and will do so at once unless restrained by the order of this honorable court.

"The plaintiffs further state that the defendant is about entering into a contract for a jail and jailer's residence under the provisions of said act, and will do so unless restrained by the order of this honorable court.

"The plaintiffs further state that the defendant will, at the time fixed by law for making the next general annual levy of taxes, levy a special tax on all the taxable property within said county of Shawnee, and including all the property of the plaintiffs, both real and personal, and will do so unless restrained by the order of this honorable court.

"The plaintiffs further state that the defendant, in addition to making the contract aforesaid, will speedily thereafter issue scrip, to be designated as 'Shawnee County Jail Scrip,' under the provisions of said act, and will do so unless restrained by this honorable court.

"The plaintiffs further state that all the acts of the defendant aforesaid, threatened to and about to be done, are illegal and void in this: (1) That the pretended law hereinbefore recited, and under whose pretended provisions all the aforesaid acts of the defendant are threatened to be done, is void; (2) that the subject-matter is not embraced within the title of the act; (3) that the title of the act does not authorize them to levy a tax, nor is the levy of a tax within the scope of the title of said act; (4) that the authority to contract for a jail and jailer's residence, and to employ an architect, is not embraced or included in the title of the act; (5) that the expenditure of money for, or the

levy of a tax to pay for, a jailer's residence, is not for a public purpose; (6) that there is now, and has been for a long period of years, within the county of Shawnee, and in use, a jail, provided and built according to the general law, and pursuant to and by a levy of tax for the payment thereof on the taxable property of Shawnee county; (7) that there is upon the statute books a requirement of law, and which is unrepealed, that requires the defendant, before they shall proceed to build any permanent county buildings, and assess a tax for that purpose, that the defendant shall first submit the question to a vote of the electors of the county at some general or special election, and must be authorized by an affirmative vote cast at said election.

"And the plaintiffs aver that the defendant proposes to let the contract for said jail and jailer's residence without submitting it to the electors of Shawnee county.

"And the plaintiffs further aver that the jail and jailer's residence proposed to be built by the defendant is intended to be, and will be, a permanent county building, and that no election whatever has ever been held or submitted to the electors of said county authorizing the same to be done.

"The plaintiffs further state that the defendant proposes to employ said architect, and make said contract, and pay for the same by the issuance of Shawnee county jail scrip, bearing seven per cent. interest per annum, and which these plaintiffs aver will be done without having any of the claims concerning the same audited, and contrary to the law in such cases made and provided concerning expenditures in said county. And for such other reasons as may be urged in argument upon the hearing hereof, the plaintiffs again aver, and charge the fact to be, that all of said contemplated acts of the defendant under said pretended law, and the law itself, are null and void.

"The plaintiffs further state that if the defendant is permitted to hire said architect, to contract and build said jail and jailer's residence, issue scrip therefor, and levy said tax to pay said scrip, that it will inflict a large amount of illegal expenditure and unnecessary tax charges upon the property of the plaintiffs, and to their, and each of their, great and irreparable injury.

"Plaintiffs aver and charge the fact to be that the taxable property of Shawnee county exceeds five millions of dollars, and that a levy made by the defendant under the statute passed in 1886 will make the current expenses of Shawnee county exceed five mills upon the dollar.

"Wherefore the plaintiffs ask that a temporary injunction may issue restraining the defendant from hiring said architect, from the building of said jail and jailer's residence, from issuing any Shawnee county jail scrip in payment thereof, or from levying said tax provided by said pretended act, and that upon a final hearing the plaintiffs demand that said injunction may be made perpetual, and for such other relief as may be proper, and for costs of suit."

This petition was duly verified.

On March 27, 1886, the plaintiffs, upon this petition, and upon no other pleadings or evidence, asked the court to grant them the temporary injunction prayed for; which the court refused; and to reverse this ruling of the court below, refusing the temporary injunction, the plaintiffs bring the case to this court.

H. H. Harris and Waters & Chase, for plaintiffs in error. *Overmeyer & Safford and Charles Curtis*, for defendant in error.

VALENTINE, J. The only question involved in this case is whether chapter 74, Laws 1886, ("An act authorizing and directing the county commissioners of Shawnee county to levy an assessment to build a jail and jailer's residence," approved February 4, 1886,) is constitutional and valid or not. The court below, the superior court of Shawnee county, upon an application for a temporary injunction, held it to be constitutional and valid, and refused

the injunction, (3 Kan. Law J. 118;) and from that refusal the plaintiffs bring the case to this court. The question is now of but very little importance, for the jail and jailer's residence—one building—has already been built, and all the other matters and things which the plaintiffs wish to have restrained have been performed. Really, the only material question left in the case is, who shall pay the costs? We think the act is valid. The words "levy an assessment," in the title to the act, was intended to mean *levy a tax*; and, as the tax was "to build a jail and jailer's residence," the legislature had authority to provide in the body of the act, as they did, for the building of such jail and jailer's residence, including all the necessary details. The jail and jailer's residence was intended to be only one building.

Even if Shawnee county already had a jail, that fact would not prevent the legislature from giving authority to the county commissioners to build another jail; and the fact that there may have been a general law authorizing the building of county jails would not prevent the legislature from passing a special act for the same purpose, provided the general law could not well be made applicable. Also, the fact that the act authorizes the county commissioners to build a jail, without submitting the question to a vote of the electors of Shawnee county, we do not think renders the act void. In fact, we think the act is valid, and the judgment and order of the court below will be affirmed.

(All the justices concurring.)

(37 Kan. 226)

STATE v. DORSEY.

(Supreme Court of Kansas. October 8, 1887.)

LARCENY—APPEAL—RECORD OMITTING EVIDENCE AND INSTRUCTIONS.

Where defendant claims, on appeal, that he was erroneously tried and convicted for larceny generally, while he should have been tried under the statute relating to pick-pockets, and the record does not properly show the evidence or the instructions refused by the trial court, and does not otherwise show the manner in which the property was stolen, the judgment will be affirmed; following *State v. McClintock*, 14 Pac. Rep. 511.

Appeal from district court, Summer county; J. T. HERRICK, Judge.

S. B. Bradford, Atty. Gen., and J. L. Grider, for the State. Roy & Neustadt, for appellant.

PER CURIAM. The defendant, Robert Dorsey, was charged upon a criminal information with stealing certain United States treasury notes and certain national bank-notes of the aggregate value of \$30, and the property of Charles Carr. He was tried upon this charge and convicted, and was sentenced to imprisonment in the penitentiary for the term of two years; and from this sentence he now appeals to this court. He now claims that the larceny was committed by means of his taking the money from the pocket of said Charles Carr; and claims that the conviction was therefore erroneous; and this he claims upon the theory that the defendant was charged, tried, and convicted for larceny generally, under section 78 of the act relating to crimes and punishments; while he should have been and could only be tried or convicted for pocket-picking, under chapter 105 of the Laws of 1886, relating to pick-pockets. The question, however, which is attempted to be presented to this court, is not in the case; for neither the evidence nor the instructions refused by the trial court have been properly preserved in the record, nor is there anything else in the record which shows the manner in which the money was stolen. The judgment of the court below will be affirmed upon the authority of the case of *State v. McClintock*, 14 Pac. Rep. 511.

(37 Kan. 253)

BOARD OF CO. COM'RS OF WABAUNSEE CO. v. BISBY.

(Supreme Court of Kansas. October 8, 1887.)

HIGHWAYS—AWARD OF DAMAGES—APPEAL—REVIEW.

Where an appeal is taken by a land-owner from an award of damages allowed for the location of a public road across his lands, *held*, that the only question the court has jurisdiction to hear and determine on said appeal is the amount of damages appellant is entitled to; and *further held*, that it is no defense to said action that a public road had been previously laid out and established over the same right of way.

(Syllabus by Clogston, C.)

Error from district court, Wabaunsee county; R. B. SPILMAN, Judge.

This was an appeal to the district court of Wabaunsee county from the allowance of damages by the board of county commissioners on account of the location and establishment of a public road through the lands of the defendant in error. Trial by the court, jury being waived, and judgment for the plaintiff below, defendant in error, for \$99.40 costs, and the county brings the case here for review.

W. A. Doolittle, for plaintiff in error, H. A. Pierce, for defendant in error.

CLOGSTON, C. The only errors complained of in this case are—*First*, that the court erred in refusing to allow the defendant to introduce in evidence the township record, tending to show a location and establishment of a public road through plaintiff's land in 1859; *second*, the court erred in refusing to admit in evidence the record of the county clerk, tending to show the location of a public road over a part of the plaintiff's land in 1868; and, *third*, that the judgment ought to have been for the defendant below, instead of for the plaintiff. The statute under which this appeal was taken is as follows:

"Sec. 7. It shall be the duty of the viewers, at the same time that they make their report of the view, to make also a separate report to the county commissioners in writing, stating the amount of damages, if any, by them assessed, and to whom. They shall also be required to submit with such report the written application on which assessments have been made. All allowances for damages, as provided in this act, shall be subject to revision by said board of county commissioners; and any person feeling himself aggrieved by the award of damages made by the board of county commissioners may appeal from the decision of the said board of county commissioners to the district court, upon the same terms, in the same manner, and with like effect as in appeals from judgments of justices of the peace in civil cases."

Under this provision the only thing that the district court had jurisdiction to hear and determine was the amount of damages plaintiff was entitled to; nothing else. The location and establishment of the road was final when it was located and established by the board of county commissioners. Then only such testimony as tended to establish or show the damages of the plaintiff was competent. The proceedings before the county commissioners were the regular proceedings to establish a public road. A petition had been presented; publication had; viewers appointed; notice to land-holders given. The viewers met, together with the surveyor, and surveyed and located the road. They heard claims for damages, and made awards of damages, and allowed the plaintiff \$10. Their report was properly made to the board of county commissioners. The commissioners confirmed their report, and allowed the plaintiff the same damages awarded by the viewers. From this award of damages he appeals.

The evidence sought to be introduced to show, or tending to show, that a road had been established over this same route by the county some years before, was not competent for the purpose of showing the amount of his dam-

ages. The county was treating this matter as if no road had ever been located there. Whatever proceedings had taken place prior to that time they were entirely ignoring. They were saying to the defendant, "We are going to locate and establish a road over your land, and, if you claim damages, you must present your claim;" and after it has done this it cannot be heard to say, "A public road is already established over this same route, and therefore you are not damaged." Such a claim would be proper if this was an application to compel the defendant to open a public road which it was alleged he had obstructed or closed up. The evidence clearly shows that the plaintiff was entitled to at least the amount found by the court.

It is recommended that the judgment of the court below be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

(37 Kan. 212)

SACHROWITZ v. ATCHISON, T. & S. F. R. Co.

(Supreme Court of Kansas. October 8, 1887.)

RAILROAD COMPANIES—ASSAULT UPON PASSENGER BY STRANGER.

Where it appears that the plaintiff, while standing upon the platform of one of the cars of a train, which he was about to enter as a passenger, was knocked off and robbed, just as the train started, by a person holding a lantern in one hand and a club in the other; and where it does not appear that the person committing the assault and robbery was an employe of the railroad company, otherwise than that he carried a lantern with letters on it, and wore a cap with a badge upon it; and where it does not appear that the assault was made in ejecting, or attempting to eject, the plaintiff from the cars, by any one connected with the operation of the train, or having any charge of the depot, its grounds, or the road; and where it further appears that the alleged assault was wholly disconnected from any service in which any employe of the railroad company was engaged: *held*, that the railroad company operating the train is not responsible for the wrongful acts committed upon the plaintiff, under a petition charging that the plaintiff was assaulted and injured by the servants and employes operating and controlling a train of the company.

(Syllabus by the Court.)

Error from district court, Reno county; L. HOUK, Judge.

W. T. Buckner, for plaintiff in error. Geo. R. Peck, A. A. Hurd, and C. N. Sterry, for defendant in error.

HORTON, C. J. This action was brought by the plaintiff in error to recover damages for personal injuries which he alleges he sustained through the conduct of one of the servants or agents of the defendant in error. The defendant, in its answer, averred that the plaintiff sustained his injuries in attempting to climb upon a freight car while in motion, with the intention of riding on the car without paying any fare.

On the trial, the plaintiff gave evidence tending to show that he was a Hebrew, and had only been living in the United States some two years; that just previous to his injuries he had started to go from Pueblo to Kansas City, and had purchased a ticket to be transported from Pueblo to Kansas City over defendant's road; that he had a grip-sack containing his personal effects, which he shipped by express to Kansas City, not wishing to be bothered with it on the cars; that when he had reached a point between Hutchinson and Burrton, the conductor put him off the train he was riding on because he had either lost the pasteboard given him by a former conductor, or that conductor had taken it up; that when he was put off the train he had about five dollars in money; that he walked on to Burrton, reaching there shortly after noon; that while at Burrton he met a young man with whom he could talk a little, as this young man could talk German; that he gave this young man a half dollar in exchange for a cigar-case, and then walked around with him until towards evening, when they went into a private house and got a meal;

that after this he left the young man, and walked south of town some distance, and while he was there the regular passenger train going east passed through Burrton; that shortly after 10 o'clock he came back towards the depot, and, as he came, he saw the emigrant train standing there, and he then concluded to purchase a ticket to go to Newton upon it; that he thereafter attempted to cross over the cars to the platform and to the station, which was on the other side, but, as he got upon the platform of one of the cars, the cars started, and he gave up his attempt to get to the depot; that, just as the cars started, a man having a lantern with letters upon it, and a cap with a badge on it, holding the lantern in one hand, and a club in the other, jumped upon the same platform, and struck the plaintiff with both the club and the lantern, or with one, on the head, knocking him senseless on the ground; that plaintiff never saw the man before; that he had no words with him at the time. The only thing said by either preceding the blows was the words, "You God damned son of a bitch," uttered by the man who struck him; that plaintiff at the time could neither write, speak, nor understand English, and did not and does not know what the letters were which were on the lantern, or the badge on this man's cap; that he thought this man was a railroad man because he had a lantern with letters on it, and a cap with a badge on it; that was the only reason for saying or believing that he was a railroad man; that, after plaintiff had lain where he fell for two or three minutes, this same man came running towards him, and told him to get up, but plaintiff could not; that he seized the plaintiff, and, raising him up with one hand, went through his pockets with the other; that, as he did so, another man came running towards them, and, as this man came, the one who had hold of him dropped him and ran off towards the town, away from the direction in which the train was; that this other man coming up, an alarm was given, and the citizens came and carried him to Dr. McAtee's office, where Dr. McAtee and his brother dressed his arm and set the bones; that the next morning Dr. Smalt, who was in the employ of the defendant, came and examined the arm and the dressing, and stated that it was all right; that afterwards his arm had to be amputated because of the unskillful and negligent manner in which it was set.

The defendant gave evidence tending to show that between 10 and 11 o'clock on the night of June 26, 1882, a train called "emigrant train," consisting of engine, freight, and emigrant passenger cars, arrived at Burrton on its way east, and stopped there so that the engine could take water at the tank; that, as the rear of the train passed the depot, the conductor, hearing some one hollowing as though he was hurt, caused the train to be stopped, and with the brakeman went to the spot where the noise proceeded from, and found two men, dressed and looking like tramps,—one of them was lying on the ground, apparently hurt and in pain, and the other was holding this man's head up and crying; that the one who was not hurt, upon inquiry as to what was the matter, stated, in substance, that he and the injured man, whom he called "Joe" and "Partner," had been beating their way from Denver east, stealing rides when they could on the cars, and that they had been put off a train early that morning at Burrton, and that they had watched every opportunity to get upon this train, and started to climb up the side of one of the freight cars on the ladder after the train had started, and that the man who was hurt was clumsy and awkward about such business; that, as he reached the top, he fell and struck the ground, and severely hurt himself; that the conductor dispatched the man who was not hurt in search of a doctor, and soon a doctor arrived with some of the citizens of the town, and the man was carried to the doctor's office, where it was found that his arm was broken badly; that after a while this arm was set, and the plaintiff was left in the doctor's office that night, in care of the man who was with him; that afterwards it was ascertained the arm had not been properly set, and that amputation was necessary in order to save the plaintiff's life, and therefore his arm was amputated; that when the

plaintiff was taken to the doctor's office, the city marshal, who was present, searched his pockets for such valuables as he might have, for the purpose of keeping them for him, but discovered nothing except a loaded revolver.

The case was submitted to the court with a jury, and the jury returned a verdict in favor of the defendant. The court subsequently approved the verdict, and rendered judgment accordingly. The plaintiff, in his proceedings in error, alleges that the district court improperly received upon the trial the declarations of a person known as "Cooney," who claimed to be the "partner" of the plaintiff, as to the manner of his receiving his injuries. Exceptions were also taken to certain instructions.

A careful examination of the record convinces us that the court below could not have committed any error prejudicial to the rights of the plaintiff. After the plaintiff had produced all of his evidence, the defendant demurred thereto, and the court overruled the demurrer. Thereupon the defendant introduced the evidence heretofore recited, tending to show that the plaintiff was accidentally injured while endeavoring to climb up the side of a car in motion, with the intention of stealing a ride thereon. The plaintiff did not show, upon the trial, that the person whom he alleges knocked him down and robbed him was the servant or agent of the defendant; but even if we assume that because the man who assaulted him had a lantern in his hand with letters on it, and wore a cap with a badge, that therefore he was an employe of the defendant, it does not follow that he was acting in the course of his employment in making the assault. It is not claimed that he was employed directly to make the assault. It does not appear that he had charge of the train, or of the car upon which the plaintiff was standing when he claims he was knocked off. The plaintiff testified that the person who struck and robbed him did not run towards the train after he had got his money, but ran the other way; that he went down town. The evidence of the plaintiff is insufficient in not showing that the person who assaulted him was in the employ of the defendant. Even if we concede he has shown that much, yet his evidence is fatally defective in not showing that the wrongful acts alleged, were done by the servant or agent of the defendant in the course or within the scope of his employment. *Hudson v. Railway Co.*, 16 Kan. 470. This action was not brought against the defendant for its negligence in not protecting the plaintiff while a passenger on its train from the assault of some third party; and it nowhere appears in the evidence that he was thrown from the train by any person connected in any way with its operation.

The evidence offered by the defendant, after the demurrer was overruled, did not supply the omissions in the plaintiff's case. Upon the evidence of the plaintiff, the trial court would have been justified in withdrawing the case from the consideration of the jury, and in deciding it in favor of the defendant. After all the evidence had been presented on both sides, the court would have been justified in instructing the jury to render a verdict for the defendant.

As there is no evidence in the record tending to show that the assault and robbery grew out of any service in which any employe of the defendant was engaged, or that was in the line of the duty of any employe of the defendant, but appears to have been clearly disconnected therefrom, the judgment rendered is the only one that the evidence will support. Under these circumstances, it is unnecessary to discuss the various alleged errors presented in the briefs of plaintiff. The judgment of the district court will be affirmed.

(All the justices concurring.)

(37 Kan. 391)

CORMACK v. WOLCOTT, Register, etc.

(Supreme Court of Kansas. October 8, 1887.)

REGISTER OF DEEDS—MANDAMUS—PRIVATE PARTIES CANNOT COPY ENTIRE RECORDS.

The register of deeds will not be compelled by *mandamus* to permit any person to make copies of the entire records in his office, for the purpose of making a set of abstract books for private use or speculation; and no such right is given by section 211, c. 25, Comp. Laws 1885.

(Syllabus by Clogston, C.)

Original proceedings in *mandamus*.

This was an application to this court for a writ of *mandamus* to compel the register of deeds of Russell county to permit the plaintiff to make a set of abstracts of the titles to real estate in that county; on which petition an alternative writ was by the court granted. The defendant filed his motion to quash the writ, for the reason that the facts therein stated were insufficient at law to entitle the plaintiff to recover the relief sought. The petition states, in substance, as follows: That the plaintiff was a resident of the county of Ottawa, and on or about the first of March, 1887, desired to become a resident of Russell county for the purpose of engaging in the business of abstracting the titles in that county; that on the twentieth day of March, 1887, plaintiff employed A. W. Cormack to go to the city of Russell, in said county, to arrange with the defendant, the register of deeds of said county, to allow plaintiff to put an employe (J. T. Cormack) in said office for the purpose of doing a part of the necessary work in making a set of abstract books of the titles of the real estate in said Russell county; that said defendant, as such register of deeds, refused to allow plaintiff's employe to go to work in the office, and make said examination of the records, and make copies thereof, as described by the plaintiff, for the purpose for which plaintiff desired said copies and information. The plaintiff further shows that, for the purpose of making and completing the set of abstract books, it was necessary that the plaintiff and his employes examine and search the records and papers belonging to said office, and make copies thereof; and that plaintiff desired so to do at reasonable times, and in a proper manner.

Thompson & Midgely, for plaintiff. *H. L. Pestana* and *W. G. Eastland*, for defendant.

CLOGSTON, C. The defendant's motion to quash must be treated as a demurrer to the petition, and the only question is, was the plaintiff entitled to an examination of the records and papers in the office of register of deeds of Russell county for the purpose of making a set of abstract books of the titles to the real estate in that county? The statute under which plaintiff claims the right to make this examination of the records in question is as follows: "Every county officer shall keep his office at the seat of justice of his county, and in the office provided by the county, if any such has been provided; and if there be none established, then at such place as shall be fixed by special provisions of law; or if there be no such provisions, then at such place as the board of county commissioners shall direct; and they shall each keep the same open during the usual business hours of each day, (Sundays excepted;) and all books and papers required to be in their offices shall be open for the examination of any person." Comp. Laws 1885, § 211, p. 299. The statute also defines the duty of the register of deeds: "The register of deeds shall have custody of, and safely keep and preserve, all the books, records, deeds, maps, and papers deposited or kept in his office." Comp. Laws 1885, § 90, p. 281.

Before the plaintiff can maintain his claim in an action of this kind he must show affirmatively that the right claimed, and which is denied by the defendant, is a clear legal right, and one of which there can be no doubts or exceptions. The writ of *mandamus* only lies before this kind of a right. A pub-

lic officer can be compelled to do such acts as the law requires to be performed, and none other. The plaintiff claims that the records in the office of the register of deeds are public records that every person has a right to inspect, examine, and copy, at all reasonable times, and in a proper way; and the register cannot deny access to his office or books for such purpose to any person coming there at a proper time, and in an orderly manner; and that the register must transact the business of the office, and allow persons reasonable facilities to exercise this right in that office. On the other hand, the defendant insists that while the records are public records, and that all persons have a right to examine the records and books of that office at all reasonable times, yet this right is controlled to some extent by the objects for which the examination is made, or the use to be made of such information; and that, as in this case, where the information is to be used for the purpose of private speculation and gain, solely for the benefit of the plaintiff, for no public use or purpose, and not for the purpose of an examination of any title or interest of the plaintiff therein, and not as an attorney or agent of some person having an interest in lands, but solely for the purpose of selling said information to others for compensation and speculation.

The question is an embarrassing one, and we are not free from doubt. At common law parties had no vested rights in the examination of a record of title, or other public records, save by some interest in the land or subject of record. So no authorities at common law can throw any light upon this question; the practice of making abstract records being of more recent date. In some states the right has been recognized and regulated by law; in others, abstracts are made by permission of the register of deeds; but in this state no action of the legislature has been had. Then, under the provisions of the statute above quoted, the right of the plaintiff must be found, if at all.

The primary purpose of making and keeping a record of the titles to land is that the title and its history may be preserved and protected, so that the information there contained may be obtained by those who seek it. Without these records there would soon be that uncertainty in the title to real estate that would render it almost valueless, or involve its owners in endless litigation to protect it. Necessity then requires that these records shall be correctly made, and when so made to be safely and securely kept. The law has imposed this duty upon the register of deeds, and, when any persons desire to inspect the same, that inspection must be under the immediate eye and observation of the register of deeds or his deputy. Otherwise that provision of the law that requires him to "safely keep" would impose a duty without the power to perform it. Then the right to inspect must of necessity have some restrictions, and must be done under such rules as the register may fairly impose, that will tend to the safety and preservation of his trust. The right claimed by the plaintiff for himself and for every person to inspect the records at will, and make copies therefrom, must of equal necessity be governed. If this right exists, it exists for all. If the plaintiff may make abstracts of the records and copies therefrom, then others have that same right. Should two or more desire to make an examination at the same time, who is to decide *which* shall make the examination or abstract first, or the length of time to be occupied in making that abstract? With the right come things incidental to that right; facilities for making the copies desired. If no decision or direction is to be made, then each may pursue his work at the same time, and this must be done under the immediate observation of the register. He must either superintend and watch over this work, or furnish suitable deputies to do so. The records must be preserved and safely kept. If this construction was to be given, the public would be called upon to furnish greater facilities for the register of deeds and those desiring to make abstracts in his office; and a large expense would be incurred to carry on a work in which the public had no special interest or benefit; it would be enabling private individuals

to engage in speculation for gain at the public expense. In large and populous counties the demand for the right to make abstracts would be great, and much time consumed in their making; and, instead of having an office where the records were to be kept for public inspection, it would be converted largely into an office for private individuals, for private and not for public use; and, if this right is granted, then could it be denied in any other department of county or state government? The records would be free to be inspected and copied for any and all purposes; for when the right is conceded for private use or inspection, then it is conceded to be equally open for him who examines for idle curiosity or unlawful purposes. If you grant this right to one citizen you must grant it to another. No distinction can be made between the good citizen and the bad. Both must have the same facilities and the same right, independent of the purpose for which the information is sought.

In *Buck v. Collins*, 51 Ga. 395, the court said: "But no person has a right to examine or inspect the records of his office, except in his (clerk's) presence and under his observation. If he may do this for a minute, the clerk is not keeping them safely and securely. A blot or scratch may be made in a minute that may alter a record. A leaf may be abstracted in a minute; and if one man may of right take a record book, and abstract its contents, work a week upon it, any other man may do it. If a good, honest man has a right to do this, a bad man has the same right; and, if this may be done except under the clerk's immediate inspection, no record can be safely kept. If the complainant has the right to do what he claims, he has the right to keep the clerk's attention from minute to minute, from day to day, until his book is finished. He has the right to the services of the public officer for months together without pay; for not only the law, but every principle of propriety, requires that no person shall inspect the books, except under the watchful observation of the clerk."

The supreme court of Colorado, under a law that is identical with that of this state, have decided that the right of a person to examine the records is not open for all. The court in *Bean v. People*, 7 Colo. 202, 2 Pac. Rep. 909, says: "We are of opinion that the statute in question was not designed to allow individuals, who wish to abstract the entire records for future profit in their private business, the privilege of using continuously the public property, and of monopolizing, from day to day, for months and years, a portion of the time and attention of a public officer, against his will and without recompense." The supreme court of Michigan have also decided this question, founded upon a statute much broader than ours. The court says: "The right once conceded, there is no limit to it until every public office is exhausted. The inconveniences which such a system would ingraft upon public officers; the dangers, both of a public and private nature, from abuses which would inevitably follow in the carrying out of such a right,—are conclusive against the existence thereof. * * * The language of the act referred to does not, in clear and unmistakable terms, include a case like the present, and such a one should not be conferred by construction. The object of the act was to enable persons, having occasion to make examination of the records for any lawful purpose, * * * to have suitable facilities therefor." *Webber v. Townley*, 43 Mich. 534, 5 N. W. Rep. 971.

Our statute nowhere intends to give the right to permit the taking of copies of the records. The language is to "make an examination." That examination was intended for persons who desired some information that could be readily gained by personal inspection of the records. The duty of granting this right is imposed upon the register, but it was never intended that the inspection would give the right to make entire copies of the records, and consume his time in watching and protecting the records during the time required to take an abstract of the titles of land in any county. This right of inspection would be exercised only by persons who had an interest in the record, or

by some one for them, for the purpose of information, and was not intended to give a right to parties to engage in private speculation in connection with the information there received. The statute provides how copies may be obtained of all records, and prescribes fees to the various officers for furnishing those copies. Those desiring to engage in the abstract business can procure the information or copies as the law provides; and if upon examination the statute does not clearly provide for that class of information, or for copies, then the duty will be upon the legislature to provide it, and not upon the court.

The plaintiff in error cites but two authorities in support of the right claimed by him. The first case cited is *People v. Richards*, 99 N. Y. 620, 1 N. E. Rep. 258. In that case there is a remarkable distinction from the one at bar. In that case the relator was a corporation created by a special act of the legislature of New York, and under that statute and charter the company was empowered and authorized to make, and cause to be made, and to procure and pay for, such researches, abstracts, including maps and copies of records, as its trustees may deem necessary; and yet under this broad power granted to this company the court refused to grant the right, where the register of the city of New York had allowed the relator to put three men in his office, with accommodations for making copies of the records in his office. The petitioner claimed that considering the great number of records of the city, an abstract could not be made in a life-time by that company with the men permitted to work in the register's office, and to deny it greater facilities was to deny all the right granted by its charter. The court held in that case that the corporation could make such copies under such reasonable restrictions as the register might impose, and that the regulation imposed was reasonable.

The next case was brought by McLean in the circuit court of the United States for the Southern district of Ohio, asking the court for an order giving the right to the inspection of certain fee-books and judgment docket of that court. The court refused the order, but afterwards granted an order giving the right to inspection of certain records in accordance with the fourth rule of the supreme court of the United States, which rule provided for the right of inspecting certain records of the courts of the United States; the court laying down the rule that at common law the right to inspect records and judgments of courts in the United States existed only to the parties to the record, and those having an interest therein. *Re McLean*, 8 Reporter, 813. Neither of these decisions can be relied upon as sustaining the right claimed by the petitioner.

It is recommended that a peremptory writ of *mandamus* be denied.

BY THE COURT. It is so ordered; all the justices concurring.

(37 Kan. 276)

ACKER v. KIMME.

(Supreme Court of Kansas. October 8, 1887.)

SALE—WARRANTY—NOTICE OF DEFECTS—WAIVER.

Where K. purchased a harvester from A., and is furnished with a written warranty, prepared by the manufacturers of the said harvester, which provides, in case the harvester fails to do the work as warranted, that notice must be given them, and the harvester is furnished by A., and he superintends the setting up and starting it, and it is found, after thorough trial, that the harvester will not do the work required, and thereupon A. informs K. that he will immediately notify the manufacturers, and request them to send a skilled man to repair and start it, and afterwards informs K. that he has so notified the manufacturers; and afterwards A. sends a skilled mechanic, who, with K., attempts to start the harvester, and it again fails. K. then offers to deliver the harvester to A., and A. refuses to receive it, and brings action to recover the purchase price: *held*, that A. might waive the right to require K. to give notice to the manufacturers of the harvester of any defect therein,

and by agreeing to give the manufacturers thereof notice that the harvester would not work, and by afterwards giving such notice, he thereby waived all right to demand that notice be given by K.¹

(Syllabus by Clogston, C.)

Error from district court, Brown county; DAVID MARTIN, Judge.

Action brought by the plaintiff in error to recover the purchase price of a harvester; trial by jury at the January, 1885, term; judgment for the defendant. Plaintiff brings the case here. The opinion contains a statement of the facts.

W. D. Webb, for plaintiff in error. S. L. Ryan, for defendant in error.

CLOGSTON, C. Plaintiff commenced this action to recover the purchase price of a Champion harvester and cord-binder, which defendant purchased of plaintiff. The contract, or order for the machine, was as follows:

"ORDER FOR CHAMPION HARVESTER AND CORD-BINDER.

"LEONA, KANSAS, May 15, 1883.

"Mr. Alvin Acker, Esq., Leona, Kansas: You are hereby authorized to procure for me one of the Champion harvesters with cord-binder, by the first day of June, 1883, for which I agree to pay you two hundred and fifty dollars,—also freight on same,—in cash on delivery; or, in lieu of said cash payment, to execute notes, payable as follows: Two hundred and fifty dollars October 1, 1883, including interest at the rate of 10 per cent. per annum after maturity, payable at Leona, Kansas. The machine to be warranted as per the manufacturers' printed warranty, a copy of which has this day been received. The machine to be shipped to Leona. Taken by L. G. Gim, agent.

"ANTHONY KIMME."

The manufacturers' printed warranty referred to was as follows:

"WARRANTY OF WHITLEY'S CHAMPION HARVESTER AND CORD-BINDER.

"This machine is warranted to be of good material and well made, and, if properly set up, adjusted, and operated according to the directions will do good work under all ordinary circumstances. While it is not recommended for cutting hemp, extra tall rye, or other very exceptional crops, it is warranted to do as good work in harvesting all ordinary crops, viz., wheat, barley, oats, flax, etc., as any other machine and binder. But it is expressly understood and agreed that this warranty is invalid and of no effect unless the machine is properly set up and adjusted, and used in accordance with our directions. If said machine does not perform as above represented under the management of the purchaser and agent, immediate notice must be given to us at Springfield, Ohio, advising us fully as to the name and residence of the purchaser, and that the machine is held by the purchaser, who will furnish the necessary facilities for testing same in the presence and under the direction of a competent person, to be designated and sent by us for that purpose; when, if the machine does good work, it shall be kept by the purchaser, and continued use shall be considered conclusive acknowledgment that it fills the warranty. But if, upon a second trial, in the presence and under the directions of the person designated and sent by us for that purpose, after notice from the purchaser, said machine does not work as above, it may be returned to us, and the payments will be refunded.

CHAMPION MACHINE CO."

Under this contract, the defendant received the machine, and with the plaintiff the machine was set up, and an effort made to operate it. In this effort some part of the machine was broken. The plaintiff sent a mechanic with a piece and repaired the machine, and the defendant with said mechanic again tried to operate the machine, and was unsuccessful. The plaintiff,

¹See note at end of case.

some days later, again tried to operate it, and again set a mechanic, a skilled man, to try to make the machine work. All these efforts failed to make it do the work required. The plaintiff then informed the defendant that he would notify the machine company, and request them to send a skilled person to try and make it work. The defendant waited several days, and again called upon the plaintiff, and requested him to place the harvester in a condition to be operated. The plaintiff informed him that he had three times telegraphed the machine company to send an expert to place it in working order, and had received no response therefrom. The defendant gave no notice to the Champion Machine Company at Springfield, Ohio, and no notice was given them save such as was given by the plaintiff.

The record does not contain all the testimony. The only question urged by the plaintiff in error is that the defendant failed to give notice as required by the conditions of the printed warranty, and therefore was obliged to pay for the machine whether it worked satisfactorily or not. This claim is founded upon the theory that the sale of this machine was made by the Champion Machine Company, and not by the plaintiff. If this claim is correct, and the sale was actually made by the Champion Machine Company, then, before the defendant could complain and refuse to pay for the machine, he would have to show a substantial compliance with the terms of their printed directions, which he received at the time of purchase. The defendant, however, insists that he purchased the harvester in question, not from the Champion Machine Company, but from the plaintiff,—his contract was with the plaintiff; that he received the machine from the plaintiff; and that he is now sued for the purchase price by the plaintiff. If this claim of the defendant's is correct, then no notice to the Champion Machine Company, at Springfield, Ohio, was necessary to be given by the defendant. This question, under proper instructions by the court, was submitted to the jury, and they found generally for the defendant on all the issues. In addition to this finding, we are inclined to think that the defendant's theory of this case is correct. The transaction seems to have been with the plaintiff, not as agent for the machine company, but acting for himself. The notes were made payable to him, and he was to furnish the machine; and in bringing an action in his own name for the purchase price, it would seem that he himself so considered the transaction. If not, why was the action not brought in the name of the Champion Machine Company, instead of the plaintiff? There is no allegation here, or evidence, tending to show the relation between the plaintiff and the machine company. This contract, then, being between the plaintiff and defendant, the stipulation in the printed circular that accompanied the machine was only applicable and binding upon these parties so far as the warranty was concerned, or the quality of the machine, and that the same would perform the work as therein stated; and the plaintiff being present, and having full knowledge of the character of the work and the failure of the machine to perform that work, was all the notice that was necessary.

The plaintiff, in his brief, cites a case recently decided in this court, (*Furneaux v. Esterly*, 13 Pac. Rep. 824,) as authority. We have carefully examined that case, and find nothing therein that will help the plaintiff. The contract in that case was also for the sale of a harvester, but made with the harvester company through its agents. Notes for the purchase price were taken by them, and suit brought on those notes by the machine company. Also, the warranty provided that, in case the harvester failed to do good work, written notice must at once be given to the agent who sold the harvester, as well as to the machine company, by the purchaser. No notice was given to the company by the purchaser. It was held that the giving of the notice was a condition precedent, and must be performed; and as no notice was given, the failure of the machine to do good work was waived. While in this case the warranty provides that, if the harvester does not perform the work as war-

ranted, under the management of the agent and purchaser, notice must be given to the machine company, but does not provide who shall give that notice, or how it shall be given. The plaintiff notified the company by wire at least three times, and, if the sale was made by the plaintiff as the agent of the Champion Machine Company, then the agent, as well as the machine company, would be equally interested with the purchaser in the success of the machine. It was as much the duty of the agent as the purchaser to give the notice; so, under either theory of the case, the plaintiff could not recover.

It is recommended that the judgment of the court below be affirmed.

BY THE COURT: It is so ordered; all the justices concurring.

NOTE.

It is held in *Furneaux v. Esterly*, (Kan.) 13 Pac. Rep. 824, that where a machine is sold with warranty, containing a stipulation that, if it fails to work satisfactorily, written notice shall be given, stating wherein it is defective, the giving of written or actual notice, unless waived, is a condition precedent to the enforcement of the warranty against the vendor.

Written notice may be waived. *Nichols v. Root*, (Minn.) 29 N. W. Rep. 160; *Nichols v. Knowles*, (Minn.) 18 N. W. Rep. 413; *Davis v. Robinson*, (Iowa,) 25 N. W. Rep. 280. But where oral notice is contended to have been given to an agent of the vendor, it must appear that such agent had authority to waive the written notice, or that his action, relied upon as a waiver, has been ratified. *Nichols v. Knowles*, *supra*. The purchaser is relieved from his duty to give notice where the agent of the vendor attends at the trial of the machine, is aware of its defects, and attempts to put it in order. *Flatt v. Osborne & Co.*, (Minn.) 22 N. W. Rep. 440; *Manufacturing Co. v. Trindle*, (Iowa,) 33 N. W. Rep. 79.

(37 Kan. 222)

STATE v. METSCH.

(*Supreme Court of Kansas*. October 8, 1887.)

1. OBTAINING MONEY UNDER FALSE PRETENSES—ALLEGING FALSITY OF PRETENSES.

In a prosecution for obtaining money under false pretenses, it is necessary for the state to negative specifically the false pretenses relied on to sustain the charge.

2. SAME—PLEADING AND PROOF—PRETENSES NOT ALLEGED.

No pretenses other than those set out in the information can form a basis for a verdict of conviction.

3. SAME—FALSE PRETENSES MUST HAVE BEEN RELIED UPON.

To sustain the charge of obtaining money under false pretenses, it is essential to show, not only that false pretenses were made, but also that the person who parted with the money relied upon the false pretenses made, and that the money was obtained by reason thereof.¹

4. SAME—EVIDENCE INSUFFICIENT.

The testimony in the record examined, and held insufficient to sustain the conviction.

(*Syllabus by the Court*.)

Appeal from district court, Ellsworth county; S. O. HINDS, Judge.

S. B. Bradford, Atty. Gen., and J. D. Lafferty, for the State. S. P. Harrison, for appellant.

JOHNSTON, J. Charles Metsch was prosecuted in the district court of Ellsworth county upon a charge of obtaining money under false pretenses from the State Savings Association of Ellsworth, and was convicted. The infor-

¹To constitute the offense of obtaining money or property under false pretenses, there must be an intent to defraud; actual fraud must be committed; false pretenses must be used for the perpetration of the fraud; and the false pretenses must be the cause which induced the owner to part with his property. *People v. Jordan*, (Cal.) 4 Pac. Rep. 773. To secure conviction under an indictment for obtaining goods by false pretenses, it must be shown that the defendant not only made the false representations, but that he knew that they were false. *Com. v. Devlin*, (Mass.) 6 N. E. Rep. 64. See, also, note, *Id.* 68.

mation charged that he obtained \$246.80 from the association upon the security given by chattel mortgages upon one bay horse ten years old, three cows, one bay horse five years old, one bay gelding three years old, one bay gelding four years old, one bay horse seven years old, one bay horse nine years old, one sorrel mare eight years old, and one sorrel gelding six years old. It is alleged that in negotiating the loans he pretended that he was the owner of the horses and cows described, and that they were kept on the farm of one Boggs, about four and one-half miles from the city of Ellsworth, and that the mortgages executed by him as security for the loans were valid. It is alleged, however, that Metsch was not the owner of the horses or the cows, and that his representations regarding them were designedly and wholly false. At the trial it was disclosed that three mortgages were executed by Metsch to the State Savings Association, which were designated as "A," "B," and "C." The state did not put in evidence the mortgages "B" and "C," nor offer evidence of any false pretenses in obtaining the money secured by those mortgages. The prosecution relied only on the pretenses connected with the "A" mortgage, which was given on September 1, 1886, to secure the payment of \$43.25, and the only property therein described was "one bay horse ten years old, weight about twelve hundred pounds, white in forehead, named 'Jim,'" and "three cows of different ages, sizes, and colors, now kept on the T. B. Boggs farm, four and one half miles south-east of Ellsworth city."

We are of opinion that the conviction should not stand. The testimony brought up in the record (and there is a statement that it contains all that was given) is clearly insufficient to sustain the verdict of the jury. There is no testimony that Metsch made any representations or pretenses in negotiating the mortgages which have been mentioned. Dolde, the secretary of the association, testifies that he negotiated and filled out the "B" and "C" mortgages, and loaned the defendant money on them. He also testified that he inquired of the defendant whether he owned the property, and whether there were any liens existing against it, but in no case does he state what reply, if any, was made by Metsch to these inquiries. No other witness undertakes to testify in relation to obtaining the money. Then, again, there is no testimony that the \$43.25, borrowed upon the security of the "A" mortgage, was obtained upon the strength of any representations or pretenses made when it was borrowed. Indeed, it does not appear, except by the remotest inference, that Metsch obtained any money upon the "A" mortgage. The witness Dolde states that he loaned him money upon chattel mortgages, but the transactions that he had with the defendant were loaning upon the security of the "B" and "C" mortgages, which are entirely out of the case. He states that a Mr. Hale made out the "A" mortgage, but Mr. Hale did not testify in the case, nor did any one else testify that the \$43.25, which purported to have been secured by the "A" mortgage, was paid by reason of any representation or pretense made by the accused. To sustain the charge, it is essential not only to show that the false representations and pretenses were made, but it must appear that the association relied upon those pretenses, and that the money was obtained by reason thereof. Proof that they relied upon, and paid out money on, the pretenses made to them in other transactions, will not supply the want of proof upon the individual transaction on which the verdict is based.

The testimony is singularly indefinite and incomplete in other respects. The only pretenses set out in the information were that the mortgage was valid, that he was the owner of the horse and three cows, and that they were kept on the Boggs farm. In the "A" mortgage it was represented that he owned the property, and that there was no other mortgage or lien upon it; and the representation in relation to other liens seems to have been mostly relied upon by the prosecution. But the information does not charge that he claimed or pretended that the property was free from incumbrance when the

mortgage in question was made; and the only pretenses upon which he could be tried or convicted were those charged in the information. But, if the representation in the mortgage that the property was free from incumbrance should be treated as an alleged pretense, there would still be a failure of proof. It is conceded that Metsch was the owner of the horse described in the mortgage. The contention is that he was mortgaged to G. W. Clawson on July 10, 1886, nearly two months before the execution of the mortgage in question. The only proof in support of this contention was that given by the register of deeds, who testified that a mortgage dated July 10, 1886, from Metsch to Clawson, on "one bay horse eight years old, weight about eleven hundred and fifty pounds," was filed in his office, and that no satisfaction of the mortgage had been entered of record. This description does not correspond with the description of the horse given in the mortgage we are considering. He was there described as "one bay horse ten years old, weight about twelve hundred pounds, white in forehead, named 'Jim.'" The horse mortgaged to Clawson appears to have been two years younger, with no white on its forehead, and fifty pounds lighter in weight. This proof certainly fails to show that the "Jim" horse was the one which had been mortgaged to Clawson.

The alleged pretense in regard to the cows was that they were owned by him and kept upon the Boggs farm. The proof regarding them is equally unsatisfactory and incomplete. The only witness who undertook to negative the alleged pretense was one Loliker, who resided upon the Boggs farm from May until some time in September, 1886. He states that he does not think there were any cows kept there by Metsch at that time. He admits, however, that along about the first of September he was away from there a week at a time, and that Metsch was in the habit of trading horses and cattle a great deal, and that he may have owned and had the cows there without his knowledge. While it appears that he was trading in cattle a great deal, there was no attempt to show that he did not own the cows, and hold them in other parts of the county. Besides, the information does not specifically negative the pretense that the property was located upon the Boggs farm. After specially averring the pretenses, the information specifically negatives the representation that he was the owner of the horse and cows, but does not negative the alleged representation that they were kept upon the Boggs farm.

The false pretenses relied on to sustain the charge should be specifically negated in the information. *Keller v. State*, 51 Ind. 111; *State v. Bradley*, 68 Mo. 140; 2 Whart. Crim. Law, § 1224. As there was no negation of the alleged pretense that the property was kept on the Boggs farm, the testimony of Loliker is rendered less important.

We think the testimony, viewed in the most favorable light for the prosecution, falls far short of justifying the conviction, and hence the judgment must be reversed, and the cause remanded.

(All the justices concurring.)

(5 Utah, 319)

CHARTER OAK LIFE INS. CO. OF HARTFORD, CONN., v. STEPHENS, Trustee, and others.

(Supreme Court of Utah. October 17, 1887.)

1. DEED OF TRUST—MINING PROPERTY—RENTS AND PROFITS—FORECLOSURE.

The evidence showing that certain deeds of trust of mining property were given simply as security for money advanced by the trustee and others, and that they provided that the amounts secured should be paid out of the "rents, issues, and profits" of the mine, and that the amounts advanced as expenses in opening the mine should also be so paid, an action to subject the mining property to a lien for the moneys so secured may be maintained, as, under such a deed, not only the "rents, issues, and profits" are subject to the payment of the debts, but, if these are insufficient, the property as well.

2. SAME—LIMITATION OF ACTION.

Where mining property is conveyed by a deed of trust for the security of money to be paid out of the "rents, issues, and profits" of the property, the statute of limitations does not run against the right to subject the property to the payment of the claims secured by the deed of trust; such trust being designed to continue indefinitely.

3. SAME—PAROL EVIDENCE TO EXPLAIN CONSIDERATION.

Evidence is admissible to show who furnished the money secured by a deed of trust, and for whom the trustee was acting, when the deed of trust does not show these facts.

4. SAME—ASSIGNMENT OF DEBT.

The assignment of a debt secured by a deed of trust is not an assignment of the trust.

5. SAME—FORECLOSURE—DECREE—REDEMPTION CLAUSE.

A decree of foreclosure is not erroneous because it does not state that the party against whom it is rendered is entitled to redeem.

6. VENDOR AND VENDEE—LIEN FOR PURCHASE MONEY.

A person who furnishes money to be used in the purchase of lands is entitled to a vendor's lien therefor, in the same manner as a vendor.

7. CONTINUANCE—DEPOSITIONS—WANT OF DILIGENCE.

A refusal of a court to allow a continuance to give a party time for taking a deposition which the party, if he had used due diligence, might have known several months earlier that he would need, is not error.

Appeal from district court, Salt Lake county; C. S. ZANE, Judge.

Arthur Brown, for appellant. *Marshall & Royle*, for respondent.

BOREMAN, J This is an appeal from a judgment. In the spring of 1874, the appellant Mathew T. Gisborn, was the owner of one-third interest in the Mono mine, situated in the Ophir mining district, Tooele county, in this territory. He obtained a bond upon the other two-thirds from his co-owners, Embody, Miller, and Heaton, and then went to New York to sell this two-thirds. Failing in this, he borrowed \$100,000 with which to buy the interest of Embody, one of his co-owners, which was four-eighteenhs of the mine. The money was furnished through defendant Stephens, trustee, and paid to Embody; and Embody made the deed of his interest to Gisborn. In return for the money thus advanced by Stephens, trustee, the appellant conveyed to him, by deed absolute on its face, all of his original interest, and all of the interest he had obtained from Embody; which two interests together amounted to ten-eighteenhs of the mine. The money thus furnished came from Allen, Stephens & Co., of which firm Stephens was a member. Stephens, likewise, afterwards furnished \$300,000 more, to enable Gisborn to buy the residue of the two-thirds of the mine; the same being the interests of Miller and Heaton, his co-owners in the mine. This money, according to agreement with Gisborn, was paid to his said co-owners in the mine, and the deed made to Gisborn; and then Gisborn, by deed absolute on its face, conveyed the same over to Stephens, trustee. Thus Stephens, trustee, held the title to the whole of the mine. Thereupon Stephens, in accordance with the wishes of Gisborn, made a declaration of trust, showing that the two deeds above mentioned, of Gisborn to Stephens, trustee, were not in fact absolute deeds, although on their faces they appeared to be such, but were made upon trusts, and that Stephens held the property in trust to receive the "rents, issues, and profits" of the mine, and to pay therefrom the expenses of operating the mine; then to pay back the \$400,000 obtained through Stephens, trustee; then to pay Gisborn a percentage on a third of the rents, issues, and profits, and to pay Gisborn \$275,000. After these several amounts should be paid, then the trustee, Stephens, was to cancel the two deeds referred to, on the record; thus, according to the declaration of trust, leaving the title to the whole property finally in Gisborn. He, by a subsequent contract with Hussy, agreed to convey half of the mine to Hussy for money and services rendered; and afterwards, Hussy

transferred said half interest to Stephens individually. The trustee entered upon the discharge of his duties in carrying out the trust; but the amount of ore that could be obtained from the mine decreased so rapidly that the whole output of the mine after the trustee took hold of it, only netted some \$20,000, and thereafter failed completely; the vein being lost. The work on the mine was done, under the trustee, by two managing agents specified in the declaration of trust,—the one being chosen by Gisborn, the other by the trustee. In a fruitless endeavor to find the ore vein, there were heavy expenditures, amounting to nearly \$52,000 beyond the ability of the trustee to pay. The debts thus incurred were not paid by the trustee, but were taken up by the respondent, to whom they were assigned. Allen, Stephens & Co. assigned their claims, also, to the respondent, including the claim of \$400,000 above referred to, and advanced through Stephens, trustee. The present action was brought to subject the mining property itself to the payment of the whole indebtedness, and that the same might be declared to be charges and liens thereon. Gisborn, one of the defendants, contests the right of respondent to this. The judgment of the district court being in favor of the respondent, the appellant, Gisborn, has brought the case to this court by appeal from that judgment. The appellant contends that the claims set up as the basis of the complaint are not debts against him or the mine, and have never existed as such; that the \$400,000 never were a debt at all, but were purchase money. He urges that, if such claims ever existed as debts, it was against the "rents, issues, and profits" of the mine, and that the "rents, issues, and profits" do not include the property itself, or the sale thereof. No personal judgment is sought against the appellant. Whether, therefore, the claims ever existed as debts against him personally, is, in this action, not material.

The first question, then, for our consideration, is whether the \$400,000 were purchase money or not. The appellant claims that the whole transaction showed that a purchase of the property, or of two-thirds thereof, by Stephens, trustee, was the aim and object of the parties, and that Gisborn was only security in the matter, and helping Stephens to make his purchase. Gisborn went to New York, it appears, among strangers, if this theory be true, to help a stranger to buy two-thirds of the mine from his co-owners. Gisborn, however, in his testimony, says that when he went to New York he first talked of making the sale of the two-thirds upon which he held a bond, but that he failed to make the sale. He then borrowed \$100,000, and afterwards \$300,000 more were advanced through the same channel. If a sale to Stephens, trustee, was the intention, we are unable to see why the whole of the mine was conveyed to Stephens, trustee, when he was only buying two-thirds. Nor do we see that there was any necessity for the declaration of trust. An absolute deed of two-thirds of the mine by Gisborn to Stephens, trustee, would have answered every purpose. But it would seem that the question whether the \$400,000 were a loan or purchase money is settled by the requirement set forth in the declaration of trust; that this \$400,000 was to be paid back to the party who advanced it; and that Stephens, trustee, was not to hold the mine after the sums of money specified in the declaration of trust had been paid, but the title to the whole mine was to revert to Gisborn. The parties who furnished the money through Stephens, trustee, were to have nothing further to do with the property after they should get back the money which they had advanced. If the title of the mine was to revert to Gisborn, it could not have been a sale to Stephens, nor to Allen, Stephens & Co. The provision in the declaration of trust, that Gisborn was to have title to the property after the payment of the sums of money thereafter specified, wholly precludes the idea that at that time the parties contemplated a purchase of the property, or of two-thirds of it by Stephens, or by Stephens, trustee, or by Allen, Stephens & Co. The idea of a sale, and that the purchaser was not to get the title, are not consistent.

But it is said that we should consider what was to take place after these sums were paid off, and the title placed in Gisborn; and that, if this were done, a sale would appear to have been the ultimate object of the whole transaction. The evidence tends to show that subsequent to the payment of the sums referred to, and subsequent to the title being placed in Gisborn, a conveyance was to be made by Gisborn to Hussy of one-half of the mine, and that thereafter Hussy was to convey such half interest to Stephens individually. We do not think that we are authorized to consider these matters which were to occur after the payment of the sums referred to, and after the title should be placed in Gisborn, unless they were parts of the contract or transaction of which the declaration of trust was the "final act;" for it does not appear, nor is it claimed, that after the execution of the declaration of trust there was any new contract between Gisborn and Stephens, or any alteration in the old contract. The two deeds by Gisborn to Stephens, trustee, and the declaration of trust which followed, embodied the terms of the contract between the parties. We can, perhaps, consider the oral statements prior to, and contemporaneous with, these written contracts, in order to arrive at a correct interpretation of them wherever the meaning is doubtful; but when the proof shows, and it is admitted, that the declaration of trust was the final act, it is not competent for us to allow that, by any oral evidence, the plain letter of the written contract can be contradicted or changed; nor can we consider what may have occurred after the execution of the declaration of trust. But if the \$400,000 be treated as purchase money, and the whole transaction treated as a conveyance to Stephens of the one-half of the mine, or of thirteen-eighteenths of it, yet such purchase could not result in a transfer of the title for any interest to Stephens until the purchase money had been paid back to him, or to those who furnished it through him. The buyer, according to the theory of appellant, was to have no title until all the purchase money which he had paid should be returned to him. That would be an anomalous proceeding, yet exactly what would have occurred if the transaction were a sale of the property to Stephens, and not a loan of money by him, or those acting through him; and, if the purchaser was to have no title until the purchase money was paid back to him, we are at a loss to see what was to be, or could be, the consideration for the transfer of the title to the purchaser. With the purchase money all paid back, it is evident that no consideration for a conveyance of the title to the purchaser existed. In reason and equity, it would seem that when the \$400,000, the only consideration mentioned in the transaction, should be paid back, the title to the property would revert to the seller. If Embody, Heaton, and Miller, therefore, were the sellers, as is claimed, the title would naturally fall to them in such a contingency. But the contract expressly provides that the title shall go to Gisborn, and not to Embody, Heaton, and Miller. The conclusion would be that he (Gisborn) was the seller, if the transaction was a sale; and that is what the face of the papers shows him to have been, if a sale took place. He is the one who made the deeds to Stephens; he is the one for whom the declaration of trust was made. The whole transaction shows that Embody, Heaton, and Miller, the co-owners in the mine with Gisborn, were entirely out of the whole matter when they received the pay for their interests. Such interests were two-thirds of the mine, and not simply two-thirds of the rents, issues, and profits. They lay no claim to any interests in the mine now, and the money that caused them to release their hold upon it, and convey their interests to Gisborn, came through Stephens, trustee; and the claim for the repayment of such money is one of the debts that this action is brought to enforce.

The contracts themselves between Gisborn and Hussy, and between Hussy and Stephens, are inconsistent with the idea of a sale to Stephens. The agreement of Stephens of May 30, 1874, to transfer to Hussy one-half of the property after the repayment of the debts or claims referred to, says that the deed was in consideration of "certain moneys advanced and services rendered to

me in effecting the purchase of two-thirds of the Mono mining claim and lode from my late co-tenants." The transfer of that half-interest, therefore, to Hussy, and by Hussy to Stephens, had no connection whatever with the transactions between Gisborn and the trustee, prior to or simultaneous with the declaration of trust. It was simply an agreement of Gisborn's to convey to Hussy, in consideration of Hussy's services in negotiating the trade. Whatever Hussy might do thereafter with the interests acquired was a matter of Hussy's own choice, and was immaterial to Gisborn. It had no bearing upon the disposition of the property as directed in the declaration of trust. The transfer by Hussy was not in pursuance of any agreement between Hussy and Gisborn, and Gisborn could not control Hussy in the matter of his disposing of his interests.

The agreement between Gisborn and Hussy took place on the thirtieth of May, 1874, the same day on which the declaration of trust was made. But the brief of the appellant says (and the proof is to the same effect) that the declaration of trust was the "final act." The agreement between Gisborn and Hussy refers to the declaration as being already executed and delivered to Gisborn. This agreement, then, was subsequent to the "final act," and was no part of that transaction, and in no way connected with it. It further appears that the transfer of this half interest by Hussy to Stephens did not take place for several months after the execution and delivery of the declaration of trust, and of the agreement between Gisborn and Hussy. It, therefore, could not have had any bearing upon any of the transactions of the thirtieth of May, but was subsequent thereto, and independent thereof. Moreover, it was not a transaction to which Gisborn was a party. If ever a sale was contemplated to Stephens, it was when the two deeds, absolute on their face, were made by Gisborn to him; but, if the idea did then exist in their minds, it seems to us that it was entirely removed or obliterated by the declaration of trust, and that we are bound by the declaration of trust; and it clearly shows that there was no purchase, nor intended purchase, of any part of the mine by Stephens, or by those he represented, but that the money was loaned to Gisborn on the strength of the security given by the conveyance of the mine, as stated in the declaration of trust.

The question now arises whether the \$400,000, and the other moneys referred to in the declaration of trust, were claims against the mine itself, or whether they were claims to be satisfied only out of the "rents, issues, and profits" of the mine. The declaration of trust, referring to the two deeds of conveyance by Gisborn to Stephens, trustee, says that "such conveyance was made and received upon the trusts, nevertheless, and to and for the uses, interests, securities, and purposes, hereinafter limited, specified, described, and declared; that is to say, upon trust to receive the rents, issues, and profits of said premises, and to apply the same as received as follows, viz., etc." Then followed in the declaration of trust the requirement to pay—*First*, the expenses of operating the mine, etc.; *second*, to pay the \$400,000 back to Stephens, trustee; *third*, to pay Gisborn a percentage of one-third of the net proceeds, of the mine, etc.; and *fourth*, to pay Gisborn \$275,000. The appellant urges that the foregoing provisions for the trustee to receive the "rents, issues, and profits" of the mine requires these various amounts to be paid out of the product—the ores—of the mine, and is a prohibition upon the taking of the mine itself to pay them.

This is not a case where the court is asked to make a new contract for the parties, but to give an interpretation and enforcement of a contract already made. The court is asked to declare that the contract made creates a lien upon the land itself. The mine had ceased to produce ore, and resort to a sale of the property itself was necessary, unless the trust had ceased, and all the property subject to a lien had been exhausted. It is not contended that the contract as made does not embody the agreement of the parties. Neither side

says that anything was intended other than what the contract says. But appellant contends that the court below gave a wrong interpretation of that contract, and that it was never intended that the property itself was to be subject to the liens mentioned, or to be sold to satisfy them; and that the contract conveys no such idea or authority. It being admitted that the contract embodies the agreement of the parties, we must look to the contract itself to learn its meaning. Primarily, no doubt, the indebtedness was to have been paid out of the ores taken from the mine; but when the mine ceased to be productive this mode of paying the indebtedness failed. If the creditors could resort only to the "rents, issues, and profits," and this meant only the ores, and they had ceased, the creditors had exhausted all their security. The meaning of the words "rents, issues, and profits" has often been before the courts; and by a long line of decisions the courts of chancery have declared that, unless these words be connected with other words which restrain the meaning of the terms to the rents, issues, and profits as they arise, (as if the trust is to pay debts out of the annual rents,) the courts will give the words a meaning broad enough to include the sale of the property itself. The strict meaning of the words, as opposed to land, is the annual rents, issues, and profits; yet the courts hold that they should not be confined thereto, but should be taken, in a more enlarged sense, to include every mode by which land may be made to yield profits, out of which money so charged upon it may be taken, and, consequently, to include the sale of the property itself. The doctrine is thus laid down broadly by Judge Story in his work on Equity Jurisprudence. It is likewise laid down in *Perry on Trusts*, in *Hawkins on Wills*, *Powell on Mortgages*, and in other works; citing an array of authorities. 2 Story, Eq. Jur. §§ 1064, 1064a; 1 Pow. Mortg. 60-80; Hawk. Wills, 120 *et seq.*; *New v. Nicoll*, 73 N. Y. 130, 131; 2 Perry, Trusts, pp. 168, 170, §§ 602g, 602k; Fletch. Trustees, 56 *et seq.*

In the declaration of trust there were no such restraining words as the books seem to require in order to confine the meaning of the words "rents, issues, and profits," to annual rents, issues, and profits. The title to the mine is held by the trustee; and the trustee declares, in the declaration of trust referred to, that he holds it in trust to receive and pay out the "rents, issues, and profits." Under the authorities, therefore, as we have seen, he holds it to pay the indebtedness, not only out of the products of the mine, but also out of the sale of the property itself. We cannot avoid this conclusion; and this is a reasonable, just, and equitable conclusion, as the money was furnished mainly to buy the title for Gisborn, and the title ought to be held to pay it back. We do not think that a fair construction of the whole transaction shows that the parties ever intended to confine the security for the repayment of the money solely to the products of the mine. They do not say so. Had such been the intention, it is reasonable to suppose that some words conveying that idea would have been inserted in the declaration of trust. The deeds of Gisborn to Stephens, trustee, convey the title, and convey it as security. If the sole security was to be the ores, there could have been no necessity for the conveyance of the title. A simple lease for the purpose of working the mine, and paying off the debts, would have been sufficient. It does not seem reasonable to suppose that it was intended that when the party loaning the money had the title, he was merely to hold the mine, and make the money out of the ores, and in case there were no ores he was yet to reconvey the title, and lose all he had loaned upon the security given by the deeds. If such had been the intention, it should have been expressly stated. The court cannot infer it. If we look solely to the naked equity of the case, we do not see that the position of the appellant can be maintained. A party loans money to buy property for another, and takes a conveyance of the title in trust to secure him, but is required to apply the first products of the property to repay the loan, and then to reconvey the title to the grantor. The

lender is to hold the title, and pay himself out of the products of the property. It turns out that there are no products. Does equity require that he shall give up the title which was conveyed to him as security, and which his money bought for the grantor? This would give the grantor the whole property, when two-thirds of it were bought for him by the money of the creditor, and the creditor could get nothing. We do not think there is any equity in such a course, and a court of equity could not uphold it. If the appellant had come into court and laid claim to only one-third of the mine, looking at the naked equity of the matter, there might have been some equity in this claim.

It is further contended that if the indebtedness of \$400,000, or the expense account of some \$52,000, ever existed as charges against the mine, they have both long since been barred by the statute of limitations, which requires action thereon to be begun in four years. No time is mentioned within which any of the indebtedness was to be paid. The declaration simply says that the indebtedness was to be paid out of the "rents, issues, and profits." In the brief of the appellant it is said that "if suit can be maintained to foreclose his interests now, it could have been maintained the next morning after the papers were signed." The question arises, then, whether suit could have been maintained the next morning after the papers were signed. There was no ore on hand, and no time to get any out. The whole terms of the declaration show that the indebtedness was to be paid only when time had been given to get out the ores and sell them, and it would be absurd to say that was to be done the next morning after the papers were signed. Yet that would have to be said if it be true that the suit could have been begun the next morning after the papers were signed. Is the converse of the proposition true? If suit could not have been maintained the next morning after the papers were signed, does it follow that it could not be maintained now? It is a general rule, no doubt, that, where no time for payment is specified, the debt is due immediately, and the statute of limitations begins to run immediately. No time is fixed in the declaration of trust for the payment of any of the indebtedness, and, if the rule be applicable, all of the indebtedness fell due upon its creation. But the tenor of the declaration of trust is against the application of the rule to any of this indebtedness. The declaration of trust provided for the payment of the claims out of the "rents, issues, and profits;" and further provided for the obtaining of these "rents, issues, and profits," primarily, by working the mine. If all of the \$400,000 could have been taken out within a few hours, there would have been no necessity for going to New York to borrow it, nor spending many days in negotiation. It is clear that many months were expected to be used up in gathering out these "rents, issues, and profits." The indebtedness, therefore, was not due immediately, and the statute of limitations did not begin to run immediately.

It is a rule in regard to the statute of limitations, applicable in all cases, that the statute begins to run when the debt is due, and an action can be instituted upon it. The indebtedness in the present case did not, as we have seen, begin to run immediately; and the inquiry arises, when did it begin to run? The trustee does not set up the statute of limitations; nor does he claim to have disavowed the trust, nor to have held adversely; nor does it appear that he has ever disavowed the trust, or held the title adversely. We doubt whether one of the *cestuis que trust* can do these things for him. But, assuming that he can, then, as there is no disavowal of the trust by the trustee, or any showing of his holding adversely, the rule is that the statute of limitations does not begin to run until the trust is closed. *Bacon v. Rives*, 106 U. S. 99, 1 Sup. Ct. Rep. 3. The trust in this case has not been closed. We do not think it a sufficient answer to this to say that the trust could not be carried out; that the ore failed, and the trustees ceased working, by reason of lack of money to pay the expenses. That is not the meaning of the word

"closed" when applied to trusts. The trust cannot be closed until the work is accomplished. To say that the trust has run its course and is completed, because there are no "rents, issues, and profits," is simply to say that the trust is accomplished because it could not be accomplished. The authority of the books is that the statute does not begin to run until the trust work is fully completed. So long as the trust exists, the statute cannot run. It cannot be said that the trust in this instance has been accomplished. The whole of the evidence shows that it was not done; and all efforts in that direction ceased at the very threshold of the business, by the loss of the ore vein, and the lack of funds to further prosecute the work,—the declaration of trust having made no provision to meet the extraordinary contingency which had arisen. The authorities produced are to the effect that, generally, when a trust upon real estate has been completed, the property reverts. When the trust is completed,—has accomplished its work,—then its course may be said to have been run, and, after that period, the trustees have no duties in regard thereto to perform. They would then have ceased, and the statute begun to run. The trust held by the trustee, after his work is finished, is a dry trust, and it is his duty to convey the estate to the beneficial owner. This rule is expressly recognized in the declaration of trust, which provides that the property shall pass, by conveyance from the trustee, back to Gisborn, after the expenses of working the mine, and after the \$400,000 are paid to Stephens, and after \$275,000 shall have been paid to Gisborn. But neither the language of the declaration of trust, nor the general rule referred to, gives to Gisborn a right to the property, before all these things are done,—before all these sums are paid. At this point, then, when these sums should all be paid, his rights would begin, according to the terms of the declaration of trust. But that time has never arrived.

The trust in this case is an express one. It is declared by the parties in the declaration of trust. 1 Perry, Trusts, 24; Laws Utah 1884, p. 192, § 226. The trust was also intended to continue indefinitely. It is a continuing trust. In such cases the statute of limitations does not apply. 2 Perry, Trusts, § 863, and notes; *Oliver v. Piatt*, 3 How. 411; Ang. Lim. §§ 166, 468; *Kane v. Bloodygood*, 7 Johns. Ch. 90; *Seymour v. Freer*, 8 Wall. 218. Such trusts are not cognizable in an action at law, but fall within the proper, peculiar, and exclusive jurisdiction of courts of chancery. An accounting was necessary to ascertain the receipts and disbursements and liabilities of the trustees, and also to ascertain the relative priorities of the claims.

The indebtedness of \$400,000 is a charge and lien upon the mine. The title was expressly conveyed for its security. The fact that the declaration of trust provided such indebtedness, to be paid primarily out of the products of the mine, does not affect the question; for we have seen that the words "rents, issues, and profits," although primarily meaning the products of the mine, yet in a broader sense include the mine itself. Aside from this fact, the \$400,000 were purchase money; were furnished by Allen, Stephens and Co. to Gisborn, to enable Gisborn to make the purchase of the two-thirds of the mine in his own name. It is not necessary that such lien should be confined to vendors. The party furnishing the money to the purchaser is entitled to the lien in the same manner as a vendor. 2 Dev. Deeds, 1150, and a vast number of cases there cited; *Barroilhet v. Anspacher*, 8 Pac. Rep. 804; *Motherwell v. Taylor*, 10 Pac. Rep. 304; 2 Lead. Cas. Eq. (3d Amer. Ed.) 712, 713, Har. & W. notes. The expense accounts are also a lien upon the realty. These claims were necessarily incurred in endeavoring to secure the objects of the trust. They were not incurred for the trustee's gain, but in a fair effort to carry out the trust. They were just charges upon the trust property. 2 Pom. Eq. § 1085 *et seq.*; 2 Perry, Trusts, §§ 485, 486, 610, 618, 907; *Davis' Petitioner*, 14 Allen, 24. And this would be true, even if in the trust there were no provisions for expenses. 2 Perry, Trusts, §§ 910, 913. The respondent, by assignment, takes

the place of the assignor, and, as the statute of limitations could not bar the claims in the hands of the assignors, it cannot bar them in the hands of the assignee.

It is objected that the respondent was allowed to prove for whom the trustee was acting, and who furnished the money. This objection is based upon the ground that to make such proof is to add to the written contract in trust, and that the evidence is likewise immaterial. It is claimed that the written trust speaks for itself. We do not think that such evidence added any new provisions to the declaration of trusts. It simply explained what did not appear on the face of the declaration of trust, but which the language of the declaration indicated to exist. Parol evidence was admissible to show these things. *Railroad Co. v. Durant*, 95 U. S. 576.

It is likewise objected that respondent was allowed to introduce in evidence the written assignment by Allen, Stephens & Co. to respondent of their claims and demands. The ground of the objection was that Allen, Stephens & Co. had no power to assign the trust, or to transfer the execution of the trust, to any other party. The objection is untenable. The evidence does not show any assignment of the trust, or of the execution of it. Allen, Stephens & Co. owned some of the claims and demands, and these they had a right to assign, and did assign. The assignment of these claims and demands was not an assignment of the trust. There was no assignment of the trust.

It is said that Gisborn made some advances towards working the mine, and, as this action was in part for an accounting, that these advances should have been allowed. These claims of Gisborn were not set up in his pleadings, but, on the contrary, he contended against the validity of any liens or charges against the trusts, property, or mine. The accounting called for was that of the trustee. If Gisborn paid any accounts for expenses, he should have presented them to the trustee. The trustee was the only proper party to keep the account of the expenses.

The refusal of the district court to grant a continuance on the application of Gisborn is assigned for error. The refusing or granting a continuance is a matter very much in the sound discretion of the court. Unless we can see that that discretion was abused, we cannot be justified in reversing the case on the ground of such refusal. In the present instance, the deposition of Stephens was taken, and, having been returned to the court, was published on the twentieth of November, 1885. The appellant did not call at the clerk's office to see it, or to see if it had been returned, until the first of May, 1886. It was then not in the office, and, supposing it to be in the hands of counsel for the respondent, appellant waited until the tenth of May, when it was obtained from such counsel. Upon examination of the deposition, it became evident to appellant that he would need the deposition of Warren Hussy, and it would take about three weeks to get it. The trial was set for the twelfth of May, 1886. Had he procured an examination of the Stephens deposition when he first went after it, he would not, according to his own showing, have had time in which to take Hussy's deposition before the trial. We do not think that the appellant showed diligence, and the district court did not err in refusing to grant a continuance.

We do not think that there was any error in the failure of the decree to state that Gisborn was entitled to redeem. That is a matter which is regulated by the statute, and it is not necessary that it should be stated in the decree.

Finding no error in the record, the judgment of the lower court is affirmed.

ZANE, C. J., and HENDERSON, J., concur.

(5 Utah, 344)

REDDON v. UNION PAC. R. CO.*(Supreme Court of Utah. October 1, 1887.)***1. MASTER AND SERVANT—FELLOW-SERVANTS—SUPERINTENDENT OF MINE.**

A foreman having entire supervision of a mine, and all its workings, employing and discharging laborers, and prescribing their duties, is not a co-employee within the rule which exempts the master from responsibility for the injuries received by a servant through the negligence of a fellow-servant.¹

2. SAME—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

In an action to recover damages for personal injuries received while at work in defendant's mines, the testimony of the plaintiff was to the effect that certain places in the mine had become dangerous by reason of the settling of the base of the columns or partitions left to support the roof of the mine, which caused masses of rock and coal to fall from the top and sides; that, after a portion of the dangerous section had been cased and timbered, the defendant's superintendent directed the work stopped, saying that he would timber it at another time; that coal and other material continued to fall from the sides and roof of the untimbered sections, which was known to both the plaintiff and the superintendent; that, three or four days before the accident, plaintiff called the superintendent's attention to the unsafe condition of the section beyond the timbering, upon which the superintendent assured plaintiff that there was no danger, but promised to have it made secure. Subsequently the plaintiff, at the superintendent's direction, went to work at a place beyond the timbering, but not at the particular place to which he had previously called the superintendent's attention, and was injured by a fall of coal from the sides of the mine. *Held*, that a motion for nonsuit was properly overruled; the question whether plaintiff was guilty of contributory negligence, by remaining in defendant's employ with knowledge of the danger, being for the jury.

3. TRIAL—INSTRUCTIONS—REQUESTS TO CHARGE.

It is not error to refuse to give instructions, in themselves proper, in the language they are requested, if the court substantially gives them in its own language.

4. NEW TRIAL—EXCESSIVE DAMAGES—REMITTING PORTION OF VERDICT.

The overruling of a motion for a new trial upon the ground of excessive damages, upon condition that plaintiff remit a certain sum from the verdict and judgment, is the exercise of a supervision which courts have in certain cases over verdicts, and is not such a determination by the court of the fact that the damages were excessive as to taint the whole verdict, and warrant the appellate court in setting it aside.

Appeal from district court, Third district; C. S. ZANE, Judge.

Arthur Brown, for plaintiff and respondent. *P. L. Williams*, for defendant and appellant.

HENDERSON, J. The plaintiff seeks in this action to recover against the defendant damages on account of a personal injury which he received while in its employ as a laborer in its coal mine. The evidence on the part of the plaintiff tended to show: That the defendant was the owner of and was operating a coal mine known as the "Grass Creek Mine;" that the mine consisted of extensive under-ground workings, requiring the services of a large number of miners and workmen; that during the time in controversy one Thomas Thomas was defendant's foreman, and as such had entire supervision of the mine and all the workings, employed and discharged laborers, and prescribed their duties; that the plaintiff was a practical coal miner, and had been for some years; that on the first day of December, 1884, the plaintiff applied to Thomas for employment, and was employed by him in defendant's mine; that the openings to and from the mine were through various entries, which were designated by numbers, and all entering on the vein of coal on an incline, and were separated from each other by columns or partitions left in the coal vein to support the roof, these partitions being known to the miners as "ribs;" that through all these entries tracks were laid and horse cars run for a great distance into the mine, for the purpose of bringing out the coal; that at the time the plaintiff was employed, for some time before, and from that time up to the time of the injury, there was going on in said mine what is known

¹ See note at end of case.

among miners as a "squeeze," which consists of the settling of the base of the columns or partitions left to support the roof into the softer material of the floor, thereby causing the floors in the spaces to heave, and masses of rock and coal to fall from the top and sides, rendering them more or less dangerous; that this process was more apparent in the fifth entry, making it more dangerous than the other portions of the mine; that when plaintiff commenced work he was, with other workmen, under the immediate supervision of the superintendent, set at work clearing up the *debris* which had fallen in the fifth entry on account of the "squeeze," and leveling the floor, and relaying the car track, other workmen following and casing and timbering to protect from the falling material as fast as the entry was cleared, such work commencing at the mouth of the entry, and extending along it towards the interior of the mine; that after such clearing and timbering had proceeded for some days, and had been extended back some distance from the mouth of the opening, the superintendent, Mr. Thomas, directed the timbering stopped, and the workmen engaged in it were directed by him to assist in the clearing, giving as a reason that he was in a hurry to get the cars running through the entry, and saying he would timber it after the clearing was done, but that no further timbering or casing was done; that the clearing of the fifth entry was finished about January 15th following plaintiff's employment, and from that time up to the time of the injury, which occurred May 15th thereafter, the plaintiff was engaged as track-layer and repairer, his duties as such calling him to the various entries and chambers of the mine connected therewith, laying track, removing *debris* therefrom, putting in switches and connections between the various tracks going from one portion of the mine to another, as directed by the superintendent; that during all this time coal and other material was occasionally falling from the sides and roof of the various entries, but that it was falling most in the fifth entry beyond the timbering, and that such entry was dangerous, and was so understood by the plaintiff and all the workmen; that the superintendent knew of the unsafe condition of the fifth entry, was constantly about the mine, and that his attention was particularly called to its unsafe condition; that one of the workmen called his attention to it at the time he ordered the timbering discontinued, and told him that unless it was timbered, some one would be hurt, and he replied that there was not time then, but that he would timber it after the entry was cleared; that three or four days before the injury, while the superintendent was passing along the fifth entry, the plaintiff called his attention to its unsafe condition, and walked with him along the entry back of the timbering, and back of the particular place where the injury occurred, and notified him of its condition, and the superintendent promised to fix it, the plaintiff himself stating the conversation as follows: "*Answer.* I took him and told him this coal was going to fall, if it wasn't taken down, I was afeard; and I took him in along the road all the way in, sounded the coal for him, until I got him to the room where Mr. Locke worked—John Locke—and that was the dangerousest place there was, between his rib and the next one; and he says: 'Bill,' he says, 'that won't fall yet; you have no idea how this coal will hang;' and he says, 'I can't stop the turn to take it down now, but'—says he—'I will take it down some other time.' Them was just the words that was used, as near as I can get at it. *Question.* What more did he say, if anything, than that he wanted to keep the turn running? *A.* Why, he didn't say nothing, only as I told you; he said that he couldn't stop the turn then to take it down,—that he would take it down some other time—have it taken down; he didn't take it himself, of course. *Q.* He said he would take the coal down? *A.* Yes, sir; he would have it taken down; he didn't work his own self." That on the twenty-fifth day of May the plaintiff was called from another part of the mine by the superintendent, and was directed to go into the fifth entry at a place beyond the timbering, but not at the particular place where plaintiff had

called the attention of the superintendent to the loose coal, and there load up some coal which cumbered the track. The plaintiff commenced the work, and within a few moments a large mass of coal fell from the sides onto the plaintiff, causing the injury complained of. The direction of the superintendent to do this particular work was testified to by the plaintiff as follows: "*Answer.* Mr. Thomas ordered me and Mr. Harry Thomas over there, to go in and clear up the coal and lower the track. *Question.* Well, what did you do after having received those orders? *A.* I went in the entry and staid there until the turn—we was a little ahead of the trip; that is, the turn coming in. The man that drove the cars staid there until they came in, and Mr. Thomas came in also, right behind the cars, and I asked him if I should start in here, and he says 'Yes, clear right up, boys'— *Q. (Interrupting.)* Which Thomas do you mean? *A.* Thomas Thomas. He says: 'Hurry and clear up, for I want to send coal out here this evening.'"

The plaintiff's testimony further tended to show that the plaintiff knew from reputation and hearsay what effect a "squeeze" had on a mine, but had never had experience with one before; that Mr. Thomas, the foreman, had had experience in seven or eight "squeezed" mines before; that timbering or casing, and removing coal as fast as it is loose from the walls, would have lessened the danger, and been a protection, and that such is the usual precaution in mines undergoing a "squeeze," but that neither was done except the timbering above mentioned. The plaintiff was 36 years of age, had always been well and healthy before the accident, and the testimony tended to show that the injury received by plaintiff was to the nerves of the back, and to the spinal column, and was permanent; that it was and is very painful, totally disabling him from any labor; that he requires the constant care and attendance of nurses; that he cannot dress or undress without assistance, and that his lower limbs are so far paralyzed that he has but little use of them.

At the close of the testimony for the plaintiff the defendant moved the court for a nonsuit, on the ground that the plaintiff had not made a case entitling him to recover, and because the plaintiff's testimony showed that he was guilty of contributory negligence, which was overruled by the court. The defendant's testimony tended to show that the plaintiff, by the exercise of due diligence, could have avoided the accident by discovering that the coal which fell on him was loose; that he knew the dangerous condition of the mine, and of the fifth entry, where he was hurt, and tended to contradict the plaintiff's testimony. At the close of the testimony the defendant presented a number of requests to charge. The trial judge did not follow the requests to charge, but formulated his charge to the jury, varying and modifying some of the requests. The jury returned a verdict for the plaintiff for \$20,000, and judgment was entered thereon. The defendant thereupon moved for a new trial on statement, on the ground, among other things, that the damages were excessive. The court overruled the motion for a new trial, upon condition that the plaintiff should remit \$5,000 from the verdict and judgment, which the plaintiff did, and the motion for a new trial was denied; and the defendant appeals to this court from the judgment and order overruling motion for new trial.

The first question arising upon this record is the ruling of the court in overruling the appellant's motion for nonsuit. The first ground stated for a nonsuit raises the question as to whether under this state of the case the defendant is liable to the plaintiff for the acts of Thomas, the superintendent; and, if so, whether negligence or neglect of duty was shown which was the proximate and efficient cause of the injury. In the reported cases of the various states there has been much discussion and diversity of opinion as to the responsibility of masters for the acts and omissions of co-employees, and as to how far and under what circumstances agents and employees engaged in various departments of duty and service are fellow-workmen or co-employees with other servants, so as to exempt the master from liability for their acts;

but we think that the great weight of authority in the state courts establishes the proposition that the superintendent of a mine who has general and entire charge of the work, employs and discharges workmen, and directs their duties and employments, is not a co-employee with common laborers in the mine, whose duty it is to obey the orders of such superintendent, within the rule exempting the master from responsibility for the acts and omissions of such superintendent, and that as to such common workmen the master is responsible for neglect of duty by such superintendent. *Ryan v. Bagaley*, 50 Mich. 179, 15 N. W. Rep. 72; *Birckner v. Railroad Co.*, 49 N. Y. 672; *Malone v. Hathaway*, 64 N. Y. 5; *Railroad Co. v. Stevens*, 20 Ohio, 415; *Railroad Co. v. Keary*, 3 Ohio St. 201; *Railroad Co. v. Collins*, 2 Duv. 114; *Ford v. Railroad Co.*, 110 Mass. 241; 1 Redf. R. R. 554; Whart. Neg. § 232; *Bowers v. Railroad Co.*, 7 Pac. Rep. 251. This rule is recognized and adopted by the federal courts; *Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184; *Hough v. Railway Co.*, 100 U. S. 213; *Railroad Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. Rep. 590; *Railroad Co. v. Fort*, 17 Wall. 553.

Did, then, the evidence tend to show negligence on the part of the superintendent, or was the accident the natural result of the dangerous and hazardous business in which the plaintiff had voluntarily engaged to serve the defendant? One who engages in the employment of another for the performance of certain duties for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of the service, and the pay is presumed to be regulated to cover compensation for such risk. This is a part of the contract on the part of the employee, and this rule applies as well where the service in which he engages is naturally hazardous or extrahazardous. This is so well established by adjudications that references are needless. On the other hand, it is the duty of the master not to expose the servant in performing his duties to hazards or perils which may be guarded against by proper diligence. It is his duty to observe all the care which prudence and the exigencies of the situation require, and to furnish reasonably safe and proper structures and instrumentalities to avoid danger. He is not required to furnish the safest known appliances and means of avoiding danger, but such as are usual and reasonable under the particular circumstances and exigencies, and this is a part of the contract of hire on the part of the master. *Hough v. Railway Co.*, 100 U. S. 213; *Railroad Co. v. Fort*, 17 Wall. 553; *Railway Co. v. McDaniels*, 107 U. S. 454, 2 Sup. Ct. Rep. 932. The servant's exposure to hazards resulting from the violation of this duty on the part of the master is not within his contract of service, and the master is liable for injuries resulting therefrom. *Hough v. Railway Co.*, *supra*. We are of the opinion that the testimony clearly tended to show that the accident to plaintiff was the result of a violation of this duty on the part of the defendant, and should have been submitted to the jury. The superintendent knew of the dangerous character of the mine resulting from the process then going on in it. His attention had been expressly called to the danger in the fifth entry; he had recognized the danger and the necessity and propriety of timbering or casing, and of sounding along the walls, and removing the loose coal and debris, by promising that it should be done; and it is reasonable to suppose, from the testimony, that the accident would have been avoided if either had been done; but, representing the company, simply to facilitate its operations, and suit its convenience, this precaution was neglected and the plaintiff subjected to the risk which resulted in his injury.

The ground most relied on by appellant for a nonsuit is "that the plaintiff was guilty of contributory negligence." At the close of the plaintiff's testimony the court should not grant a nonsuit, on the ground of contributory negligence, unless it affirmatively appears by his testimony. Contributory negligence is an affirmative defense, and the burden of showing it was upon the defendant. *Hough v. Railway Co.*, *supra*; *Railroad Co. v. Gladmon*,

15 Wall. 401; Whart. Neg. § 423; *Bowers v. Railroad Co.*, 7 Pac. Rep. 251; *Railroad Co. v. Horst*, 93 U. S. 291. A nonsuit should not be granted, and the case taken from the jury, unless the court will feel constrained to grant a new trial upon the same evidence. *Bowers v. Railroad Co.*, *supra*; *Railroad Co. v. Stout*, 17 Wall. 657; *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322.

It is insisted by appellant that the plaintiff's testimony shows that he knew of the dangerous character of the mine, and of the precautions taken by defendant to avoid accident, and that by continuing in its employ after such knowledge he was guilty of contributory negligence. If a servant, before he enters service, or afterwards, discovers that the instrumentalities furnished for his protection are defective, and understands, or by the exercise of ordinary observation ought to understand, the risks to which he is thereby exposed, and if notwithstanding such knowledge he, without objection, and without any promise on the part of the employer that such defects will be remedied, continues in such service, he cannot recover for injuries resulting therefrom, but will be deemed to have waived all negligence and neglect of duty on the part of the master, and would be guilty of contributing to such negligence. *Hough v. Railway Co.*, *supra*; *Greene v. Railway Co.*, 17 N. W. Rep. 378. But where there is any evidence tending to rebut the presumption of waiver on the part of the servant, it presents a case for the jury. *Hough v. Railway Co.*, *supra*; *Greene v. Railway Co.*, *supra*; *Lansing v. Railroad Co.*, 49 N. Y. 521. We think that the promise of the superintendent in this case, to remedy the defect, was very clearly evidence tending to rebut the presumption that the plaintiff, by continuing in the employment, assumed the increased risk caused by the defendant's neglect. In *Hough v. Railway Co.*, before referred to, Mr. Justice HARLAN, speaking for the court, quotes with approval from Shear. & R. Neg. § 96, as follows: "There can be no doubt that where a master has expressly promised to repair a defect, the servant can recover for an injury caused thereby, within such a period of time after the promise, as it would be reasonable to allow for its performance, and, as we think, for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept." And he cites in support of the doctrine thus stated, *Conroy v. Iron-Works*, 62 Mo. 35; *Patterson v. Railroad Co.*, 76 Pa. St. 389; *Le Clair v. Railroad Co.*, 20 Minn. 9, (Gil. 1.) And, again, quoting from Cooley on Torts, he says: "If the servant, having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover, the assurance removes all ground for the argument that the servant by continuing the employment engages to assume the risks." See, also, *Greene v. Railway Co.*, *supra*. In this case the plaintiff called the attention of the superintendent to the defect, and made known his fears, and the superintendent in reply asserted his superior knowledge to that of the plaintiff, and assured him there was no danger, but promised to remedy the defect. In prosecuting such a work as the defendant was here conducting, persons are selected and employed with reference to the duties they are intrusted with. A superintendent is employed for his supposed superiority in ability, capacity, and experience to the common laborers who are under his supervision; he is supposed to inspire their trust and confidence; they are accustomed to obey his orders, and to trust to his superior judgment. The representations and promises of this superintendent were undoubtedly made to the plaintiff to induce him to continue his service, and dispel his fears. Is it unreasonable to suppose that it did so? We think not. We are of the opinion that it was for the jury to say whether the defective appliances and precautions were such that

it was negligent for the plaintiff to continue the service; and if, under all the circumstances, considering the promise and conduct of the superintendent, the plaintiff was not wanting in due care and caution in continuing, then the defendant was not excused for the omission to perform its duty.

The appellant also complains of the refusal to give various of its requests to charge, and to the modifications of some. The charge given by the court was in accordance with the principles before stated. This court has held that it is not error to refuse to give instructions in themselves proper, in the language they are requested, if the court in its own language gives their substance. The requests, so far as they were proper, were substantially given; indeed, the substance of most of the defendant's requests was given. The change made by the court in the giving of defendant's third request, in view of other portions of the charge given, was immaterial. The defendant requested the court to charge as follows: "If you find that it was the course pursued in this instance by the defendant to carry on the business of mining, while the walls and surroundings in the mine were unsafe and dangerous, and this fact was known to the plaintiff, and that he also knew the character of the dangers there existing, and yet entered upon and continued in said service, he assumed the risk of such dangers, and is not entitled to recover in this action." This the court did not give, but did instruct the jury that under substantially such circumstances the defendant would not be liable, unless there was an agreement to remedy the defect, and provide necessary and proper protection, and that the plaintiff, relying upon such promises, continued his work; and this was all the defendant could properly ask.

The appellant asks that the judgment be reversed because the damages were excessive, appearing to have been given under the influence of passion or prejudice. The argument is that the trial court, having determined that the damages are excessive, it taints the whole verdict, and that none of it should stand. The practice which was pursued in this case is thoroughly established by precedent. 1 *Suth. Dam.* 813-815, and cases there cited. It is a supervision which courts exercise over verdicts for the protection of defendants in what are deemed to be proper cases, and if the rule is ever to be disturbed, it should be on the application of parties injured, and not those who are benefited by it. We are not prepared to say that the damages, after the reduction, are excessive, in view of the severe character of the injuries. The discretion of the trial judge in this respect, who saw the plaintiff personally and heard the testimony of all the witnesses, ought not to be disturbed, unless it presents a plain case of the abuse of its exercise.

The judgment and order appealed from should be affirmed.

ZANE, C. J., and BOREMAN, J., concurred.

NOTE.

FELLOW-SERVANTS—WHO ARE. Within the meaning of the rule exempting the master from liability for injuries resulting to a servant from the negligence of a co-employee, fellow-servants are defined to be persons engaged in the same common service, under the same general control. *Gravelle v. Railway Co.*, 10 *Fed. Rep.* 711. They must be directly co-operating with each other in a particular business, in the same line of employment, or their usual duties must bring them habitually together, so that they may exercise a mutual influence upon each other promotive of proper caution. *Railway Co. v. Snyder*, (Ill.) 7 *N. E. Rep.* 604. A track-repairer and an engineer are held to be fellow-servants. *Van Wicklev. Railroad Co.*, 32 *Fed. Rep.* 278. So, also, a brakeman employed by a railroad company on one of its trains, and an engineer working for the same company on a different train. *Randall v. Railroad Co.*, 3 *Sup. Ct. Rep.* 322. And a station agent, required to look after the safety of switches, and to see that the main track is kept free and unobstructed for the passage of trains, is a fellow-servant of a brakeman or engineer. *Toner v. Railway Co.*, (Wis.) 31 *N. W. Rep.* 104; *Brown v. Railway Co.*, (Minn.) 18 *N. W. Rep.* 834; *Dealey v. Railroad Co.*, (Pa.) 4 *Atl. Rep.* 170. An inspector of cars is held to be a fellow-servant of a brakeman. *Smith v. Potter*, (Mich.) 9 *N. W. Rep.* 273. It is immaterial that a negligent servant is in a position of

greater responsibility than the injured one, or in a different line of employment, so long as both are in the same general business. *Mining Co. v. Kitts*, (Mich.) 3 N. W. Rep. 470. The rule obtains regardless of the fact that one employe may be the superior in rank of others in the same general undertaking, unless he occupies the place of vice-principal. *Railway Co. v. Adams*, (Ind.) 5 N. E. Rep. 187; *Copper v. Railroad Co.*, (Ind.) 2 N. E. Rep. 749; *Fraker v. Railway Co.*, (Minn.) 19 N. W. Rep. 349; *Peschel v. Railway Co.*, (Wis.) 21 N. W. Rep. 269. A mining boss is a fellow-servant of other employes. *Reese v. Biddle*, (Pa.) 3 Atl. Rep. 813. And a conductor is held to be a fellow-servant of a brakeman. *Pease v. Railway Co.*, (Wis.) 20 N. W. Rep. 908. On the other hand, in limitation of the general rule, it is held that the master is liable for injuries occurring to an employe while doing an act beyond the scope of his employment at the direction of a co-employe having authority over him. *Gilmore v. Railway Co.*, 18 Fed. Rep. 866. So, also, where a servant is injured through the negligence of an employe in providing suitable material or appliances, the latter being authorized or required by his employment to discharge this duty. *Id.*; *Kruger v. Railway Co.*, (Ind.) 11 N. E. Rep. 957; *Benzing v. Steinway*, (N. Y.) 5 N. E. Rep. 449. And the broad principle is laid down that where a servant is invested with control or superior authority over another employe, and injury is incurred by the latter through the negligent exercise of the authority so conferred, the master is liable. *Thompson v. Railway Co.*, 14 Fed. Rep. 564; *Gravelle v. Railway Co.*, 10 Fed. Rep. 711; *Ross v. Railway Co.*, 8 Fed. Rep. 544, 5 Sup. Ct. Rep. 184; *Railway Co. v. Perego*, (Kan.) 14 Pac. Rep. 7; *Mason v. Machine-Works*, 28 Fed. Rep. 228. A station agent is held not to be a fellow-servant of a carpenter employed by the railroad company in a department wholly disconnected from that in which the agent is working. *Palmer v. Railway Co.*, (Idaho,) 13 Pac. Rep. 425. And a common hand engaged in the business of relaying a track under the control of a foreman is not in the same employment within the sense of the rule as one who is managing a switch-engine which is used in moving cars, and not engaged in the work of relaying said track. *Garraty v. Railroad Co.*, 25 Fed. Rep. 258. At common law, where the master delegates to any officer, servant, or agent, high or low, the performance of any duty which really belongs to the master himself, the latter is not relieved from liability for the negligent acts of such servant. *Railroad Co. v. Fox*, (Kan.) 3 Pac. Rep. 320; *Railroad Co. v. Moore*, (Kan.) 1 Pac. Rep. 644. So it is held, directly contrary to the decision in the case of *Smith v. Potter*, *supra*, that an inspector of cars is not a fellow-servant of a brakeman. *Braun v. Railroad Co.*, (Iowa,) 6 N. W. Rep. 5. And when a railroad company confers authority upon one of its employes to take charge and control of a gang of men, in carrying on some particular branch of its business, such servant in governing and directing the movements of the men under his charge with respect to that branch of its business, is a representative of the company, and not a fellow-servant of the men under his control. *Railway Co. v. Hawk*, (Ill.) 12 N. E. Rep. 253; *Railway Co. v. Lundstrum*, (Neb.) 20 N. W. Rep. 198.

(5 Utah, 334)

ENRIGHT and others v. GRANT and Wife.

(*Supreme Court of Utah*. October 17, 1887.)

1. CREDITORS' BILL—PLEADING—INSOLVENCY OF JUDGMENT DEBTOR.

A creditors' bill by two plaintiffs,—one of whom alleges a judgment, with execution, and return of *nulla bona*; the other, a judgment without execution, and a general allegation that plaintiffs know of no property upon which a levy can be made; and that the judgments will remain wholly unsatisfied unless they can resort to equity,—is sufficient allegation of insolvency to sustain the bill as to the second judgment, in view of the fact that the judgment creditors are joined as co-plaintiffs. *HENDERSON, J.*, dissenting.

2. SAME—STATUTORY REMEDY NOT EXCLUSIVE—SEQUESTRATION.

The "proceedings supplemental to execution" established by Code Civil Proc. Utah, c. 2, tit. 9, Laws 1884, are not exclusive of the common-law and equitable remedies; and a creditor may bring an original action in the district court, in the nature of a creditors' bill, to sequester the debtor's property, and subject it to the payment of his debt.

3. SAME—JOINDER OF CREDITORS.

Creditors on separate judgments may join as co-plaintiffs, and enforce their rights by creditors' bill, in one action.

4. JUDGMENT—BY DEFAULT—OPENING—DISCRETION OF COURT—REVIEW ON APPEAL.

Where a motion to open a default judgment is addressed to the discretion of the trial court, its action will not be reviewed on appeal unless the discretion appears to have been abused.

Appeal from district court, Third district; C. S. ZANE, Judge.

Arthur Brown, for appellants. *E. D. Hoge* and *W. I. Snyder*, for respondents.

HENDERSON, J. The complaint in this case is in the nature of a judgment creditor's bill. It avers that plaintiffs Enright and Kelly are copartners; that as such, on the thirty-first day of December, 1883, they recovered a judgment in the Third district court against Richard Grant for \$866.55 and costs, and that on that day an execution was issued and delivered to the sheriff of Summit county, where the defendants reside; "that said execution has been duly returned by said sheriff wholly unsatisfied;" that on the ninth day of April, 1884, the plaintiff Bremer obtained a judgment against defendant Richard Grant in the Third district court for \$426.07, and costs, (there is no allegation that execution has been issued or returned;) that defendants are husband and wife; that, after the indebtedness accrued upon which the said judgments were rendered, the defendant Richard Grant was the owner in his own right of certain real estate in Park City: that he sold it, and with the proceeds purchased lot 11, in block 22, in Park City, and caused it to be conveyed to his wife, Bridget Grant, and built thereon a building, and purchased fixtures and stock necessary to conduct a saloon, and conducted a saloon business in the name of Bridget Grant, pretending it was hers; that Bridget had no property whatever, but that all of said property, fixtures, and stock was purchased with money belonging to Richard Grant, and that Bridget's title thereto was without consideration, and was wholly void, as against the plaintiffs; that Bridget has sold an undivided half of the property to one Clark, but that she still retains one-half, which, plaintiffs allege, in fact belongs to Richard, and is subject to their rights as his creditors; that Richard Grant was also the owner of certain mining claims in Summit county, which he sold to one M. Shaughnessy, and received his promissory note therefor for \$3,000, and that he assigned said note without consideration to his wife, and that his said wife has commenced suit on said note for the collection thereof, which suit is now pending; that all of said conveyances and transfers of said lot, saloon, and note to Bridget was in trust for Richard, and was done for the purpose of hindering, delaying, and defrauding the creditors of Richard, by concealing it from and putting it beyond the reach of such creditors; and that Richard has always remained in the possession and control of the whole thereof; "that the defendant Richard Grant has not any property other than that specified herein, to the knowledge of plaintiffs, out of which the execution on the judgments aforesaid could be satisfied, in whole or in part; and that, unless the said property can be applied to the payment of said judgments, the same must remain wholly unpaid." Judgment is demanded that the conveyances and transfers to Bridget be declared void as to plaintiffs, and that she be decreed to hold the same in trust for Richard and his creditors; and that the defendant's property, real, personal, and equitable, of whatever nature, be sequestered and applied to the payment of the judgments, and prays for injunction and receiver according to the practice in courts of equity, and that all of the property, real, personal, and equitable, of Richard, be transferred to such receiver.

To this complaint the defendants demurred upon the following grounds: *First*, that the court has no jurisdiction of the subject of this action, for the reasons that the "proceedings supplemental to execution" established by the Code of Civil Procedure of this territory are a substitute for a creditors' bill, and constitute the only manner of obtaining the relief sought; *second*, that said complaint does not state facts sufficient to constitute a cause of action; *third*, that there is a misjoinder of plaintiffs, for the reason that plaintiffs Enright & Kelly and said plaintiff Bremer do not stand in the same situation as creditors, and that they have no common interest as creditors; *fourth*, that several causes of action have been improperly united, for the reason that the

cause of action of said plaintiffs Enright & Kelly, and the cause of said plaintiff Bremer are united in this action.

February 20, 1886, the court overruled the demurrer, and allowed 10 days to answer, and, no answer being filed within the time allowed, default was entered, the cause brought to hearing October 26, 1886, and, on hearing, the court found the facts substantially as stated in the complaint, and made a decree that the plaintiffs by virtue of their judgment, and the commencement of this action, have a lien upon the property hereinafter described, which lien took effect on the thirty-first day of December, 1883. That the claim and title of Bridget Grant, of, in, and to an undivided one-half of lot 11 of block 22 of Park City, Summit county, Utah territory, together with the saloon building thereon, and the saloon fixtures, furniture, and stock, is without consideration, and is fraudulent and void, as against the plaintiffs in this action. That the indorsement and assignment of the promissory note of M. Shaughnessy for \$3,000 from Richard Grant to Bridget Grant be, and the same is hereby, set aside and deemed to be void, and that defendants reclaim their costs taxed at the sum of \$51.05.

On the twelfth day of February, 1887, the defendants moved to vacate the decree and default, on the ground that the decree had been rendered without evidence as to the fraud charged in the complaint, and on account of the excusable neglect of the defendants and their attorneys. Various affidavits were read in support of the second charge alleged, and rebutting affidavits were also read. The motion was denied. The defendants appeal from the decree, and from the order denying the motion of defendants.

The first question presented is whether an original complaint in the nature of a creditors' bill can be maintained, or whether the supplementary proceedings provided for by chapter 2, tit. 9, Code Civ. Proc. 1884, (Laws 1884, pp. 266-268,) is a substitute therefor, and precludes this action. Section 3, c. 55, p. 154, Laws 1854, provides as follows: "This Code establishes the law of this territory respecting the subjects to which it relates;" and section 172, p. 183, provides that "there is in this territory but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs." The argument of appellant is that the supplemental procedure above referred to is the only provision in the Code; that it takes the place of and precludes action by original complaint in the nature of a creditors' bill. The organic act (section 1868, Rev. St. U. S.) provides that the "supreme court and the district courts, respectively, of every territory, shall possess chancery as well as common-law jurisdiction." The mode of procedure and practice in the territorial courts is governed by the laws of the territory, (*Hornbuckle v. Toombs*, 18 Wall. 648;) but the jurisdiction of the district and supreme courts, under the section last referred to, cannot be abridged or legislated away by the territory, (*People v. Clayton*, 11 Pac. Rep. 206; *Bank v. County of Yankton*, 101 U. S. 129; *Stevenson v. Moody*, 12 Pac. Rep. 902; *Dunphy v. Kleinsmith*, 11 Wall. 610.) The jurisdiction thus conferred upon the district and supreme courts of the territory is such jurisdiction, at common law and in equity, as was exercised by the English common-law courts; and to determine whether such courts have jurisdiction over an equitable cause of action, and whether a plain, adequate, and complete remedy exists at law, so as to prevent resort to an equitable action, reference must be had to the principles of the common law of England. *Robinson v. Campbell*, 3 Wheat. 212. This is recognized by the Code of Civil Procedure, which enacts "that the jurisdiction of district courts extends to all civil actions for relief formerly given in courts of equity." Laws Utah 1884, p. 159.

If the statute in relation to supplementary proceedings on execution is to be regarded as a statute merely prescribing the practice or mode of procedure upon bills in the nature of creditors' bills, then it should be followed, and it would prohibit any other mode. I think it is plain that it is not to be so con-

strued. It is a statutory proceeding providing for a summary process, but its efficiency and utility depends much upon statutory construction. Its power to reach creditors or their property which may be outside the limits of the judicial district in which the proceedings are had, may be doubted. There is no provision for a receiver, and it may be said that it does not purport to be a direction as to how an independent equitable jurisdiction shall be exercised, but only to provide a speedy and summary proceeding to which the creditor may resort if he sees fit to do so. *Reed v. Baker*, 42 Mich. 272, 3 N. W. Rep. 959. Original suits brought by creditors in the nature of creditors' bills is a well-recognized subject of equitable jurisdiction, both in England and in this country, wherein the courts will proceed, according to the established principles and course of equity, to sequester and administer the estate of a debtor, and apply it to the liquidation of the indebtedness. Where a remedy exists at common law, and a new remedy is given by statute, and there are no negative words in the statute indicating that the new remedy is to be exclusive, the presumption is that it is meant to be cumulative, and a party may at his option pursue either the statutory or common-law remedy. *Cooley*, Torts, 651, and cases cited in note 1. In my opinion the statute under consideration is not a substitute for creditors' suits, and was consequently no bar to this action. *Freem. Ex'ns*, § 394.

It is also insisted that there is a misjoinder of plaintiffs and of causes of action. The right of several judgment creditors to join as co-plaintiffs, and enforce their rights by creditor's bill in one action, is established by the great preponderance of precedent, and should be favored as preventing multiplicity of suits. *Story*, Eq. Pl. § 537; *Dix v. Briggs*, 9 Paige, 595; 1 Pom. Eq. Jur. § 261, note 1; 2 *Story*, Eq. Jur. 890; *Brinkerhoff v. Brown*, 6 Johns. Ch. 189, 151, and 156; *Bisp.* Eq. § 527.

The second cause of demurrer—"that the complaint does not state facts sufficient to constitute a cause of action"—remains to be considered. It is contended that, as no execution had been issued and returned upon the judgment of plaintiff Bremer, no cause of action existed in his favor, and that the demurrer should have been sustained, and that the decree in his favor cannot be sustained. In all kinds and classes of creditors' suits, equity will not take cognizance where there is a remedy at law.

Counsel for appellants have cited us to various decisions in Michigan and New York holding that, before a bill can be maintained in equity, an execution must be issued and returned unsatisfied, and that this is jurisdictional. The courts of these states early held this rule, and, in both, the rule has passed into express statutory enactments. The general rule, where it is not regulated by statute, is that a judgment must be obtained, and certain steps taken, before equity will intervene; but there is much conflict in the cases as to how far the creditor must proceed before he can resort to equity. Much of this conflict arises from the effect that is given to judgments and executions by different statutes in various jurisdictions. 3 Pom. Eq. Jur. 464; *Trask v. Green*, 9 Mich. 358.

But the reported cases all agree that the prime inquiry is as to whether the complaint shows that there is no remedy at law; and where the bill is filed, as in this case, to reach choses in action and personal property, in such shape that no levy can be made upon it, or to reach real estate in which the debtor has but an equitable interest, it must be shown that the debtor has no other property upon which execution can be levied, and payment of the debt enforced; and, as before stated, the general rule is that this is shown by the issue of the execution, and its return *nulla bona*. This is conclusive evidence. But if this fact is established by other evidence, or in other ways, I can see no reason why it should not have the same effect. In the case of *Case v. Beauregard*, 101 U. S. 688, Mr. Justice STRONG, speaking for the court, upon this subject, says: "But, after all, the judgment and fruitless execution are

only evidence that the creditor's legal remedies have been exhausted, or that he is without legal remedy at law. They are not the only possible means of proof. The necessity of a resort to a court of equity may be made otherwise to appear. Accordingly, the rule, though general, is not without many exceptions. Neither law nor equity requires a meaningless form." When it appears from the bill that the debtor is insolvent, and that the issuing of an execution would afford no relief, it is not a necessary prerequisite to equitable interference. *Case v. Beauregard, supra*; *Turner v. Adams*, 46 Mo. 95; *Postlewait v. Keeler*, 3 Iowa, 365; *Bank v. Harvey*, 16 Iowa, 141; *Brainard v. Van Kuran*, 22 Iowa, 261; *Botsford v. Beers*, 11 Conn. 369; *Kipper v. Glancey*, 2 Blackf. 356; *Payne v. Sheldon*, 63 Barb. 169; *Cornell v. Radway*, 22 Wis. 260; *Barnes v. Dow*, (Vt.) 10 Atl. Rep. 258; *Prisay v. Hogan*, 53 Me. 554; Bisp. Eq. §§ 526, 527; *Tabb v. Williams*, 4 Jones, Eq. 352. When it comes to the proof, it may be difficult to establish, but we are dealing with it now as a pleading, and not as to what would constitute sufficient proof under it; but the general rule above referred to is a stringent one, and the allegation should be clear and explicit of the debtor's insolvency before equity can interfere. Bisp. Eq., *supra*.

Does this complaint make such allegation? We are now considering this complaint with reference to plaintiff Bremer, and for the purpose it must be considered as a complaint filed by him alone. The plaintiffs have seen fit to join together in the action, and they must show a joint right, or they can have no right; that is to say, the pleadings must show that all of the plaintiffs have a proper cause of action against the defendants. We have, then, in addition to the averment above quoted, an allegation by a creditor that an execution has been issued but a short time before, upon the judgment of another creditor, and returned *nulla bona*. I cannot believe that such an allegation, in view of the stringency of the general rule above referred to, can be considered as such a positive, direct, and unambiguous allegation of insolvency as to show on its face that the creditor has exhausted all his legal remedy. I do not forget the rule that, when a condition of things is once shown to exist, there is a presumption that it continues; and it may be said that the return of this execution by the sheriff but a few months before should be considered as establishing the fact that the debtor had no property, until it is rebutted. But I do not consider that rule or presumption of sufficient strength to overcome or constitute an exception to the stringent rule before stated. I am inclined to the opinion that this complaint does not show a cause of action on the part of plaintiff Bremer. But my associates are both of the opinion that the allegation of the issuing and return of the execution on the Enright & Kelly judgment unsatisfied, together with the allegation that the plaintiffs know of no property upon which an execution can be levied, and that the judgments must remain wholly unsatisfied, unless they can resort to equity, is a sufficient allegation of insolvency to bring it within the exception, in view of the fact that they are joined together as co-plaintiffs.

The objection that the decree was rendered without evidence is not well taken, if that were necessary. The decree recites the fact that evidence necessary to enable the court to render judgment was given.

The motion to set aside the decree and open the default was addressed to the discretion of the district court, and could only be reviewed by this court when the discretion has been abused, which we are not prepared to say in this case. *Howe v. Independence Co.*, 29 Cal. 72; *Bailey v. Taaffe*, Id. 422; *Coleman v. Rankin*, 37 Cal. 247; *People v. Rains*, 23 Cal. 127.

The decree appealed from should be affirmed.

ZANE, C. J., and BOREMAN, J., concur.

(2 Ariz. 286)

CARLYON v. FITZHENRY and another, Copartners, etc.

(*Supreme Court of Arizona.* September 1, 1887.)

1. BAILMENT—DEPOSIT—ORDINARY DILIGENCE.

Where a bailee not for hire allows money to be deposited in his safe for safe-keeping, and without his fault the safe is robbed, the owner must bear the loss.

2. SAME—USE BY BAILLEE.

In such a case, if the bailor consents to the use of the money by the bailee, if such robbery occurs before there has been such use of the money, the bailor must bear the loss.

Appeal from district court, Cochise county; BARNES, Judge.

Thomas Mitchell, for appellant. Wm. Herring, for appellees.

PORTER, J. Defendants were partners in the general grocery business. The defendant Fitzhenry, in the absence and without the knowledge of defendant Mansfield, received from the plaintiff \$400 in gold coin, and at his request, and for his accommodation, put the money in the firm's safe for safe-keeping. Mansfield knew nothing about the transaction until after the loss of the money. The plaintiff and Fitzhenry being together in defendants' store, in the absence of Mansfield, Fitzhenry told the plaintiff "that the defendants might be short of cash for freight, and asked him if they might use one hundred or one hundred and fifty dollars of the money if they needed it, to which the plaintiff replied that they might use the whole of it, provided he could have it by the first of the following month." The defendants' safe was afterwards robbed, and the plaintiff's money, among other things, lost.

The important question arises, did that conversation change the relation of bailor and bailee to that of creditor and debtor, without regard to whether the money was used or not? The true rule is as stated in 1 Add. Cont. 530, cited by counsel for plaintiff, and is as follows: "If a sum of money be bailed by one man to another under circumstances fairly leading to the presumption that the bailee has authority from the bailor to use it or not, as he may think fit, the bailee will stand in the position of a mere depositary, or he will be clothed with the increased duties and liabilities of a borrower, according as he may or may not have thought fit to avail himself of the privilege of user, impliedly accorded to him. If he puts the money in a coffer or bags, and refrains from using it, and so preserves its identity, with the intention of restoring it *individuo* to the bailor, he undertakes the duty of a mere depositary, and is bound only to take the same care of the deposit that he is in the habit of bestowing on his own money, and will not be responsible for loss by robbery, fire, or any other casualty. But if he were to mix the sum deposited with his own money, with the intention of restoring an equivalent, and so destroy the identity and individuality of the subject-matter of the bailment, this would be a user of the money, which would at once alter the nature and character of the bailment, converting it into a loan for use and consumption, with its increased duties and responsibilities."

We cannot see that there was an absolute loan of the money created by the conversation between plaintiff and Fitzhenry. It was contingent upon the necessity for the use of the money. No consideration having passed, the plaintiff did not lose dominion over the money till its acceptance. Fitzhenry testifies that the contingency did not arise, and that the money remained in the safe as at first placed, till the robbery. We find a case directly in point, not cited by counsel, in Mississippi Reports, vol. 60, p. 330, (reported in American Reports, vol. 45, p. 410,) *Caldwell v. Hall*, in which the opinion was rendered by the eminent Judge CHALMERS, which says: "Appellee Hall placed in the iron safe of appellant Caldwell the sum of thirty-five dollars. It was contained in an open box, and to it and from it Hall added and withdrew at his pleasure, so that at one time he had on deposit as much as seven hundred

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dollars. The money was never mingled with Caldwell's, nor was any receipt given for it, nor any entry of it made upon his books. His book-keeper, who carried the key of the safe, sometimes used small portions of it in making change, always dropping into the box tickets, showing the amount so withdrawn, and always replacing them within a few days. His habit in this regard was known to and acquiesced in by both the depositor and depository. Some months after the date of the original deposit, Caldwell's safe was robbed, without any fault or negligence on his part. His own money was lost along with that of Hall and other depositors. Caldwell was not a banker, but a merchant, and the deposits belonged to friends and customers to whom he had not made himself liable. The day before the robbery his book-keeper used fifteen dollars or twenty dollars of Hall's money, which not having been replaced, he paid to Hall after the robbery. This suit is brought by Hall to recover the balance of the sum stolen. The right to recover is rested upon the statement testified to by Hall, but denied by Caldwell, that at the time of the first deposit it was understood and agreed between the parties that the money was to be used by Caldwell in his business, if he so desired, and that it was received on this basis. It is not claimed that Caldwell actually then became the borrower of the money, and that the relation of creditor and debtor then arose, but that Caldwell became a bailee of the money, with an agreement to return it in specie, or to use it and repay with other money at his option. * * * In order for this suit to be successfully maintained, such a state of facts must be shown as will warrant the idea that Caldwell, when the money was deposited, became at once the debtor of the depositor; and testing the case by Hall's own testimony, it is evident that such was not the contemplation nor agreement of the parties. The true aspect of the case, under the facts testified to by him, is this: The money was received by Caldwell as a bailee, without reward, and was to be so held and accounted for by him, with permission, however, to use it in his business, if at any time thereafter he should elect so to do. If he *did* use it, he was to become at once the debtor of the depositor. If he did *not*, but on the contrary it should continually remain on deposit at all times subject to be drawn out by the depositor whenever he chose, and without consultation with Caldwell, the latter remained a bailee without hire and bound only for that ordinary care demanded of persons occupying that position. It is not pretended by appellee that appellant, at the time of the deposit, borrowed the money or in any way indicated a present intention to appropriate it to his own use; and the subsequent manner of dealing with it by both parties shows that it continued to be regarded by them both as the property of the depositor. Under this state of facts, there was no liability upon the depository."

The defendants requested the court to charge the jury as follows: "The court instructs the jury that, although they may find from the evidence that the plaintiff, at the request of the defendant Fitzhenry, consented that the defendants might use a part of the money which he had deposited with them for safe-keeping, if they needed it, that alone would not constitute a loan, and that the plaintiff cannot recover on the third cause of action, unless you further find from the evidence that the defendants did in fact use the money." But the court refused so to charge, but charged the jury that if they "believed from the evidence that the defendant Fitzhenry requested the plaintiff to permit him to use the said money, or a part thereof, and the plaintiff consented that he might so do, and if they also believed that this transaction was one for the benefit of the firm, then the relation of bailor and bailee, which had heretofore existed between the parties, was changed to one of creditor and debtor, as to the amount which the plaintiff consented that the defendants might have the use of, and the plaintiff would be entitled to a verdict on the third cause of action for that amount, whichever the jury might find it to be from the evidence, whether the money was in fact used or not." The re-

fused instruction should have been given, and the one given should have been refused. Before the use of the money by defendants the contract was unexecuted and the title had not passed to defendants.

The judgment is reversed and the cause remanded.

(15 Or. 330)

SWEENEY v. McLEOD and others.

(*Supreme Court of Oregon.* October 17, 1887.)

1. CONTRACTS—PUBLIC POLICY—AGREEMENT FOR "LOBBY SERVICES."

It is against public policy for a person to hire himself out to perform "lobby services" with members of the legislature, and a contract for such services is illegal and invalid.

2. SAME—ATTEMPT TO INFLUENCE MEMBERS OF LEGISLATURE—DISCLOSURE OF INTEREST.

Crim. Code Or. § 633, providing that any attempt to influence members of the legislature, in relation to measures pending before the assembly, "without first truly and completely disclosing to such members" the interest of the person making the attempt, shall be punished by imprisonment, does not, by implication, make such an attempt, *after* such a full disclosure, a legal undertaking, nor does it legalize contracts for such services even if the services are to be performed *after* making the required disclosure of interest.

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.
H. T. Bingham, for respondent. Zera Snow, for appellants.

STRAHAN, J. The material portions of the complaint in this action are as follows: That on the twelfth day of December, 1886, the defendants employed plaintiff as their agent to procure evidence to be submitted to the legislature of the state of Oregon, which was soon thereafter to convene, or to such committees of said legislature as might be appointed to investigate the subject, that the method of taking salmon fish by means of fish-wheels at the fishery of the defendants at Celilo, Oregon, was not detrimental to the salmon fishing interests of the state, and was not more destructive of fish than other methods of capture. And they employed plaintiff to attend said session of the legislature, and, by means of all *legitimate importunity* and submission of evidence, to prevent the passage of any law prohibiting the taking of salmon by fish-wheels. And, as a consideration for such services to be done and performed by the plaintiff for the defendants as aforesaid, defendants agreed and promised to pay the plaintiff as much as his said services were reasonably worth, and to pay him for all moneys he should pay out in the doing of said services for which he was employed by the defendants as aforesaid, and also agreed to pay him his outlay in expenses in attending the said session of the legislature; that in pursuance of said hiring and agreement plaintiff did procure such evidence, and did submit the same to the several committees appointed by the legislature for the investigation of fish-wheels for the taking of salmon fish by the defendants and others, *and by his efforts induced favorable reports by the said committees* allowing the use of fish-wheels, but providing for open days in each week when the wheels should not be used for the taking of fish; and *finally succeeded in preventing any legislation prohibiting the use of fish-wheels* for the taking of salmon fish. The complaint then alleges various sums of money paid out by plaintiff as "expenses necessarily incurred," among which are \$100 paid Henry Johnson, and \$15 for three boxes of cigars used in the entertainment of members of the legislature while in the employment of defendants as aforesaid.

The defendants' answer denies the material allegations of the complaint, and then alleges, by way of separate defense, that about the twelfth of December, 1886, the defendants engaged the plaintiff to attend the session of the legislature of the state of Oregon, thereafter shortly to convene, and to appear before said legislature, and such committees of said body as might have the subject in charge, then and there to make an argument and showing that the

taking of fish by means of fish-wheels was not injurious to the fishing interests of the state; that at the time of such employment plaintiff had been engaged by other persons interested in and engaged in the business of fishing by means of fish-wheels, for a similar service in their behalf by the plaintiff; in consideration whereof the plaintiff agreed to accept and receive from the defendants the sum of \$90, in full satisfaction and settlement for all service rendered under the engagement and employment by the defendants as aforesaid, and of all expenses incurred in the course of the same, which sum was then and there at the time of such engagement, and shortly thereafter, and prior to the commencement of this action, paid to plaintiff by the defendants, and the plaintiff agreed to perform no service and incur no expense other than such as by the said sum of \$90 would be thereby paid for; and that this is the same service mentioned in complaint, and none other. A further defense alleges that at and during all the time mentioned, while the plaintiff was performing such service, he was also secretly in the employment of other persons representing the same interests, and received divers sums of money therefor and kept the same concealed from the members of the legislature; but on the contrary the plaintiff gave it out, and caused it to be understood among members of the legislature, that he was not so employed by any persons interested in the taking of fish by means of fish-wheels, and had no pecuniary interest therein, but was acting wholly in the public interests, unbiased by private interest or employment, intending then and there and thereby to exercise a greater influence with said members of the legislature, and of said committees, and intending then and thereby and by the secrecy and deception aforesaid, to corrupt the judgment and understanding of the said legislature, and of the members thereof. Another defense alleges that for \$90 the defendants employed the plaintiff to appear before the legislature, then about to convene, to make an *argument*, and by means thereof a showing before such legislature and such committees thereof as might have the subject in charge, that the taking of salmon by means of fish-wheels was not injurious to the fishing interests of the state, and not more injurious than the taking of fish by other means. That plaintiff failed to appear before the legislature, or any committee thereof, or to make any *argument*, but instead thereof did then and there act wholly as a "lobby member," in the interests of the taking of fish by means of fish-wheels, and then and there in the lobby chambers and corridors of said legislative hall, and on the street, at the hotels and boarding-houses, at the town of Salem, where said legislature convened, personally importuned divers and sundry members of said legislature, and of its committees, in the interests of the taking of fish by means of fish-wheels; and did then and there, as such "lobby member," at the places aforesaid, seek to use his personal influence with the members of said legislature and of said committees, with many of whom the plaintiff was personally acquainted, in the interest of fishing by means of fish-wheels, and did expend of the money so paid plaintiff as aforesaid, large sums of money in liquors, cigars, and dinners in entertaining said members of said legislature and of said committees, etc.; and concealed from said members and committees the fact of plaintiff's said employment. The new matter in the answer is all denied by the reply. The trial resulted in a verdict and judgment for the plaintiff in the sum of \$281, from which judgment an appeal is brought to this court.

On the trial in the court below, the evidence on the part of the plaintiff tended to show that about the eighth of December, 1886, it was arranged between plaintiff and defendants that plaintiff should immediately enter the service of the defendants as a *detective* and agent, to keep them advised and informed as to what was going on with respect to rumored hostile action against fishing by fish-wheels, by various persons interested adversely to the defendants, and that such service was to continue during the session of the legislature; and that for such service the plaintiff was to receive a rea-

sonable sum, and be reimbursed all his expenses incurred and paid out by him in the service; that he incurred the expenses set out in the complaint, and that his services were reasonably worth \$200 per month. On the part of the defendants the evidence tended to prove that in December the defendant McLeod heard that plaintiff was engaged to represent the fish-wheel men at the coming session of the legislature, where it was supposed measures antagonistic to fish-wheels were to be pressed, and he wrote to plaintiff inquiring of him what was going to be done, and what it would cost to let us (defendants) into the fight. The plaintiff then came to Celilo, and he came a number of times afterwards without defendants' solicitation. He wanted money, and talked about his going to Salem when the legislature convened. He said he knew many of the members, and had a personal influence with them, and that he could do a great deal to prevent hostile legislation; that he had experience in that class of work, and if necessary could steal any bill that might be passed; that he had done that in Washington Territory; that he must have money to go on. Defendant McLeod told him he could make no contract with him till Mr. Taffe returned from the east, but plaintiff persisted in wanting money, and said he was on his way to Alkali, to see some of the members of the legislature whom he knew, and with whom he had personal influence. The defendant then gave him \$20, but did not direct him what to do with it nor did he say what he would do with it. Subsequently plaintiff again came to Celilo without solicitation, and wanted money to go to Salem. Defendant McLeod told him he could make no contract with him, because Mr. Taffe was still east. He persisted in wanting money, and defendant McLeod finally gave him \$70 more to get rid of him, and told him to work as far as that would go, and when his money gave out he was to stop. Never told him what he was to do for it, nor did plaintiff tell defendant what he would do with it. Never engaged plaintiff to perform any service, nor agreed to reimburse him in his expenses at Salem or elsewhere, nor agreed that McLeod & Co. should pay him for any service or any expense. Never authorized the incurring or paying any of the items charged in the amended complaint. That in January, 1887, after Mr. Taffe's return from the east, defendants were on their way from The Dalles to Celilo, and found plaintiff on the train. He again wanted money. Mr. Taffe and he were talking about what could be done if a bill were passed; to which plaintiff replied: "Well, I could steal the bill. The clerk of the senate was elected by me, and owes his position to me, and I'd steal the bill." The evidence of J. H. Taffe, one of the defendants, tended to prove that he and McLeod saw plaintiff on the train at The Dalles about the twenty-sixth of January, 1887. That witness then asked plaintiff what he could do if a bill should be passed injurious to the fish-wheel men. He said he could steal the bill. Witness asked him how. He answered: "Well, I can't exactly tell you how; but the clerk of the senate owes his position to me, and I could steal it through him."

At the conclusion of the evidence, the defendants' counsel asked the court, among other things, to charge the jury as follows: "That if the contract between the plaintiff and defendants was that plaintiff should attend the session of the legislature, and there to lobby with the members thereof against a bill there pending antagonistic to the taking of salmon fish by fish-wheels, and by lobby services prevent the passage of such a law, he could not recover thereon." Defendants' counsel further asked the court to instruct the jury as follows: "That if it was the understanding, between the plaintiff and defendants, that plaintiff should attend at the session of the legislature, and there privately importune, converse with, and persuade members of the legislature in the interests of the defendants, against any measures pending before the legislature antagonistic to the taking of salmon fish by means of fish-wheels, he cannot recover." Defendants' counsel further asked the court to instruct the jury as follows: "That if it was the understanding between plaintiff and defendants that the plaintiff should attend the session of the legislature, and by ex-

exercising, and seeking to exercise, his personal influence with members of the legislature in the interests of the defendants, and by means of such influence, and by then lobbying for the defendants, prevent, or aid in preventing, any legislation forbidding the taking of salmon fish by means of fish-wheels, he could not recover, nor could he recover for any expenses incurred while engaged in such service."

These instructions, with others asked by the defendants, embracing in substance the same legal propositions, were refused by the court, to which an exception was taken. The court then, of its own motion, gave the jury the following instruction: "By section 638 of the Criminal Code it is made a misdemeanor for any person, being an agent of another interested in the passage or defeat of any measure before the legislature in relation to such measure, to converse with, explain, or in any manner attempt to influence any member of the legislature in relation to such measure, without first truly and completely disclosing to such member the interest of the person whom he thus represents; and, if it was the contract between the plaintiff and defendants that the plaintiff should perform his service without disclosing truly and completely the interests of the defendants, he cannot recover; but, on the other hand, the plaintiff had the right to contract with the defendants that the plaintiff should go to the legislature, and, after truly and completely disclosing the interests of the defendants, oppose and prevent the passage of any law antagonistic to the defendants' interests, by public discussion, argument, or submission of evidence, or by privately, and not openly, conversing with and importuning individual members of its committees in defendants' interests, and by exercising, and seeking to exercise, a personal influence with them in the defendants' interests: provided, that all the while such member or members had been truly and completely informed, by the plaintiff, of the interests in behalf of which plaintiff was working and of his own interest therein; and the plaintiff can recover for such services if he was retained to perform the same, and for all expenses alleged in the complaint if they were incurred and paid out by him, if the plaintiff [defendants?] promised to reimburse his expenses; except that the plaintiff cannot recover for the items of \$15 alleged to have been expended for cigars in entertaining members of the legislature while he was engaged in such service."

The first question demanding our attention is the refusal of the court to give the instructions asked by appellants. These instructions all, in effect, assert the same principle, though somewhat varied in form, and we think they contain a correct statement of the law applicable to the particular facts before the jury, and that it was error to refuse them. It is against public policy for any person to hire himself out to perform lobby services for another, and all contracts made, or other acts done, in furtherance of such purpose, are illegal, and furnish no cause for action whatever for or against any one. In *Powers v. Skinner*, 34 Vt. 274, the principle is thus stated: "It has been settled by a series of decisions, uniform in their reason, spirit, and tendency, that an agreement in respect to services of a lobby agent, or for the sale by an individual of his personal influence and solicitations, to procure the passage of a public or private law by the legislature, is void, as being prejudicial to sound legislation, manifestly injurious to the interests of the state, and in express and unquestionable contravention of public policy. *Clippinger v. Hepbaugh*, 5 Watts & S. 315; *Wood v. McCann*, 6 Dana, 366; *Marshall v. Railroad Co.*, 16 How. 314; *Harris v. Roof's Ex'rs*, 10 Barb. 489; *Rose v. Truax*, 21 Barb. 361; *Bryan v. Reynolds*, 5 Wis. 200. The principle of these decisions has no relation to the equities between the parties, but is controlled solely by the tendency of the contract, and it matters not that nothing improper was done, or expected to be done, under it. The law will not concede to any man, however honest he may be, the privilege of making a contract, which it would not recognize when made by designing, corrupt men.

A person may, without doubt, be employed to conduct an application to the legislature as well as to conduct a suit at law, and may contract for, and receive pay for, his services in preparing and presenting a petition or other documents, in collecting evidence, in making a statement or exposition of facts, or in preparing or making an oral or written argument; provided all these are used, or designed to be used, either before the *legislature itself*, or some committee thereof, *as a body*; but he cannot, with propriety, be employed to exert his personal influence, whether it be great or little, *with individual members, or to labor privately in any form with them out of the legislative halls*, in favor of, or against any act or subject of, legislation."

In *Clippinger v. Hepbaugh*, *supra*, it is said: "It matters not that nothing improper was done, or expected to be done, by the plaintiff. It is enough that such is the tendency of the contract that it is contrary to sound morality and public policy, leading necessarily, in the hands of designing and corrupt men, to the use of an extraneous secret influence over an important branch of the government. It may not corrupt all; but if it corrupts or tends to corrupt some, or if it deceives or tends to deceive some, that is sufficient to stamp its character with the seal of disapprobation before a judicial tribunal." And to the like effect is *Brown v. Brown*, 34 Barb. 533; *Cook v. Shipman*, 24 Ill. 614; *Mills v. Mills*, 36 Barb. 474; *Trist v. Child*, 21 Wall. 441; *Wood v. McCann*, 6 Dana, 366; *Frost v. Belmont*, 6 Allen, 152; *Harris v. Simonson*, 28 Hun, 318; *Usher v. McBratney*, 3 Dill. 385, note; *Tool Co. v. Norris*, 2 Wall. 45; *McBratney v. Chandler*, 22 Kan. 693.

The last case cited states the rule thus: "The contract of an attorney for services as such, whether the services are to be rendered before a court, a department of the government, or a legislative body, is valid, and upon performance of the service a recovery can be had. The contract of a 'lobbyist,' in the sense in which that term is now used, for his services as such, is against public policy and void. When there is a single contract, and the services contracted for and rendered are partially those of an attorney, and partially those of a lobbyist, and blended together as part and parcel of a single employment, the entire contract is vitiated. 'That which is bad destroys that which is good, and they perish together.'"

Nor can we give our assent to the application which the learned circuit judge made of section 638 of the Criminal Code. That section provides: "If any person, having any interest in the passage or defeat of any measure before, or which shall come before, either house of the legislative assembly of this state, or if any person being the agent of another so interested, shall converse with, explain to, or in any manner attempt to influence, any member of such assembly in relation to such measure, without first truly and completely disclosing to such member his interest therein, such person, upon conviction thereof, shall be punished by imprisonment in the county jail not less than three months, nor more than one year, or by fine not less than fifty dollars nor more than five hundred dollars."

This section ought not to be so construed as to render any contracts valid which would have been void if it had not been enacted. Such was not its purpose. It does not render contracts valid made to secure lobby services, if they were made under such circumstances that the lobbyist could not be punished criminally. This would be extending the effect of this enactment very much beyond what we conceive to have been its object. Its sole purpose was to make lobbying under certain conditions *criminal*, but not to make the employment of the lobbyist, even under the particular circumstances enumerated in the section, one that should receive the encouragement of the law. The instruction given by the court below is not in harmony with this construction, and was therefore erroneous. Such contracts as the one sued on are always closely and rigidly scrutinized by the courts when sought to be enforced. Nothing wrong may have been intended in this particular case, nor

was it necessary. If the terms of the contract required any services to be rendered, or if the party employed, in furtherance of the general purposes of his employment, rendered or designed to render any services, either to cause or prevent any legislative action otherwise than by publicly presenting the subject before the legislature or some of its committees, such contract cannot be enforced in this state.

It follows from the views expressed that the judgment of the court below must be reversed, and a new trial awarded.

(15 Or. 339)

LILLIENTHAL and others v. CARIVITA and others

(Supreme Court of Oregon. October 18, 1887.)

1. APPEAL—NOTICE OF—FAILURE TO NOTIFY PARTIES INTERESTED IN RELIEF SOUGHT BY.

A motion to dismiss an appeal, on the ground that all the adverse parties to the suit had not been served with notice of appeal, will not be granted when it appears that the parties not served were interested as well as the appellant in having the judgment appealed from set aside, and were not *adverse* parties, but that the relief sought by the appeal could be granted without affecting their interests.

2. SAME—ADMISSION ON SERVICE OF NOTICE—RESIDENCE OF ATTORNEY.

An admission of service of notice of appeal in these words: "*State of Oregon, County of Multnomah—ss.: Service of the within notice by certified copy is hereby admitted in Portland, Oregon, June 1, 1887. ALEX. BERNSTEIN, Attorney for Defendants,*"—although it does not show that the attorney resided in the county named, is sufficient, and the court will imply that "service" meant all that the law required to make it valid.

Appeal from circuit court, Multnomah county.

STRAHAN, J. Counsel for respondents have filed a motion to dismiss the appeal in this cause for the following reasons: (1) That no appeal has been taken and perfected herein as by law required, in that all the adverse parties to this suit have not been served with any notice of appeal, nor made parties hereto, nor are they now before this court; (2) that the court has no jurisdiction herein, in that the alleged service of the notice of appeal upon the defendants' and respondents' attorney has not been properly made, nor is it such a service as is by law required.

The object of this suit was to set aside a judgment confessed by V. Carivita, and an execution issued thereon as fraudulent, which was older and upon its face had priority over the plaintiffs' claim, as well as the claim of all the other defendants. By its decree the court below set the same aside and from that part of the decree the plaintiff has not appealed, nor did the original plaintiff whose judgment was set aside, appeal.

Objection is now made that this party, whose judgment and execution were set aside on the ground of fraud, was an *adverse party*, within the meaning of section 527, Hill's Code. We think otherwise. A party is not bound to appeal from a decree in his own favor, as a condition to being heard on his appeal from that part of the decree against him. In addition to this, the parties who made this motion, are interested as well as the plaintiffs in the setting aside of the judgment and execution referred to. It was a fraud upon their right as well as the rights of the plaintiffs.

It seems that the only question on this appeal is one of priority. It is simply a contention as to who shall be first paid from the assets uncovered by the annulling of the fraudulent judgment. In *Thompson v. Ellsworth*, 1 Barb. Ch. 624, the term "adverse party" in this connection, was held to mean the party whose interest in relation to the subject of the appeal is in conflict with the order or decree appealed from, or the modification sought for by the appeal. And in *Senter v. De Bernal*, 38 Cal. 637, it is said: "Our Code allows any and every party, who is aggrieved, to appeal without *joining any one else*, no matter what may be the character of the judgment against him,

whether joint or several, and in this respect works a change from the former practice; but he is required to notify all other parties who are interested in opposing the relief which he seeks by his appeal, if they have formally appeared in the action in the court below, or his appeal, *as to those not served*, will prove ineffectual, and also *as to those served*, if the relief sought is of such a character that it cannot be granted as to the latter without being granted as to the former also." Here the only relief which is sought by this appeal, can be granted without in any manner affecting the interests of the defendant not served.

We might pass the other objection without any particular notice, for the reason that the specific and particular objection relied upon in the argument is not pointed out in the motion. But, waiving this defect, is the admission of service sufficient? It is as follows:

"*State of Oregon, County of Multnomah—ss.:* Service of the within notice by certified copy is hereby admitted in Portland, Oregon, June 1, 1887.

"ALEX. BERNSTEIN, Attorney for Defendants."

The particular defect claimed to exist in this admission of service is that it does not appear that said attorney resided in Multnomah county at the time he admitted service. This admission was made by an attorney of this court, and is his solemn act for and in behalf of the parties whom he represented, and no such refined construction as is now insisted upon can be admitted. He knew what was implied by the term "service," and in the absence of anything in the record to show the contrary, we must intend that "service" in this connection means all that the law requires to make it valid. In addition to this, it was made in Multnomah county, and we do not think that, for the purpose of defeating this appeal, we ought to intend that the attorney resided elsewhere.

Let the motion to dismiss be overruled.

(15 Or. 329)

JORDAN v. LA VINE and another.

(*Supreme Court of Oregon. October 17, 1887.*)

PRINCIPAL AND SURETY—UNDERTAKING FOR COSTS—LIABILITY OF SURETIES.

Upon a judgment against a plaintiff, who has filed an undertaking with sureties conditioned "for the payment of such sum as may from any cause be adjudged against the plaintiff," the sureties in the undertaking are liable for the costs of the action; following *Carlton v. Dixon*, (Or.) 12 Pac. Rep. 394.

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge. *W. T. Burney*, for respondent. *D. R. Murphy*, for appellants.

LORD, C. J. This appeal is brought from a judgment against the defendants on their demurrer to the plaintiff's complaint. The action was on an undertaking for the recovery of personal property of the defendant La Vine, and his sureties as co-defendants. The question of law raised on the facts is identical in principle with that decided in *Carlton v. Dixon*, 14 Or. 294, 12 Pac. Rep. 394. It was held in that case, upon a condition in an undertaking as here, "for the payment of such sum as may from any cause be adjudged against the plaintiff," upon a judgment adverse to the plaintiff, that the sureties in the undertaking are liable for the costs. See *Tibbles v. O'Connor*, 28 Barb. 538. In the original action the defendant La Vine was plaintiff. As the case cited was inadvertently overlooked by counsel, and as nothing has been suggested to impeach the correctness of that determination, it must govern in the decision of this case, and consequently the judgment is affirmed.

(37 Kan. 389)

STATE v. MOWRY.

(Supreme Court of Kansas. October 8, 1887.)

1. HOMICIDE—INSANITY—INSTRUCTIONS.

The defendant interposed the defense of insanity to the charge of murder in the first degree, and on the trial the court charged substantially that the test of the defendant's responsibility was whether, at the time of the homicide, he had capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he was doing, and had power to know that the act was wrong and criminal, and would subject him to punishment. *Held*, that it was a proper instruction; and *further held*, that the omission to charge that, if the defendant knew the act to be wrong, but was driven to it by an irresistible impulse arising from an insane delusion, he would not be responsible, was not error.¹

2. SAME—INTOXICATION NO EXCUSE.

Voluntary intoxication is no excuse for crime, and can only be considered in cases involving the condition of the defendant's mind when the act was done. On a charge of murder, the drunkenness of the defendant may be considered with a view of determining whether there was that deliberation, premeditation, and intent to kill necessary to constitute the offense.²

3. SAME—RESISTING ARREST BY PRIVATE PERSON WITHOUT WARRANT.

A private person may, in a temperate manner and without a warrant, arrest one who has just committed a felony; and it is murder for the person so attempted to be arrested to kill one whom he knows is in fresh pursuit and endeavoring to arrest him for such felony.

4. SAME—NOTICE OF CRIME FOR WHICH ARREST IS MADE.

Where a person has been apprehended in the commission of a felony, or in fresh pursuit, notice of the crime and the purpose of pursuit, by one endeavoring to arrest him for such crime, is not necessary.

5. SAME—INSTRUCTIONS AS TO INFERIOR OFFENSE—EVIDENCE.

Instructions upon an offense inferior in degree and included in the one charged, should not be given unless there is some evidence tending to show that the defendant is guilty of such offense.

6. SAME—EVIDENCE.

The verdict held to be sustained by the evidence.

(Syllabus by the Court.)

Appeal from district court, Cowley county; E. S. TORRANCE, Judge.

S. B. Bradford, Atty. Gen., and C. L. Swarts, for the State. Jennings & Troup and Irwin Taylor, for appellant.

JOHNSTON, J. At the April term, 1886, of the district court of Cowley county, Henry Mowry was prosecuted and convicted for the murder of James P. Smith. He seeks a reversal, on the alleged insufficiency of the evidence and supposed errors in charging the jury. It is conceded that he shot and killed Smith on the afternoon of April 21, 1886; but he defended on the ground that he was insane and irresponsible. There is testimony that in December, 1884, he began boarding at the house of O. F. Godfrey, his partner in business, whose family consisted of himself, his wife, and two children. While boarding there he became enamored with Mrs. Godfrey, and frequently declared his love for her. She listened to his protestations of love for some time without informing her husband, but later she discouraged his attentions, and requested him to remain away from the house. He then became moody and morose, and declared that it was more than he could bear to be separated from her. About this time he had an interview with his mother, who testifies that he was then in great distress of mind because of the cold treatment received from Mrs. Godfrey. He declared his affection for her, stating that she had encouraged his attentions at first, and that he had had illicit connection with

¹See note at end of case.

²That voluntary intoxication is no excuse for a crime, but that the fact of such intoxication is admissible in evidence on the question of intent, see *Buckhannon v. Com.*, (Ky.) 5 S. W. Rep. 358, and note.

her, and was the father of her infant child, but that now she repulsed him, and he begged his mother to intercede with Mrs. Godfrey to allow him to continue his visits at her house. On the morning of August 21, 1885, the day that Smith was killed, he called on Mrs. Godfrey, and again begged her to renew her former relations with him; but she refused, and stated that she would inform Mr. Godfrey of his conduct towards her. He then asked if anything occurred by which she should be without home, friends, or money, she would call upon him, and inquired if she would marry him in case anything should happen to Mr. Godfrey. She told him she would not, and he said, "That settles it; we can't be friends any longer;" and left the house. Later in the day he returned to the house, and found Mrs. Godfrey alone, when he demanded to know whether she intended to tell Mr. Godfrey upon him as she had threatened to do. She informed him that she would, and he replied that he would just as soon shoot her, and he thought he would do it before night. He had a shotgun with him, and during the parley, pointed it at her. She ordered him to leave the house, saying that she would call her son Frank and send him for her husband, and she followed him out of the house and did call her son and directed him to go and bring his father. After leaving the house he met Mr. Godfrey, and informed him that he had had trouble with his wife, and that she had a story to tell him; to go down to the house and hear it; and he asked him if he would promise to come back and hear his side of the story. This was agreed to by Mr. Godfrey, who immediately went to the house and had an interview with his wife, and returned to the hotel, where he again met Mowry. Mowry inquired if Mrs. Godfrey had told her story, and Mr. Godfrey replied that she had, and informed him that he could not come to the house again. Mowry then insisted that he should listen to his story, stating to Godfrey that the youngest child was his, and that he was going to have it; that he would spend every dollar he had on earth, but what he would ruin the family or have that child. Godfrey left him at once and returned to his home, and had been there but a short time when he discovered Mowry coming towards the house with a shotgun in his hand. Godfrey immediately took his gun and went to the front door, and as Mowry started through the gate towards the house, he ordered him to go. Mowry said, "I don't have to," and stepped back in the street. At this time Mrs. Godfrey ran in front of her husband, who pushed her aside, and Mowry then raised his gun and fired two shots through a window in that part of the house to which Mrs. Godfrey had been pushed. Mrs. Godfrey ran and called some workmen who were engaged upon a building near by for help. Mowry immediately started away from the house, reloading his gun as he went. He was pursued by a large number of persons who were in the vicinity. Smith, the deceased, was in the lead of those in pursuit of Mowry, and gained on him as they ran. When Smith came up within about 15 feet, Mowry turned with his gun and ordered Smith to halt, which he momentarily did. Mowry ran on again, followed by Smith, when he turned, brought his gun up, and halted Smith a second time. There was only a brief halt, for Mowry made another dash to escape, but was still pursued by Smith, who was closing in on him, when Mowry turned and a third time ordered him to stop, and almost at the same time fired at Smith, discharging a load of shot into his face and neck. Some one near by came up where Smith fell, and the only words he was heard to utter were, "Catch that man," and he died within a few minutes after he was shot. Mowry was pursued until he was captured, but not until he had shot another of his pursuers. There is testimony that, after his capture, he stated that he shot at Mrs. Godfrey, and supposed he had killed her; and further, when told that he had killed Smith, he said that he was sorry he shot him; that he had told him three times to stop and he would not do it, when he shot him; and that he would do the same thing again.

It is insisted by counsel for the appellant that his conduct towards Mrs.

Godfrey, and his acts immediately before and after the homicide, are evidence of insanity. They offered testimony tending to show that he acted differently about the time of the homicide than he had before in this; that he was moody and morose, restless at night, and absent-minded in the day-time, complaining of pain in his head, and on several occasions becoming excited when he would yell, cry, laugh, and sob by turns, breaking furniture, and threatening to injure and kill those who were his friends. And that these and other incidents, all of which have not been mentioned, show unsoundness of mind. Some of the medical experts expressed the opinion that a person acting in the manner in which Mowry was represented to have acted must have been insane, and some of them characterized it as an epileptic mania. On the other side, it is insisted that there was a complete failure to support the plea of insanity; that his conduct showed an infatuation, illicit, and without hope; that when he was repulsed by Mrs. Godfrey, he schemed to separate her from her husband by telling him that she was unfaithful to him, and that he was not the father of the infant child, and also by threatening to ruin the family if the child was not given up, and that his purpose was further disclosed when he asked her to be his wife in case of Godfrey's death. There is testimony that he purchased a bottle of liquor shortly before the shooting, and several of the witnesses say that he appeared to be drinking and drunk upon that day. It is claimed that partial intoxication accounts for some of his strange and unusual actions, and that, when his relations with Mrs. Godfrey had been exposed, and he had failed to intimidate Godfrey and cause him to part from his wife, he then drank liquor to nerve him for what he was about to undertake, deliberately secured a gun, loaded it, and provided himself with ammunition, and called at Godfrey's house for the purpose of killing Mrs. Godfrey, and sought to carry out that purpose by shooting into the room where he supposed her to be.

We will not undertake, nor is it necessary, to give a detailed statement of the mass of testimony which was taken in the case. We have examined it carefully, and we readily reach the conclusion that the verdict of the jury ought not to be disturbed. There is much in the testimony showing design, and intelligent efforts to accomplish it. His consciousness of guilt, his fear and efforts to escape after committing the felony at Godfrey's house, his coolness and deliberation in three times halting his pursuer, and in firing the fatal shot, and his subsequent recollection of all that transpired during his flight and capture make an exceedingly strong case showing responsibility, and it is difficult to see how the jury could have reached a different result.

There is an objection made to an instruction, wherein the court states the test of responsibility in a prosecution where insanity is asserted as a defense. The court directed the jury that, "if he was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know that what he was doing was wrong, then the law does not hold him responsible for his act. On the other hand, if he was capable of understanding what he was doing, and had the power to know that his act was wrong, then the law will hold him criminally responsible for it. * * * If this power of discrimination exists, he will not be exempted from punishment because he may be a person of weak intellect, or one whose moral perceptions are blunted or illy developed, or because his mind may be depressed or distracted from brooding over misfortunes or disappointments, or because he may be wrought up to the most intense mental excitement from sentiments of jealousy, anger, or revenge. * * * The law recognizes no form of insanity, although the mental faculties may be disordered or deranged, which will furnish one immunity from punishment for an act declared by law to be criminal, so long as the person committing the act had the capacity to know what he was doing, and the power to know that his act was wrong." We think the court stated the correct rule of re-

sponsibility where insanity is asserted as a defense. The "right and wrong test" was approved by this court in *State v. Nixon*, 32 Kan. 205, 4 Pac. Rep. 159. It is there said that "where a person, at the time of the commission of an alleged crime, has sufficient mental capacity to understand the nature and quality of the particular act or acts constituting the crime, and the mental capacity to know whether they are right or wrong, he is generally responsible if he commits such act or acts, whatever may be his capacity in other particulars; but if he does not possess this degree of capacity, then he is not so responsible." This test has received the almost universal sanction of the courts of this country. *Lawson, Insan.* 231-270.

The defendant urges that the instruction is erroneous, because it excluded the theory of an irresistible impulse or moral insanity. This question received the attention of the court, and was practically decided, in *State v. Nixon*, *supra*, although the question was not fairly presented in that case. It is there recognized as a dangerous doctrine, to sustain which would jeopardize the interests of society and the security of life. Mr. Justice VALENTINE says that "it is possible that an insane, uncontrollable impulse is sometimes sufficient to destroy criminal responsibility, but this is probably so only when it destroys the power of the accused to comprehend rationally the nature, character, and consequences of the particular act or acts charged against him, and not where the accused still has the power of knowing the character of the particular act or acts, and that they are wrong." Further along, he says that "the law will hardly recognize the theory that any uncontrollable impulse may so take possession of a man's faculties and powers as to compel him to do what he knows to be wrong and a crime, and thereby relieve him from all criminal responsibility. Whenever a man understands the nature and character of an act, and knows that it is wrong, it would seem that he ought to be held legally responsible for the commission of it, if in fact he does commit it." In a very recent case, the supreme court of Missouri considered the refusal of the trial court to charge that, if the defendant obeyed an uncontrollable impulse springing from an insane delusion, he should be acquitted. The court repudiated that doctrine, and Judge SHERWOOD remarked, in deciding the case, that "it will be a sad day for this state when uncontrollable impulse shall dictate a rule of action to our courts." *State v. Pagels*, 4 S. W. Rep. 931. It is true that a few of the courts have adopted this principle; but by far the greater number have disapproved of it, and have adopted the test which was given in the present case. *Lawson, Insan.* 270, 308.

The court was requested to instruct that, if there was a reasonable doubt as to whether the defendant was intoxicated or insane at the time the offense was committed, there must be an acquittal. This request was properly refused. Insanity is a defense, and upon that question the jury were correctly charged; but a reasonable doubt of the defendant's intoxication, or even if his drunkenness at the time was undoubted, it would not necessarily exempt him from legal responsibility. While voluntary intoxication is no excuse for crime, yet where the crime charged is murder in the first degree, which involves the condition of the mind when the act was committed, drunkenness may be considered by the jury in determining whether there was that deliberation, premeditation, and intent to kill necessary to constitute the offense. This principle was fairly stated to the jury, and the elements of the crime charged, together with the doctrine of reasonable doubt, were fully placed before the jury.

Complaint is made of a charge of the court relating to arrest. On this subject the court instructed that, "where a felony has been recently committed by any person, and a private citizen has reasonable cause to suspect that such person is guilty of its commission, the law authorizes such private citizen, while acting in good faith, to arrest the person who has committed the felony in order to prevent his escape, and in so doing he may use such personal force

as appears necessary, under the circumstances, to effect the arrest; and, in such case, if the person whose arrest is attempted has reasonable grounds for believing that is the actual intention of the person attempting the arrest, and his motives for so doing, he would not be justifiable in law in resisting the arrest." This instruction is correct, and applicable to the facts in the case. Mowry had committed a felony, and was instantly pursued by the deceased in an endeavor to arrest him. The deceased was pursuing him in a temperate and proper manner, without arms and without violence, to make the arrest. He had the right to make the arrest in this manner without a warrant, and hence the request for an instruction upon the subject of a void and illegal arrest was properly refused, and the argument of the appellant upon that question does not apply.

Neither is there any force in the objection that the testimony fails to show that Mowry was not notified nor aware of the purpose of the deceased in pursuing him. Notice is only required to give the person an opportunity to desist from flight and unlawful action, and to peaceably surrender. If he necessarily knows the purpose of the pursuit and attempted arrest, no notice is needed. It is murder for a person to kill one whom he knows is pursuing him for a felony which he has just committed; and it has been said that, "where a party has been apprehended in the commission of a felony, or on fresh pursuit, notice of the crime is not necessary, because he must know the reason why he is apprehended." Whart. Crim. Law, 418.

The further objection is made that the court failed to charge the jury upon the law of all the degrees of the crime of homicide inferior to and included in the one charged. The jury were instructed on the law of murder in the first and second degrees, and also upon the law of the third and fourth degrees of manslaughter. There was no testimony tending to show that the defendant was guilty of manslaughter in either the first or second degree; and therefore no instruction on those degrees was required or proper. The instructions should conform to the testimony of the case. If there is slight evidence even that the defendant may have committed a degree of the offense inferior to and included in the one charged, the law of such inferior degree ought to be given, but should never be given upon a degree of the offense which the evidence does not tend to prove. An instruction upon either the first or second degrees of manslaughter would not have been wholly inapplicable to the facts in the case, and might have confused and misled the jury. The action of the court in this respect was not erroneous. *State v. Mize*, 36 Kan. 187, 13 Pac. Rep. 1; *State v. Rhea*, 25 Kan. 576; *State v. Hendricks*, 32 Kan. 566, 4 Pac. Rep. 1050.

There are other objections to the charge, none of which are regarded to be material, and examination of the entire record satisfies us that the case was fairly tried, and that no sufficient ground for a reversal exists.

The judgment of the district court will therefore be affirmed.

(All the justices concurring.)

NOTE.

INSANITY AS A DEFENSE TO CRIME—TEST OF. The legal test of responsibility for crime is the mental capacity of the criminal at the time of the commission of the offense to discriminate between right and wrong with respect to the particular act charged to have been committed. U. S. v. Young, 25 Fed. Rep. 710; U. S. v. Ridgeway, 31 Fed. Rep. 144; *Hart v. State*, (Neb.) 16 N. W. Rep. 905; *State v. Nixon*, (Kan.) 4 Pac. Rep. 159; *State v. Murray*, (Or.) 5 Pac. Rep. 55; *State v. Pagels*, (Mo.) 4 S. W. Rep. 931; *Leache v. State*, (Tex.) 3 S. W. Rep. 539; *People v. Kernaghan*, (Cal.) 14 Pac. Rep. 566; *Hawe v. State*, (Neb.) 10 N. W. Rep. 452. In *California*, moral insanity, as distinguished from mental insanity, constitutes no excuse for a crime. *People v. Kerrigan*, (Cal.) 14 Pac. Rep. 849; *People v. Kernaghan*, Id. 566. So it is held in *State v. Pagels*, *supra*, that it is no defense to a crime, that the accused obeyed an uncontrollable impulse, springing from an insane delusion. See, also, *Leache v. State*, *supra*, for a discussion of the doctrine of moral insanity and uncontrollable impulse. In *Dacey v. People*, (Ill.) 6 N. E. Rep. 165, it is held, that the insanity which will relieve of accountability

for crime must be of such a character as to create an uncontrollable impulse to do the act charged, by overriding the reason and judgment of the criminal. Where partial insanity is relied on as a defense, it must appear that the crime was the product of the delusion or other morbid condition, and connected with it as effect with cause. *Guiteau's Case*, 10 Fed. Rep. 161; *State v. Hockett*, (Iowa,) 30 N. W. Rep. 742. Mere mental weakness, the subject being of sound mind, is not insanity. *Wartena v. State*, (Ind.) 5 N. E. Rep. 20. Nor is mental unsoundness, which is not the result of a disease, but is caused by allowing the passions to run until they have become uncontrollable. *People v. Durfee*, (Mich.) 29 N. W. Rep. 109. But the presence of intelligence is not an absolute test of sanity. *Bennett v. State*, (Wis.) 14 N. W. Rep. 912. And it is held in *Parsons v. State*, (Ala.) 2 South. Rep. 854, in opposition to, or qualification of, the doctrine "of the right or wrong test" laid down in the cases above cited, that, if the criminal has the capacity to distinguish between right and wrong with respect to the particular act charged, but, by reason of the duress of mental disease, has so far lost the power to choose between the right and wrong that his free agency is at the time destroyed, and the alleged crime is so connected with such mental disease as to be the product of it solely, then such criminal is not responsible. Insanity produced by protracted over indulgence in intoxicating liquors may be held to be an excuse for a crime. *People v. Blake*, (Cal.) 4 Pac. Rep. 1; *Territory v. Davis*, (Ariz.) 10 Pac. Rep. 359.

SAME—BURDEN OF PROOF. Where the plea of insanity is interposed to a criminal prosecution, the burden of proof is on the defendant to establish such defense. *Farris v. Com.*, (Ky.) 1 S. W. Rep. 729; *State v. Pagels*, (Mo.) 4 S. W. Rep. 931; *U. S. v. Ridgeway*, 31 Fed. Rep. 144. Where an insane person has lucid intervals, the law will presume that an offense committed by such person was committed in a lucid interval. *Leache v. State*, (Tex.) 3 S. W. Rep. 539. In general epilepsy, the usual presumption of responsibility attaches to acts committed in the intervals between one attack and another. *State v. George*, (Iowa,) 18 N. W. Rep. 298. Upon the question of what proof is necessary to overcome the presumption of sanity, three different views are entertained by the courts. It is held that such presumption may be overcome by evidence tending to prove insanity sufficient to raise a reasonable doubt of sanity at the time of the offense. *Dacey v. People*, (Ill.) 6 N. E. Rep. 165. So, also, that if there is some evidence tending to rebut the legal presumption of sanity, the burden of proof is changed to the state to show sanity beyond a reasonable doubt. *Ballard v. State*, (Neb.) 28 N. W. Rep. 271. On the other hand, it is held that a reasonable doubt of sanity raised by all the evidence will not justify an acquittal, but that the defense must be sustained by a preponderance of evidence. *Parsons v. State*, (Ala.) 2 South. Rep. 854; *People v. Kernaghan*, (Cal.) 14 Pac. Rep. 566. While, under the statutes of Oregon, if the commission of the crime is proven, the defense of insanity must be sustained by proof which satisfies beyond a reasonable doubt. *State v. Murray*, (Or.) 5 Pac. Rep. 55.

Insanity cannot be proven by reputation. *Walker v. State*, (Ind.) 1 N. E. Rep. 856. Circumstantial evidence, which reasonably satisfies of the existence of insanity, is sufficient. *State v. Pagels*, (Mo.) 4 S. W. Rep. 931.

(73 Cal. 583)

In re Estate of NOAH, Deceased. (No. 11,634.)

(*Supreme Court of California.* October 24, 1887.)

HUSBAND AND WIFE—SEPARATION—ALLOWANCE FROM DECEASED HUSBAND'S ESTATE.

A husband and wife, after being married six weeks, entered into a written agreement for separation; the husband giving the wife \$10,500, and she agreeing to receive it in satisfaction of all marital claims, alimony, and support. They had no children. She continued to live apart from him without any effort to set aside the agreement, or demand for further support, until his death. She then applied to the court for \$100 per month, under Code Civil Proc. Cal. §§ 1466, 1467, providing for the granting of a reasonable allowance for the support of the family of a decedent, during the settlement of his estate. *Held*, that she did not constitute the immediate "family" of the deceased, within the meaning of the statute, and that the allowance was properly refused.

Department No. 1. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

Pillsbury & Blanding, for respondents. *Horace G. Platt, Wm. Loewy, E. N. Dempsey*, and *Gordon Blanding*, for heirs. *Henry P. Highton*, for appellant.

MCKINSTRY, J. The appellant, Harriet T. Noah, as widow of the deceased, petitioned the superior court for an allowance of \$100 a month for her main-

tenance, under sections 1466 and 1467, Code Civil Proc. There was no child the issue of the marriage of petitioner and decedent.

The executors answered the petition; and at the trial testimony was given to prove that decedent and petitioner were married October 14, 1875, and, after living together five or six weeks, separated, and thenceforth lived separate and apart until his death, which occurred on the twenty-eighth of August, 1883; that, within six weeks prior to the marriage, decedent gave to the petitioner \$2,825 for her personal use, and supplied her liberally during the time they lived together; that the separation was by mutual consent of the parties; that upon the separation the petitioner for the allowance received from the decedent \$10,500,—\$500 of which was paid by her to an attorney at law who negotiated the settlement for her; that at the time of the marriage decedent owned certain improved real estate at the corner of Spring and California streets, San Francisco, the income from which was then about \$500 a month, and had in cash about \$35,000; that after the separation the decedent contributed nothing to her support, and she did not look or apply to him for her support or maintenance,—they were as utter strangers, and never spoke or corresponded; that she had expended the money paid her on the separation prior to a point of time about four years before the filing of her petition for the allowance, and during such four years she supported herself from her own earnings, with the assistance of her mother and brother. The value of the property in the hands of the executors when the petition for allowance was heard was \$26,400. There was no community property of the marriage. The petitioner, although informed of the death of decedent, did not attend his funeral.

The executors introduced a written agreement for separation, whereby, in consideration of the consent of the decedent that the said Harriet T. should live separate and apart from him, and of the receipt of \$10,500 by her, she agreed not to demand any alimony or support from him; that she would not contract any debts on his account; that the \$10,500 should be in full satisfaction of "all her marital claims," etc.

By our law, a husband and wife may agree in writing to an immediate separation, and may make provision for the support of either of them during such separation. Civil Code, 159. Of course, the transaction is subject to the rules which control the contracts of those occupying confidential relations. Civil Code, 158.

It is said by appellant that, upon her application for an allowance, the burden was on the executors of alleging and proving the "fairness" of the contract. The answer of the executors was not demurred to by the petitioner. The answer set forth facts which, if proved, justified the court in finding the agreement to have been fair, and the evidence admitted without objection tended to establish its fairness. The precise objection that the agreement was not admissible under the averments of the answer was not made by appellant when the agreement was offered in evidence. The objection was that it was "incompetent, immaterial, and irrelevant, *on the ground* that it was not sufficient in law to vary, alter, or affect the legal rights of the petitioner, on her application, as the widow of the deceased." Moreover, the agreement, as far as it was an agreement to separate, and for her support during the separation, was fully executed during the life-time of the deceased. The husband paid the money, and never sought to compel subsequent cohabitation. The wife received the money, applied it to her support, and ever after voluntarily lived separate and apart from her husband. The order of the superior court was not based upon the agreement alone, but on the further facts that, in accordance with its terms, she ceased to live with him, and from thenceforward was not a member of his family.

In this court the appellant urges that the agreement is void because not acknowledged by her in the manner prescribed for the acknowledgment of con-

veyances of the separate property of the wife. The objection was not taken in the court below; and, when the contract was entered into, the wife had no vested interest—certainly no “separate” interest—in the separate property of the husband.

But it is said the agreement did not affect the rights of the appellant as a widow,—rights which did not accrue until after the death of Joel Noah. It is not necessary here to decide that appellant, by entering into the agreement, waived or released any of her rights as *heir* of Joel Noah, deceased. We do not think she was absolutely entitled; as of right, to an allowance during the administration of his estate.

It was held in Massachusetts that while an antenuptial agreement between the widow and deceased, whereby she covenanted to accept a certain settlement in lieu of dower, and in place of any and every claim against his estate, would, if performed, be effectual as a release of dower, it was no answer to her claim for a distributive share of personal estate left by her husband. *Sullings v. Richmond*, 5 Allen, 187. And that such an agreement was of itself no defense to a petition for an allowance for necessaries. *Blackinton v. Blackinton*, 110 Mass. 461. See, also, *Wentworth v. Wentworth*, 69 Me. 254. The decisions seem to be based on the limited and inferior jurisdiction of the probate courts in Massachusetts, which had no power to construe or enforce marriage contracts. *Sullings v. Richmond*, *supra*. The contracts in the cases referred to—which preceded the marriage, and contemplated its continuation until the death of one of the parties—in no way operated to disturb the harmony of their personal relations, and they continued to live as husband and wife until the decease of the husband. In none of the cases was there any question that the surviving wife, or wife and children, constituted the family of the deceased at the time of his death.

It was held in New York that an antenuptial contract such as above mentioned, precluded the widow from demanding certain articles of personal property directed by statute to be set apart to her. *Young v. Hicks*, 92 N. Y. 235.

Section 1465 of the California Code of Civil Procedure provides that, upon the return of the inventory of an estate, the court wherein the administration is pending may set aside for the use of the surviving wife, or wife and children, the property exempt from execution. And section 1466 provides that if the amount set apart be insufficient for the support of the widow, or widow and children, the court, or the judge thereof, “must make such reasonable allowance out of the estate as may be necessary for the maintenance of the family, according to their circumstances, during the progress of the settlement of the estate.”

By statute of Maine it was enacted: “When an estate is insolvent, or no provision is made for the widow in the will of the husband, the widow *shall be entitled* to so much of the personal estate * * * as the judge deems necessary, according to the degree and estate of her husband, and the state of her family under her care.” *Gilman v. Gilman*, 53 Me. 191. In *Kersey v. Bailey*, 52 Me. 201, the court said the original intention of the statutes of Maine, giving the power to the probate court to set aside property to her, was to furnish a temporary supply for the wants of the widow and family while the estate was in process of settlement. And the learned court also said: “From the tenor of the statute [in this respect like the provision of our Code authorizing an allowance] directing the attention of the judge to the estate and condition of the husband, and the state of the family under the widow’s charge, it is apparent that the legislature, in making the provision, was contemplating the ordinary case where the parties to the marriage relation have lived together till death severed the tie.” In that case the widow, though the legal wife of the deceased, had not lived or cohabited with him as such for more than 40 years. He had *deserted* her;

but she, supposing him to be dead, married another man, with whom she lived as his wife until the death of her real husband. She lost nothing by his death which she had before possessed, and there seemed to have been a tacit relinquishment by each of all claims upon the other for a long period of time. The court concluded she was not entitled to have any part of the estate set aside to her under the statute. The same court had previously held the widow's claim for an allowance was not an absolute right; that the order was in the discretion of the probate judge. *Murray v. Cargill*, 32 Me. 516.

Section 122 of the former probate act of this state reads: "The probate court or judge shall make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family according to the circumstances," etc. In *Estate of H. H. Byrne*, the learned judge of the probate court of San Francisco (afterwards one of the justices of this court) said that the right to an allowance, under the section of the statute quoted, was founded on the statute alone. "It is quite different from the right of the heir to inherit, or of the widow to her dower, or the right to one-half of the community property. It is an allowance made to *the family*. * * * I think that the statute was intended to embrace those who were the immediate family of the deceased; those who were by law entitled, up to his death, to look to him for support and protection. * * * Yet any person to be entitled to any allowance out of the estate must have been in the receipt or in law entitled to demand of deceased a maintenance before his death." *Estate of Byrne*, Myr. Prob. 1.

We concur in this view of the law. We also think that, in enacting section 1466 of the Code of Civil Procedure, the legislature had in contemplation the ordinary case where "the parties to the marriage relation live together until death severs the tie." The letter of the statute may cover other cases. We are not to be understood as saying that, in every instance where the husband and wife have separated, the widow should be denied an allowance. She may have been driven from her home by the cruelty of her husband, and in such case the superior court may, perhaps, make an allowance, although the widow made no effort during the life-time of deceased to reassume matrimonial relations with him. It is enough to say that—since the appellant voluntarily made an agreement with her husband for separation, such as our law authorizes, received and enjoyed the benefits of the money paid for her support during the separation, and voluntarily continued to live apart from him, without any attempt to set aside the agreement, or to assume again the matrimonial connection, or even to demand further means for her separate support—the court below was justified in holding that the petitioner did not constitute the immediate family of the deceased, to whom was to be continued during the settlement of the estate the "reasonable support" which the husband in ordinary cases is presumed to furnish his wife. Order affirmed.

We concur: TEMPLE, J.; PATERSON, J.

(73 Cal. 590)

In re Estate of NOAH, Deceased. (No. 11,635.)

(*Supreme Court of California*, October 25, 1887.)

1. HOMESTEAD—SETTING APART BY COURT—BUSINESS PROPERTY.

M. died, making no provision in his will for his widow, leaving no community property, and a four-story brick business block, valued at \$25,000, his only separate real property. This could not be divided without material loss. No homestead was set apart during the husband's life-time. The widow applied to the court to set one apart, under Code Civil Proc. Cal. § 1465, providing that the court shall set apart a homestead, none having been selected during the life-time of deceased, out of his real estate. *Held*, as the property in question was of such nature that it could not have been selected as a homestead during the life-time of deceased, the petition was properly denied.

2. SAME—MONEY IN LIEU OF.

Where there has been no selection of a homestead during the life of deceased, the court cannot substitute money therefor, under Code Civil Proc. Cal. § 1476, providing for the sale of a selected homestead by the court, and a distribution of \$5,000 to the widow.

3. SAME.

Under Code Civil Proc. Cal. § 1468, providing for the setting apart of a homestead, out of the separate property of the deceased, for a limited period, the court has no power, in case such property is not capable of proper division, to substitute therefor the payment of \$5,000 to the widow.

Department 1 Appeal from superior court, city and county of San Francisco; **J. V. COFFEY**, Judge.

Pillsbury & Blanding, for respondents. *Horace G. Platt, Wm. Loewy, E. N. Dempsey*, and *Gordon Blanding*, for heirs. *Henry E. Highton*, for appellant.

McKINSTRY, J. Deceased left a will wherein no provision was made for his widow, Harriet T. Noah, the appellant. The will was duly probated September 28, 1883; and on the sixth day of August, 1884, appellant petitioned the superior court for an order setting apart a homestead out of the real property of the estate, "or for such other or different order as may be just and proper in the premises." There was no community property, and the only separate real property of the deceased at the time of his death was a certain lot in San Francisco, covered entirely or partially by a brick building four stories high, and which was and had been used exclusively for business purposes. The answer of the executors to the petition of the widow, beside the facts above mentioned, set forth the matters averred in the answer to the application of the widow for an allowance, as contained in the transcript in *Re Estate of Noah*, (No. 11,634,) ante, 287. It is averred in the petition for homestead that the property above described "cannot be divided without material injury."

In the view we take, it is unnecessary to inquire what might have been the legal effect of the post-nuptial contract given in evidence had there been any property out of which a homestead could have been carved, or whether the court below erred in overruling the objection to the introduction of that contract in evidence.

Appellant contends the order of the court below refusing to set apart a homestead should be reversed, because the court did not find upon the issues made by the pleadings. But, if the findings were proper, the bill of exceptions fails to show that they were not waived.

Section 1465, Code Civil Proc., provides, if no homestead (as was the case here) has been selected, designated, and recorded during the life-time of the deceased, "the court must select, designate, and set apart, and cause to be recorded, a homestead for the use of the surviving husband or wife, and the minor children, * * * out of the common property, or, if there be no common property, then out of the real estate belonging to the deceased." The sections of the Code relating to homesteads to be set apart by the court—probate homesteads—do not define the word "homestead."

It may be conceded that the real property set apart as a homestead to the surviving husband or wife, by order of the court, need not be actually occupied at the time when the order is made; but it would seem that it must be property which could have been selected as a homestead during the continuance of the marriage. Mr. Justice RHODES, speaking for the supreme court, said that there was nothing in the homestead act, as it existed in 1866, "which tended to the conclusion that any property could be set apart as a homestead by the probate court which might not have been dedicated as a homestead under the homestead act immediately preceding the death of the deceased." *Kingsley v. Kingsley*, 39 Cal. 666. So far as they bear upon the question we

are considering, we find no substantial variance between the provisions of the Codes and those of the homestead act referred to in *Kingsley v. Kingsley*.

It would be doing violence to the plain intent of the statute to attempt to set apart as a homestead a lot and four-story brick building, of the value of \$25,000, the building having been erected and occupied exclusively for business purposes, when, as averred in the petition here, "the property could not be divided without material injury." The homestead consists of a dwelling-house on which the claimant resides, and the land on which the same is situated. Civil Code, 1237. The property spoken of in the petition was dedicated to business purposes, and the owner could not have converted an undivided portion of it into a homestead by living in some of the rooms, and filing a declaration.

The probate court may, in a proper case, set apart a homestead, the value whereof—that is, the value of the land and dwelling-house—does not exceed \$5,000. The law does not authorize the court to set apart \$5,000 worth of property, or \$5,000 worth of land on which a dwelling-house may subsequently be erected. This is the more apparent with reference to setting apart as a homestead, for the use of the survivor, separate real property of the deceased "for a limited period." Code Civil Proc. 1468. The superior court would be justified in refusing to set apart land as a homestead unless it were made to appear that there was thereon an edifice which could be used as a dwelling-house. Where the survivor seeks to have set apart a portion of a large building, "and the land on which the same is situated," it should, at least, be made to appear affirmatively that partition of the land and building was practicable. Here, it only appeared to the court below that the property was the separate property of the deceased; that it was of the value of \$25,000; that the building was of brick, four stories high; that it had been rented to divers persons, who carried on various kinds of business therein; and that the property could not be divided without material injury.

It is urged by appellant that the court below should have ordered the land and improvements sold, and that \$5,000 of the proceeds be paid to her in lieu of a homestead. It is difficult to see why, if she was not entitled to a homestead, she should have money as a substitute for a homestead. But there is no provision of the Codes which authorizes such an order, and by strong implication such an order is prohibited. When a homestead, selected in the lifetime of the deceased, is inventoried at more than \$5,000, and a homestead of \$5,000 cannot be carved out of it, the court may order a sale of the homestead as selected, and distribute to the surviving wife \$5,000 of the proceeds. Code Civil Proc. 1476. Here, no homestead was selected during the lifetime of the decedent. Moreover, the appellant sought to have set apart to her a homestead out of the *separate property* of deceased. In such cases the court can only set apart a homestead "for a limited period, to be designated in the order, and the title vests in the heirs of the deceased, subject to such order." Code Civil Proc. 1468. How was the court to estimate the cash value of the use as a homestead, for a period never fixed by order, of part of property, undivided and inseparable? There certainly is no statutory provision authorizing the court to substitute \$5,000 in money for the temporary use of property as a homestead. Order affirmed.

We concur: TEMPLE, J.; PATERSON, J.

(73 Cal. 580)

PEOPLE v. TRAVERS. (No. 20,329.)

(Supreme Court of California. October 8, 1887.)

1. BURGLARY—DEGREE OF CRIME—VERDICT.

An information charged defendant, with an attempt to commit burglary, but did not state the time the attempt was committed, nor specify the degree of the crime. The verdict was "guilty as charged." Pen. Code Cal. § 460, provides that "every burglary committed in the night-time is burglary of the first degree, and every burglary committed in the day-time is burglary of the second degree." *Held*, that the verdict should have stated the degree of the crime, under Pen. Code, § 1157, which provides that "whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty."

2. SAME—REVERSAL—JEOPARDY.

The reversal of a judgment in a criminal case on the ground that the verdict failed to state the degree of the crime, as required by Pen. Code Cal. § 1157, is not sufficient to warrant the court to order the discharge of the accused under Const. Cal. § 8, art. 1, which provides that "no person shall be twice put in jeopardy for the same offense."¹

In bank. Appeal from superior court of the city and county of San Francisco; JOHN HUNT, Judge.

Frederick McGregor and *Garrel W. McEnerney*, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

SHARPSTEIN, J. The defendant was charged in the information with an attempt to commit burglary; whether in the night-time or day-time is not stated. The degree is not specified in the information. The defendant pleaded "not guilty." A trial was had, the jury rendered a verdict of "guilty as charged," and the court sentenced the defendant to imprisonment at San Quentin for the term of two years. The defendant appealed from the judgment, and his contention is that the verdict is a nullity by reason of the omission to specify the degree of crime of which the jury found the defendant guilty.

Burglary is divided into two degrees: "Every burglary committed in the night-time is burglary of the first degree, and every burglary committed in the day-time is burglary of the second degree." Pen. Code, 460. "Whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty." *Id.* 1157. Prior to the adoption of the Code the statute provided that "the jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, designate by their verdict whether it be murder of the first or second degree." Wood, Dig. 331. The Code has extended this provision to all crimes "distinguished into degrees." Therefore the construction given to the clause of the statute as it existed before the Code, in murder cases, may guide us in construing it in its broader application.

In *People v. Marquis*, 15 Cal. 38, the defendant was indicted for murder. The verdict of the jury was, "guilty as charged in the indictment." The judgment was reversed. The court said: "The statute [Wood, Dig. 331] provides that the jury shall designate in their verdict the degree of the offense. This they have not done; and the court in a capital case cannot assume that they designed from a general finding to fix the grade of the crime." The judgment was reversed and the cause remanded for a new trial. In *People v. Campbell*, 40 Cal. 129, the court reversed the judgment because the verdict did not designate the degree of the crime. Under a similar statute the su-

¹Neither the plea of jeopardy nor former acquittal can be interposed by an accused at a subsequent trial, upon a showing that his conviction on his former trial was set aside because of an illegal verdict, *Robinson v. State*, (Tex.) 4 S. W. Rep. 904, and note; and a conviction upon a void proceeding or indictment, when the penalty has not been inflicted, does not operate as a bar to a subsequent indictment for the same offense, *U. S. v. Jones*, 31 Fed. Rep. 725.

preme court of Alabama held it to be error to pass sentence upon a verdict which did not specify the degree of murder of which the jury found the defendant guilty. The court said that the statute which required the jury to specify the degree was imperative, and that it was the right of the accused to have it complied with. *Robertson v. State*, 42 Ala. 509. To the same effect are the cases of *McGee v. State*, 8 Mo. 595; *Dick v. State*, 3 Ohio St. 89, and *Parks v. State*, Id. 101. We are unable to find any case in which the contrary has been held. Since the adoption of the Code this court held it to be error, under section 1192, Pen. Code, to sentence a defendant, upon a plea of guilty to a charge of burglary, without first determining the degree. *People v. Jefferson*, 52 Cal. 452.

It therefore follows that the judgment must be reversed. And here the question arises, what further order should be made? Appellant's counsel insists that we should order the discharge of the defendant under that clause of the constitution which declares that "no person shall be twice put in jeopardy for the same offense." Section 8, art. 1, Const. In none of the cases which we have followed thus far was there an order that the defendant be discharged from custody, but in each of them there was an order that the cause be remanded for a new trial. Since we reverse the judgment on the authority of those cases, we deem it proper to make the same orders which were made in them.

Judgment reversed, and cause remanded for a new trial.

We concur: SEARLS, C. J.; MCKINSTRY, J.; THORNTON, J.; TEMPLE, J.; MCFARLAND, J.

(73 Cal. 574)

PEOPLE *ex rel.* DUNN v. MELONE. (No. 20,313.)

(Supreme Court of California. October 8, 1887.)

1. LIMITATION OF ACTIONS—RUNNING OF STATUTE AGAINST STATE.

Code Civil Proc. Cal. § 345, provides that the limitations prescribed in chapter 3 "apply to actions brought in the name of the state, or for the benefit of the state, in the same manner as to actions by private parties." An action was brought in the name of the state against a defaulting secretary of state. *Held*, that there was no presumption that the state was not barred in such an action; but the statute of limitations applied to the state without being made expressly applicable to such case.

2. SECRETARY OF STATE—LIABILITY FOR FAILING TO ACCOUNT—COMPTROLLER'S ACCOUNT AS EVIDENCE.

Pol. Code Cal. § 437, provides that "whenever any person has received moneys belonging to, or held in trust for, the state, and fails to render an account thereof, and to make settlement with the comptroller within the time prescribed by law, * * * or who fails to pay into the state treasury any money belonging to the state, upon being required so to do by the comptroller, within 20 days after such requisition, the comptroller must state an account with such person, charging 25 per cent. damages, and interest * * * from the time of failure. A copy of such account in any suit therein is *prima facie* evidence of the things therein stated." *Held*, that this section applied to an action brought by the comptroller against an ex-secretary of state for fees received and not paid into the treasury by the latter.

3. SAME—LIMITATION OF ACTION.

Held, further, that the word "whenever," beginning said section, should not be construed to mean "at whatever time moneys have been received," so that no limitation would apply to the action authorized by this section.

4. SAME.

A secretary of state was sued by the state comptroller for fees received and not accounted for by the former. Pol. Code Cal. § 437, provides that where any person fails to pay into the state treasury any money belonging to the state upon being required so to do by the comptroller, within 20 days after such requisition, the comptroller must state an account with such person, etc. *Held*, that the liability of the secretary accrued at the time he was in default, and not when the comptroller made demand for the deficit, and stated an account; and the statute of limitations began to run from the former period. THORNTON, J., dissenting.

In bank. Appeal from superior court, city and county of Sacramento; W. C. VAN FLEET, Judge.

Langhorn & Miller, for appellant. *Geo. A. Johnson*, Atty. Gen., for respondent.

TEMPLE, J. Respondent was secretary of state for the term of four years, ending December, 1875. It was his duty as such officer to collect and pay over to the state monthly the fees received by him. On the first of July, 1886, the relator, as comptroller, demanded of him that he account for, and pay into the state treasury, the sum of \$11,109.50, alleged to have been received by him while in office, but for which it was claimed he had failed to account, or make settlement with the comptroller, as required by law. Respondent taking no notice of this demand, the comptroller proceeded to state an account under the provisions of section 437, Pol. Code. The account so stated was served upon respondent, who still failed to make any response, or to pay any portion of the amount claimed from him. This suit was commenced August 14, 1886. A demurrer was interposed on the ground that the claim was barred by the statute of limitations. The demurrer was sustained, and judgment entered against the plaintiff, who takes this appeal.

Our statute of limitations is divided into two chapters,—one treating of actions for the recovery of real property; the other of actions other than for the recovery of real property. Section 345, Code Civil Proc., is in this last-mentioned chapter, and is as follows: "The limitations prescribed in this chapter apply to actions brought in the name of the state, or for the benefit of the state, in the same manner as to actions by private parties." In the case of *Piller v. Railroad Co.*, 52 Cal. 42, it was held that subdivision 1, § 339, Code Civil Proc., is applicable to all actions at law not specially mentioned in other portions of the statute. The effect of this must be that all actions at law other than for the recovery of real property are barred by some provision of chapter 3, Code Civil Proc., unless, of course, expressly excepted from its operation by that or some other statute. There can be nothing in the suggestion that the same kind of action as this is cannot be prosecuted by a private party, and, therefore, under section 345, the limitation cannot apply. There is no such requirement in that section. The limitation is to apply in the same manner. Therefore, if we find that the action brought by the state is within the terms of the statute, interpreted by precisely the same rules which would be applicable if the suit were brought by a private party, the action is barred. Under this rule there can be no doubt that the statute is applicable.

It is claimed, however, that the action is founded on section 437, Pol. Code, and by the terms of that section that (1) the statute of limitations does not apply; and (2) the cause of action does not accrue until the account is stated, and demand made as provided in that section. The portions of section 437, Pol. Code, so far as material here, are as follows: "Whenever any person has received moneys belonging to, or held in trust for, the state, and fails to render an account thereof, and to make settlement with the comptroller within the time prescribed by law, * * * or who fails to pay into the state treasury any money belonging to the state, upon being required so to do by the comptroller, within twenty days after such requisition, the comptroller must state an account with such person, charging 25 per cent. damages and interest * * * from the time of failure. A copy of such account in any suit therein is *prima facie* evidence of the things therein stated."

In reply to this position on the part of the state it is contended: (1) The section 437, Pol. Code, does not apply. It is not averred that respondent did not make monthly settlements, as the law required him to do, during his term of office. If his accounts rendered were false, his case does not fall within this statute; (2) the statute gives no right of action, but only prescribes the procedure, and a rule of evidence; and (3) if no right of action

accrues until an account is stated, and demand made, then it had become a state demand, and, no account being stated within a reasonable time, plaintiff's right of action, and right to make a demand, became barred.

The claim that by the terms of section 437, Pol. Code, no limitation applies to the action authorized by it, is made to depend principally upon the use of the word "whenever." "Whenever any person has received moneys," etc., counsel contends means, "At whatever time moneys have been received." A simple reference to the language of the section will show that this is a forced and unnatural construction. There is a general requirement that those who receive money shall account. The word "whenever" here simply means the same as "if," *i. e.*, in those cases in which parties receiving money do not account, etc.

The next question in logical sequence is the contention of respondent that section 437, Pol. Code, does not apply to this case. Here, too, it seems that a simple reference to the language of the section is sufficient to dispel all doubt. The proceeding is not authorized against those who render no accounts, and make no settlement, but against those who have received money, and render no accounts *thereof*; and also against those who fail to pay into the treasury moneys belonging to the state, upon being required so to do by the comptroller. The complaint shows that while secretary of state respondent received \$11,109.50 as fees, which he has never accounted for, and that he has failed to pay the same, or any portion thereof, into the state treasury, although he had been required by the state comptroller so to do.

The next inquiry naturally is whether a right of action accrued against the respondent upon demand being made upon him under the provisions of section 437, Pol. Code. In addition to that section, it is provided in section 433 of the same Code, that the comptroller may institute suits against persons who, by any means, have become possessed of public money, and who fail to pay over the same, and that of such suits the courts of Sacramento county shall have jurisdiction, without regard to the residence of the defendants. It was conceded, on the oral argument for the plaintiff, that some sort of an action might have been brought on behalf of the state for the alleged default, without proceeding under section 437. This is a weighty concession on the part of the state. Much the strongest position would have been, if on other grounds it was tenable, that the remedy provided in section 437 is exclusive. But under the circumstances, I presume the learned counsel for the people did not deem that position open to him. It is true that when a demand is necessary in order to fix the liability, and put the party in default, the cause of action does not accrue, and the statute does not commence to run until demand has been made. But can it be said that there is not a fixed liability where there is a dereliction which may amount to a criminal default, and for which, perhaps, the defendant might have been at once prosecuted and convicted? The defendant was required, as secretary of state, to account and pay over monthly, during his term, all moneys which should come to his possession. Can it be possible that he has failed to do this, and has retired from office a defaulter in a large amount, and yet has incurred no liability? Of course it was competent for the state to have removed the limitation altogether, but the question is, has it done so? There is certainly no plain provision in the statute to that end. There is nothing to indicate such an intent. It creates no right of action where one did not exist before. It has not, according to the construction given, substituted the new remedy for the old. It merely provides that in case of a defalcation an account may be stated, which shall cast the burden of proof on the officer alleged to be in default, and impose a penalty. There is nothing in the suggestion that the presumption is that the state is not barred, and therefore the statute of limitations must be construed, if possible, so as not to apply to the state. The rule merely amounts to this: The limitation does not apply to the state unless expressly made ap-

plicable. There is very little room for the operation of such a presumption here, where our Code expressly provides that the limitations shall apply to the state in the same manner as to private parties.

I think the judgment should be affirmed, and it is so ordered.

We concur: SEARLS, C. J.; PATERSON, J.; MCFARLAND, J.; MCKINSTRY, J.; SHARPSTEIN, J.

THORNTON, J. I dissent. The examination of the law bearing on this case, which is comprised in the statutes, (I refer to part 3, tit. 1, c. 3, arts. 5-7, Pol. Code, relating to the secretary of state, comptroller, and treasurer,) shows, in my judgment, that the failure by the secretary of state to render an account, and make settlement, or his failure to pay into the state treasury any moneys belonging to the state, upon being required to do so by the comptroller within 20 days after such requisition, so far as regards moneys which he has never inserted in any account rendered by him, is, under section 437 of the Political Code, an additional breach of his duty under the law, for which he is responsible. On such failure by the officer within the 20 days above mentioned, it is made the duty of the comptroller to state an account with such officer, charging him with 25 per cent. damages, and interest at the rate of 10 per cent. per annum from the time of the failure. On this account so stated an action may be brought, and on the trial of this action a copy of the account is, by section 437, *supra*, made *prima facie* evidence of the things therein stated.

The statute of limitations did not commence to run in this case earlier than the failure of the secretary of state to account, say at the end of the period of 20 days above mentioned. In this case the requisition of the comptroller was made on or about the first of July, 1886, and the action was commenced on the fourteenth of August, 1886. The action was, then, commenced within 30 days after the end of the 20 days. If it is urged that the defendant was already in default long before the demand by the comptroller was made, upon which default the statute of limitations had run, the reply is that Melone held his office under the law (section 437, Pol. Code) which made his failure to account or pay over a new or additional breach for which he was responsible. That the legislature was competent to enact such a law there can be no doubt. Melone took and held office with this power in the legislature. It was competent for the legislature to impose new and additional duties.

I am of opinion that the judgment should be reversed, and the cause remanded, with directions to the court below to overrule the demurrer to the complaint.

(73 Cal. 594)

In re Estate of SCHEDEL, Deceased. (No. 11,553.)

(*Supreme Court of California. October 24, 1887.*)

WILL—REQUESTS TO "CHILDREN"—GRANDCHILDREN.

S. died April 22, 1878, having executed a will April 9th. He bequeathed \$2,000 to each of the children of his deceased sister, when he or she should arrive at majority or his brother should die. If either of the children should die before his brother, leaving lawful issue, such issue to receive the parent's share. The sister of S. had died 42 years, and the last of her children 7 years, before the making of the will, which was known to the testator. There were four minor grandchildren of the sister of S. living at the time of the making of the will. *Held*, that the word "children;" as used by testator in referring to the issue of his deceased sister, should be construed to mean "grandchildren."

Commissioners' decision. Department 1.

Appeal from superior court, San Francisco county; J. V. COFFEY, Judge. S. W. Holladay, for respondents. Matt. J. Sullivan, for legatees.

BELCHER, C. C. George Schedel duly executed his last will on the ninth day of April, 1878, and died on the twenty-second day of the same month. In the will he uses the following language: "I hereby direct my said executors to

pay to my said brother, Claus Schedel, all the net interest, income, and revenue, of all and singular my estate and the property left by me, during the term of his natural life, to be paid to him by my said executors monthly. On the death of my said brother, Claus Schedel, I give and bequeath—*First*, to each of the children of my said brother, Claus Schedel, the sum of two thousand dollars, gold coin; and to each of the children of my deceased sister, Elizabeth Rosenbohm, *nee* Schedel, late of Loven, near Boemerlebe, Germany, the sum of \$2,000, gold coin; and to be paid to them when he, she, or they shall have arrived at the age of majority, or as soon thereafter as my said brother, Claus Schedel, should die; and if either of the children of my said brother or sister shall have died before the death of my said brother, Claus Schedel, leaving lawful issue, such issue to receive the parent's share." The residue of the estate was given to certain charitable or benevolent societies, but the bequests failed, because the testator died within 30 days after executing his will. The testator was never married, and his parents both died before he did. Claus Schedel died on the second day of February, 1885, and left surviving him two sons and a daughter, and one grandchild, the son of a daughter who died in 1874. The sons and daughter were past the age of majority when the will was executed, but the grandchild was then under age. The sister, Elizabeth Rosenbohm, died in March, 1836, and the testator knew when he made his will that she died in that year. She left surviving her one daughter and two sons, named John and George Rosenbohm. The daughter died in 1845, at the age of 13, without issue. John married, and had one son, named John George. John died in San Francisco in December, 1869, and the testator knew of his death and attended his funeral. John George died in San Francisco in October, 1870. George Rosenbohm, the other son of Elizabeth, married in New Orleans, and died there in February, 1871. He left surviving him four children, the issue of his marriage, named respectively, Henry, Andrew, Amelia, and Johanna Rosenbohm, all of whom were minors when the testator's will was executed, but are now of age and living.

When the estate was ready for distribution the above-named grandchildren of the testator's sister, Elizabeth, claimed that they were entitled, under the will, to have \$2,000 distributed to each one of them. The court thought otherwise, and distributed to each one of them only \$509, or in the aggregate \$2,000. They appealed from the decree, and now insist that the word "children" as used in that clause of the will reading, "to each of the children of my deceased sister," etc., should be construed to mean "grandchildren."

It has been held that grandchildren, and even great-grandchildren, may sometimes take under a will giving bequests to "children." Chancellor WALWORTH states the law upon this subject as follows: "As a general rule the testator must be presumed to have used words in their ordinary or primary sense, unless it appears from the context of the will that he probably used them in some other sense; or unless, by reference to extrinsic circumstances, the use of the words in their primary sense would render the provision of the will insensible or inoperative. Wigram, Wills, 20. The word 'children,' in common parlance, does not include grandchildren, or any others than the immediate descendants in the first degree of the person named as ancestor. But it may include them where it appears there were no persons in existence who would answer to the description of children in the ordinary sense of the word at the time of making the will; or where there could not be any such at the time or in the event contemplated by the testator; or where the testator has clearly shown, by the use of the other words, that he used the word 'children' as synonymous with 'descendants,' or 'issue,' or to designate or include illegitimate offspring, grandchildren, or step-children." *Mowatt v. Carow*, 7 Paige, 339.

Judge Redfield also states the rule as follows: "The word 'children,' as well as all other similar descriptive terms of classes or relatives, it will be

borne in mind, must always be understood in wills in its primary and simple signification, where it can be done; in short, where there are any persons in existence at the date of the will, or before the devise or legacy takes effect, answering the meaning of the term. And where the term 'children' has received a larger and more extended construction, as synonymous with 'issue,' it has generally been based upon something in the will, unless it resulted, as already intimated, from the fact that there were no children in existence. And where, from the construction of the whole clause, it can be made to appear that the testator meant by 'children' to include children and the issue of such children as were deceased, that construction will be adopted. Hence the term 'children' has been held to include, in that way, all the descendants of the person named. And there are numerous American cases wherein it has been held that grandchildren and great-grandchildren will take under a bequest to children, whenever that is necessary in order to give effect to the words of the will, or that appears to have been the evident intention of the testator." Redf. Wills, pt. 11, p. 336; see, also, 1 Roper & W.'s Leg. 68.

What did the testator in this case mean by the words, "children of my deceased sister?" His sister died 42 years, and the last of her sons 7 years, before he made his will. There were at that time, then, no persons in existence who were children of his sister in the ordinary sense of that word, and could be none when the legacies would take effect. He also made the legacies payable to the children of his sister "when he, she, or they shall have arrived at the age of majority." But he knew that his sister died in 1836, and must have known, therefore, that her children, if living, could not be under the age of majority in 1878. It is suggested by counsel for respondent that the requirement that these legacies be paid when the legatees "shall have arrived at the age of majority" is obviously misplaced by inadvertence; that it should have come in at the *end* of the paragraph quoted. But we are unable to see that there was any obvious misplacement. Courts construe wills as they are written, and are not authorized to transpose their provisions, and thereby change their meaning and import.

The will also provides that if either of the sister's children "shall have died before the death of my said brother, Claus Schedel, leaving lawful issue," such issue should receive the parent's share. The words, "shall have died" import a death occurring after the date of the will. But the testator knew of the death of one of his sister's sons in 1869, for he attended his funeral, and must be presumed to have known, seven years after it occurred, of the death of the other one. Taking, then, the whole will, and looking at all of its provisions in the light of the well-settled rules of law, it seems to us that the word "children," as used by the testator in describing the issue of his deceased sister, should be construed to mean "grandchildren."

It follows that the decree of distribution should be reversed, and the cause remanded for further proceedings in accordance with this opinion.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT: For the reasons given in the foregoing opinion the decree of distribution is reversed, and cause remanded for further proceedings in accordance with the views expressed therein.

(73 Cal. 617)

ENGLISH v. KORN and others. (No. 9,861.)*(Supreme Court of California. October 29, 1887.)***APPEAL—REVIEW—CONFLICTING EVIDENCE.**

Where the evidence is so conflicting that the appellate court cannot deny the sufficiency of the evidence to support the findings of the court below, the judgment will be affirmed.

Commissioners' decision. Department 2.

Appeal from superior court, Solano county; JOHN M. GREGORY, Judge. J. F. Wendell, for appellant. J. McKenna and Geo. A. Lamont, for respondent.

FOOTE, C. This is an action of ejectment for a narrow strip of land which the plaintiff claimed as against eight different defendants, who he alleged each held possession of a separate portion of it. It seems that the main question at issue with reference to the legal title involved in the action was as to where the division line between the parties actually existed upon the ground. And this depended upon the evidence introduced upon the trial. There was a very sharp and decided conflict of testimony as to that matter, and therefore it is not to be said the findings of the court in reference thereto are not supported by the evidence. And so appears to be the case with reference to the fact stated in the findings as to the defense of the statute of limitations. We have examined the very voluminous transcript filed here with care, and fail to find any prejudicial error committed by the court on the trial of the cause.

The judgment and order refusing a new trial should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

(73 Cal. 641)

BYRNE v. CRAFTS. (No. 11,793.)*(Supreme Court of California. October 31, 1887.)***IRRIGATION—WASTE WATER—RES ADJUDICATA.**

In a former proceeding plaintiff and others had been adjudicated to be the owners of the waste water of defendant's ranch, which was defined to be "that portion of said waters which is not necessary to irrigate the * * * ranch and for household purposes thereon." In an action by plaintiff to restrain defendants from interfering with his use of the water in question, *held*, under the former decision, the defendants were entitled to use the water only on their ranch, and only so much as was necessary for the immediate purposes clearly defined in the adjudication, and testimony tending to show how much water was required by defendants for those purposes, and how much had been diverted to other uses, should have been admitted.

Department 1. Appeal from superior court, San Bernardino county; JAMES H. GIBSON, Judge.

Byron Waters and H. M. Willis, (W. G. Webb, of counsel,) for appellant. Curtis & Otis, for respondent.

PATERSON, J. In *Cave v. Crafts*, (affirmed 53 Cal. 135,) it was adjudicated "that that portion of the said waters which is not necessary to irrigate the Carpenter ranch, and which is known as the waste water of the Carpenter ranch, and for household purposes thereon, had, for more than five years prior to the commencement of this suit, been used and appropriated by defendant Leffingwell and Byrne, and their grantors, adversely to and against the owners of the lands of Cottonwood Row, and so used by them to irrigate, and for agricultural purposes, and for domestic uses; that the irrigation, cultivation,

and profitable ownership of said orchards, farms, and vineyards of these plaintiffs solely and entirely depend upon these plaintiffs having and enjoying the full and entire use of the flow of said water according to their ownership, flowing without interference, hinderance or diminution thereof from any person; that plaintiffs are the owners of all the waters of Mill creek, and are entitled to have the same flowing in said *zanja*, to and upon their their respective lands, and to use the same for the purpose of irrigating their respective parcels of land; that defendants are the owners of the waste water of the Carpenter ranch or place, and to use the same upon other places to irrigate the same."

The judgment roll in that cause was introduced in evidence in the court below on the trial of this action, and the construction placed upon the findings which we have quoted by the court is shown in its twenty-fourth finding of fact, which is as follows: "(24) That neither one-third nor any fixed portion of the water of said Mill creek constitutes the waste water of the said Carpenter ranch, but said waste water consists entirely of such water, if any, as may be allowed by the owners of said Carpenter ranch to flow past their said land when entitled to use the same, and which said owners may not care to use for any purpose thereupon."

The rulings of the court upon the testimony offered also show that the contention of counsel for defendants was sustained. That contention is thus stated by them: "The decree ractically allowed to them a certain amount of water in absolute ownership to-wit, the amount that was necessary at the time of the decree for the irrigation of the Carpenter ranch. It decreed them the amount of water absolutely, and irrespective of any point of user of the same. If they had chosen to use no portion of it upon the Carpenter ranch, and to use it upon outside lands, not included within the boundaries of the Carpenter ranch, so long as they did not exceed the amount of water awarded them, we submit that plaintiff can make no complaint."

The court excluded testimony tending to show that the defendants had used water upon land other than the Carpenter ranch. We do not think that the waste water referred to in the findings quoted above "consists entirely of such water, if any, as *may be allowed* by the owners of said Carpenter ranch to flow past their land when entitled to use the same, and which said owners *may not care to use for any purpose* thereupon."

The decision of the court in the former case defines waste water to be "that portion of said waters which is not necessary to irrigate the Carpenter ranch, and for household purposes thereon;" and the judgment awarded to them in that case the use of the water "for the purpose of irrigating their respective parcels of land at the times respectively distributed to them, as aforesaid, * * * and so much of said water as may be necessary for household purposes and watering stock on their respective places." It is nowhere said in the decision or in the judgment in that case that the waste water was such as might be allowed by the plaintiffs to flow past their land, and which the owners *might not care* to use for any purpose thereupon. If the construction placed upon the decision of the court in the former case by the court below be correct, then the defendants here could lock up the water in lakes and ditches, and use the same for boating and fishing or any other purpose. It is clear that, under the adjudication made in *Cave v. Crafts*, the defendants are entitled to use the water only upon the Carpenter ranch. The quantity of water reasonable and necessary for the purposes of that ranch were matters of legitimate inquiry in the court below on the trial of this cause, and testimony tending to show how much water was required for, and how much was diverted from the Carpenter ranch, should have been admitted.

One of the objects of this suit was to enjoin the defendants from interfering with plaintiff's water rights. It is immaterial, so far as this branch of the case is concerned, that the plaintiff asked for a decree entitling him to the use

of one-third of all the water. As stated by the court in its finding, neither one-third, nor any fixed portion of the water constitutes the waste water of the Carpenter ranch. But the defendants claim to own all the water, including the waste water of the Carpenter ranch, and it was admitted by the defendants that they had taken in several acres of land not included in the Carpenter ranch, and irrigated the same with the waters of Mill creek; and they denied that, "by the irrigation of said lands, any water belonging to the plaintiff had been absorbed, or used by said defendants, or either of them," and denied "that, by the taking in of new, or any lands by defendants, or any of them, not heretofore irrigated, * * * water belonging to plaintiff had been absorbed or used by defendants or any of them. The building of a reservoir was admitted, and, if the testimony offered by the plaintiff had been allowed by the court, it might have shown that the defendants had used the water wastefully upon the Carpenter ranch, or diverted large quantities to and upon other lands. If such a showing had been made by the plaintiff, it seems that he would have been entitled to an injunction, though other portions of his prayer were denied.

The twenty-eighth finding of the court upon the question of adverse user and claim of right by defendants is somewhat ambiguous; but, as we understand the respondent, no claim is made other than that for domestic and household purposes during the months of July and August of each year on the days when the Carpenter ranch is entitled to water. There was evidence to support the finding of the court to this extent, at least.

Judgment and order reversed, and cause remanded for a new trial.

We concur: TEMPLE, J.; MCKINSTRY, J.

(73 Cal. 599)

WEEKS v. GARIBALDI SOUTH GOLD MIN. Co. and others. (No. 11,784.)

(*Supreme Court of California. October 25, 1887.*)

1. JUDGMENT—BY DEFAULT—VALIDITY—AFFIDAVIT OF PUBLICATION—JUDGMENT ROLL.
Where service was made by publication under Code Civil Proc. Cal. § 415, and on default judgment rendered, on appeal from the judgment, *held*, that no affidavit of publication, as required by subdivision 3 of that section, being in the judgment roll, the court had no jurisdiction, and the judgment was invalid.
2. CORPORATIONS—FILING ARTICLES OF INCORPORATION—PLEADING.
Civil Code Cal. § 299, which prohibits corporations from maintaining or defending any action relating to its property, or the rents, issues, or profits thereof, unless it shall have previously filed a certified copy of its articles of incorporation in the county where such property is situated, does not apply to an action against a corporation for work and labor done at its request; and hence in such an action it is error to render judgment for plaintiff on the pleadings simply for the reason that the answer fails to allege that the defendant has filed a copy of its articles of incorporation under the above section.
3. APPEAL—JUDGMENT ON PLEADINGS—BILL OF EXCEPTIONS NOT NECESSARY.
In an appeal, where the judgment recites that it was entered on the pleadings, a bill of exceptions is not necessary.

Commissioners' decision. Department 1.

Appeal from superior court, Calaveras county; C. V. GOTTSCHALK, Judge. *Reddick & Bolinsky*, for appellants. *F. W. Street*, for respondent.

FOOTE, C. This is an action to recover a certain sum of money alleged to be due for work and labor done and performed at the defendant's request, in and about certain mining property. The Garibaldi Mining Company is a foreign corporation, having no managing or business agent, cashier, or secretary, resident in the state of California. An effort was made to serve the defendants Spruance and Rodgers, by publication of summons under section 412 of the Code of Civil Procedure. It appears, however, that no affidavit of the printer, his foreman or principal clerk, that such publication took place, as

required by subdivision 3, § 415, Code Civil Proc., was made. Hence the proof is lacking of the service of summons, as required by law, and the record does not affirmatively show that the court had jurisdiction to render the judgment against those two persons. It has been held by this court that, upon a direct attack, as by appeal, upon the validity of a judgment, it is necessary that the record should show that the court had jurisdiction of the person against whom the judgment was rendered, and that in determining such a question a recital in the judgment cannot be regarded; that upon such a direct attack the recitals in the judgment will not be accepted as a substitute for the proof of service of a summons. *McKinlay v. Tuttle*, 42 Cal. 577.

The record on the appeal here consists of the notice of appeal and the judgment roll. Section 950, Code Civil Proc. The complaint was not answered by Spruance or Rodgers; hence, so far as concerned them, that roll, if properly made up, should consist of the complaint, the summons, with the affidavit or proof of its service, the memorandum of default, and a copy of the judgment. Sub. 1, § 670, Code Civil Proc. As we have seen, the record here shows an entire absence of any proof of publication of summons. The amended certificate of the clerk of the court filed here, shows that the transcript filed in this court "contains a full, true, and correct copy of the judgment roll in said action," and "full, true, and correct copies of *all* the papers contained in the judgment roll in said action on file in my office." It is not, therefore, affirmatively shown by the record that the court below had jurisdiction of the persons of the two defendants heretofore named, and on that account, as to them, it must be held on this appeal, which is a direct attack on the judgment, that the latter is invalid. The case of *Mahoney v. Middleton*, 41 Cal. 51, cited to us as conclusive against the views we have just expressed, is not in point. There the attack made upon the judgment was collateral; here it is direct.

The corporation defendant filed an answer traversing all the material allegations of the complaint. The plaintiff moved the court to render judgment against the defendant upon the pleadings, for the reason, as alleged, that the answer did not state facts sufficient to constitute a defense to the action. It was claimed that such a proceeding should be had by the court, because, as was alleged, the corporation did not aver in the answer that a copy of its articles of incorporation had been duly filed in the office of the county clerk as required by section 299, Civil Code. The court rendered the judgment as moved for. The pleadings show that all the material allegations of the complaint were denied by the answer. It was not necessary for the defendant to have pleaded in the answer that its articles of incorporation had been filed with the county clerk, under section 299, *supra*. The action was instituted to recover money for work and labor done at the instance and request of the defendant. The section of the Civil Code, *supra*, upon which the respondent bases this contention, does prohibit corporations from making defense to certain kinds of actions, unless they have previously filed their articles of incorporation in the office of the clerk of the county where such corporation has its property. But that prohibition only extends to such actions or proceedings as may be brought "in relation to such property, its rents, issues, or profits." It is clear that the action under consideration is not one which is included in the provisions of that section. There is nothing contained in its provisions which necessitates that a corporation defending such an action as this shall either aver in its answer, or prove as a fact on the trial, that its articles of incorporation had been filed in the county clerk's office.

The respondent makes the point that a judgment upon the pleadings cannot be reviewed without a bill of exceptions, and urges that the minutes of the court printed in the transcript cannot be considered as a part of the record. It is undoubtedly true that the minutes of the court are not a part of the record on appeal, unless incorporated therein in some mode authorized by

statute. And if the record did not show that the judgment had been rendered on the pleadings without a trial, the court would have to presume in support of the judgment that a trial had taken place. The absence of findings would not overcome this presumption, because it would be presumed that finding had been waived. *Mulcahy v. Glazier*, 51 Cal. 626; *Smith v. Lawrence*, 53 Cal. 34; *Carr v. Cronan*, 54 Cal. 600; *Reynolds v. Brumagim*, Id. 254. In such a case a bill of exceptions would be necessary to enable the court to see that the judgment had in fact been given upon the pleadings. But in this case it appears from the judgment itself that it was rendered upon the pleadings. It states that "the attorney for plaintiff moved the court for judgment on the pleadings in said action, as against the said defendant, the Garibaldi South Gold Mining Company, on the ground that the answer filed herein by said defendant did not state facts sufficient to constitute a defense to said action. After argument of said motion by the respective counsel for plaintiff and said defendant, and the court having fully considered the same, said motion for judgment upon the pleadings was granted."

In view of this statement in the judgment, what need is there for anything further? A bill of exceptions is only for the purpose of making something appear of record which without it would not so appear. In order to say that one is necessary in this case we should have to say that the statement above quoted had no proper place in a judgment, and must be entirely disregarded. But while there are undoubtedly some matters which it is improper to place in a judgment, yet we think that such matters as the one under consideration are not among the number, and that when placed there they must be regarded. See *Hayne*, New Trial, § 231, p. 694. The court having given a judgment for the plaintiff which on its face shows that it was rendered upon the pleadings in an action, where the judgment roll shows that all the material allegations of the complaint were denied in the answer, and there existing no condition precedent placed by law upon the defendant's right to file its answer and defend the action, it follows that such judgment cannot stand.

The judgment should be reversed, and cause remanded for further proceedings in accordance with the views herein expressed.

We concur: BELCHER, C. C.; HAYNE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded for further proceedings in accordance with the views therein expressed.

(73 Cal. 604)

FREDERICKS v. JUDAH and another. (No. 9,100.)*(Supreme Court of California. October 27, 1887.)***1. QUIETING TITLE—CHARACTER OF POSSESSION—EVIDENCE.**

Plaintiff, in an action to quiet title, testified that he took possession in 1867, "to take care of the property under the same old agreement." *Held*, that prior leases of the property to plaintiff were admissible to show the character of plaintiff's possession; it being for the jury to determine whether plaintiff re-entered under the terms of the leases, or under a parol agreement, as testified by him.

2. SAME—INSTRUCTIONS.

The title of defendants' ancestor had been quieted by decree of court as against the city. The court instructed the jury that a later deed made by M. and others in behalf of the city vested the title in the ancestor. *Held*, that the instruction was harmless, even if the deed was void, as plaintiff's claim to adverse possession did not arise until after the making of the deed.

3. EVIDENCE—IN FORMER TRIAL—WITNESS SINCE DECEASED—PARTIES.

Under Code Civil Proc. Cal. § 1870, subd. 8, providing that evidence "of the testimony of a deceased witness, * * * given in a former action between the same parties, relating to the same matter," is admissible, testimony of a deceased witness given in an action brought by the executrix of the estate of which defendants are heirs, against the plaintiff as lessee of the property in question, is admissible in a subsequent action between the plaintiff and the heirs on questions of tenancy and adverse possession; the testimony being exclusively as to whether plaintiff held the property as tenant or as his own.

4. NEW TRIAL—MISCONDUCT OF COUNSEL—CORRECTION BY TRIAL COURT—PRESUMPTION.

Affidavits on motion for new trial, claiming that defendants' attorney, in his argument to the jury, referred to facts of which there was no evidence, and to testimony ruled out by the court, do not sufficiently show misconduct to warrant a new trial. It must appear that the court, on objection to the statements, failed to correct them; the presumption being that it did so if they were improper.

5. SAME—MISCONDUCT OF JURY—AFFIDAVITS OF JUROR TO SHOW GROUNDS OF VERDICT.

Under Code Civil Proc. Cal. § 657, subd. 2, the verdict can be attacked by affidavits of the jury, only to show that it was obtained by resort to the determination of chance. Affidavits of a juror showing the grounds upon which the verdict was rendered are inadmissible for that purpose.

In bank. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Bill to quiet title.

The plaintiff alleged title in fee to the property in question by purchase from defendants' ancestor. The defendants alleged that they were the heirs of one John Ferguson, deceased, who at his death was seized in fee of the premises, and that the plaintiff was at that time in possession as his lessee; that in an action in the county court of San Francisco the defendants recovered judgment against the plaintiff, decreeing that he held the lot as defendants' lessee. They further claimed under tax titles. The jury found in their favor and the court entered judgment that they have possession of the property. The plaintiff appealed.

P. B. Ladd, for appellant. *Wm. H. Shays*, (*Wilson & Otis*, of counsel,) for respondent.

PATERSON, J. The transcript contains copies of affidavits filed by the plaintiff in the court below in support of his motion for a new trial, showing, in substance, that the defendants' attorney persisted in arguing to the jury that the defendants had paid all of the taxes on the premises in controversy from 1861 to the time of the trial; that plaintiff had never paid any taxes thereon; that, as a fact, no evidence whatever was before the jury on the question of taxes, and that he also persisted in arguing to the jury that the county court had decided that the plaintiff was the tenant of defendants, notwithstanding the fact that the court had ruled out all evidence relating thereto, and there was no evidence before the jury on that subject. There is here no sufficient showing of irregularity or misconduct to warrant a new trial. We

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are not informed whether the court, on the objection of plaintiff, corrected the statement of defendants' attorney. If the objection of plaintiff was well taken, we must presume that the court instructed the jury to disregard the assertions made by the defendants' attorney.

The affidavits of the jurors, in which it is stated that "the principal grounds of the verdict were that the plaintiff proved no title by the deed; that defendants had three tax deeds; that plaintiff never paid any taxes, and that defendants paid all the taxes; and the county court had decided that plaintiff was a tenant of defendants,"—were inadmissible and cannot now be considered. A juror cannot thus impeach his own verdict. There is but one ground upon which a verdict can be assailed in this way. It is expressed in the Code: "Whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors." Section 657, subd. 2, Code Civil Proc.; *Polhemus v. Helman*, 50 Cal. 438; *Turner v. Tuolumne W. Co.*, 25 Cal. 397.

The leases were properly admitted in evidence. They were admissible to show the character of plaintiff's possession,—whether for himself, or as tenant of Ferguson. The plaintiff testified that he took possession in 1867, "to take care of the tract under the same old agreement." The leases contained this provision: "And to pay the rent as above stated during the term; also, the rent as above stated for such further term as the lessee may hold the same." It was for the jury to determine whether plaintiff re-entered upon the premises under the terms of the lease, or under the parol agreement testified to by plaintiff.

It was not error to admit in evidence the testimony of Dean, deceased, which had been taken down by the short-hand reporter, on a trial in the county court. Evidence may be given "of the testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties relating to the same matter." Section 1870, subd. 8, Code Civil Proc. Although in that action Mrs. Judah, as executrix, was plaintiff, it was an action between the same parties, within the meaning of this provision, for the executrix represented the heir therein, and the judgment in such cases is binding upon the heirs, whether they be made parties or not. *McLeran v. Benton*, 14 Pac. Rep. 879, and cases cited therein. It was an action "brought against the plaintiff, as lessee, under and by the terms of the lease." The testimony of the witness Dean was directed exclusively to the question whether the plaintiff held possession of the lot in controversy under the terms of the lease, and as tenant of Ferguson, or for himself, claiming the property as his own. The judgment in unlawful detainer is conclusive on the questions of tenancy and refusal to surrender, (*Willson v. Cleveland*, 30 Cal. 201;) and the judgment in an action for forcible entry is admissible in a subsequent action of ejectment to show adverse possession. *Unger v. Roper*, 53 Cal. 39. Conceding, therefore, that the test as to the admissibility of such evidence is as stated by appellant, would a judgment in the first case be evidence in the second, and was the witness open to cross-examination? The testimony of Dean was admissible upon the questions of tenancy and adverse possession.

The court instructed the jury in effect that by virtue of a deed made by Frank McCoppin and others, on behalf of the city and county of San Francisco, in pursuance of the provisions of certain ordinances, acts of congress, and the legislature of California, "all the estate and interest, present and future, of the said city and county of San Francisco, in and to such lands," had been granted unto the said Ferguson, and to his heirs and assigns forever. We are unable to see any prejudicial error in the giving of this instruction. There can be no doubt that Ferguson was the beneficiary under

the ordinance and the acts of congress. He was in the *bona fide*, actual possession thereof, by himself and his tenants, on the date of the passage of the act of congress, approved March 8, 1866.

Prior to the execution and delivery of the McCoppin deed, by a decree rendered in favor of the plaintiff in the case of *John Ferguson v. The City and County of San Francisco*, in the twelfth district court, July 8, 1865, the title of plaintiff as against the said city to the premises in controversy had been quieted. This appears from a statement in the transcript, and from evidence admitted on behalf of the defendants without objection. The plaintiff does not claim to have been in possession for himself in 1866, when the ordinance title passed. On the contrary, he recognizes Ferguson as the possessor and owner of the property down to the fall of 1867, when he, the plaintiff, claims to have gone into possession, under a verbal contract to purchase the same from Ferguson. He testified that in July or June, 1867, Miller was in possession, and refused to let him enter until Ferguson returned. He testified further: "Miller delivered up the premises to me because I was to re-enter under an agreement to take care of the tract under the same old agreement." At the request of the plaintiff, the jury was instructed: "If you find that the plaintiff went into possession of the lot in question under a lease or leases in 1861 or 1864, and that he thereafter surrendered and gave up the possession of the lot, then the relation of landlord and tenant ceased. * * * Any subsequent taking possession by plaintiff would not necessarily restore the relation of landlord and tenant. * * * If you find that he, after such surrender, took possession of the lot under an agreement with the owner that he (the plaintiff) was to have the lot as his own property in consideration for certain services, and he performed such services, he thereby became the absolute owner of the lot." In his evidence and in his instructions, he recognized Ferguson as the owner of the lot in 1867, and the evidence of the defendants shows beyond all controversy that the title of the city vested in Ferguson and his heirs. If it be conceded, therefore, that the McCoppin deed was void, the instruction of the court referred to was harmless.

Other instructions, excepted to by the plaintiff, correctly stated the law under the evidence. The order is affirmed.

We concur: SEARLS, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; MCKINSTRY, J.; TEMPLE, J.

(74 Cal. 1)

BARKLY v. COPELAND. (No. 11,878.)

(Supreme Court of California. October 31, 1887.)

1. LIBEL AND SLANDER—MITIGATING CIRCUMSTANCES KNOWN TO DEFENDANT AFTER PUBLICATION.

Defendant, in his answer in a suit for slander, alleged circumstances in mitigation, which came to his knowledge after the words complained of were spoken. The court instructed the jury that only circumstances within the knowledge of defendant before the words were spoken could be shown in mitigation of damages. *Held*, that the refusal of the court to strike out that portion of the answer worked no injury to plaintiff, in view of the charge of the court.

2. SAME—EVIDENCE.

In an action for slander for charging plaintiff with connection with one S. in the theft of certain cattle, it is admissible for defendant to introduce the testimony of S. as to agreements with plaintiff in regard to the theft of other cattle.

3. SAME—CONVERSATIONS BETWEEN PLAINTIFF'S AGENT AND THIRD PARTY.

Testimony as to conversations between plaintiff's driver and S., when it appeared that plaintiff had told S. he would report to him through the driver, *held* admissible.

4. SAME—EVIDENCE OF DEFENDANT'S WEALTH.

Testimony as to the wealth of defendant is admissible in an action for slander.

5. EVIDENCE—OFFERING DECLARATIONS OF WITNESS TO SUPPORT TESTIMONY BEFORE IMPEACHMENT.

It is no ground for reversal that prior declarations of the witness were given in evidence to support his testimony before it was impeached, when the record shows that evidence was subsequently introduced, which, if offered before the declarations were testified to, would have made them competent.

6. SAME—IMPEACHMENT—FOUNDATION.

Evidence as to a conversation with a witness, whose attention had not been called to it, held properly excluded.

7. TRIAL—ORDER OF—DISCRETION OF COURT—PERMITTING DEFENDANT TO TESTIFY AFTER PLAINTIFF HAS CLOSED.

After plaintiff had closed his case in rebuttal, defendant, who had been present during the entire trial, was permitted to testify fully as to his defense. Held, that this was in the discretion of the court, and can only be reviewed when the discretion is abused.

Department 2. Appeal from superior court, Tehama county; CHAS. P. BRAYNARD, Judge.

Plaintiff sued defendant for slander, alleging that defendant had stated that he knew the cattle he bought of S. were stolen, when he bought them, and that he was in with S. Defendant, in his answer, pleaded the truth of the words spoken, and also set up matter in mitigation of damages. The jury found for the plaintiff in the sum of one dollar, and plaintiff appealed.

Jackson Hatch and *Clay W. Taylor*, for appellant. *Chipman & Garter*, *John F. Ellison*, and *L. V. Hitchcock*, for respondent.

THORNTON, J. Action to recover damages for slanderous words spoken by defendant of plaintiff. The plaintiff recovered a verdict of one dollar damages. He then moved for a new trial, which was denied, and from the judgment and the above order plaintiff appealed.

In regard to the motion of plaintiff to strike out certain portions of defendant's answer, to which our attention is first called, we will remark that only such mitigating circumstances as were within the knowledge of the defendant when he spoke the words complained of can be alleged in the answer. See *Willover v. Hill*, 72 N. Y. 36; *Hatfield v. Lasher*, 81 N. Y. 249. But, as the jury were instructed as to such circumstances in accordance with the above, the error of the court below in refusing to strike out that portion of the answer which set forth the circumstances of mitigation, not known to the defendant when he uttered the words counted on, worked no injury to the plaintiff.

The defendant offered in evidence the deposition of Russell Speegle, who had been convicted of stealing the cattle of Thomas Polk, in relation to which theft the disparaging words uttered by the defendant had been spoken. Speegle testified to statements made by him to several persons in regard to the theft of the cattle. The statements or declarations were made to Laura Moore, David Burke, Pope, Costello, Mitchell, and I. Speegle, and were testified to by all of the last-named except Laura Moore, who does not appear to have been called. They tend to corroborate his testimony in regard to the connection of the plaintiff with the stealing of the cattle, by showing that, about or not long after his (Speegle's) arrest for the larceny of the cattle, he made statements in regard to it similar to those which he made in his testimony. The statement to Laura Moore was made shortly before the cattle were taken to the plaintiff. The statements made to the other witnesses were made after his arrest. The statements were allowed to go to the jury against the objection and exception of plaintiff, and before any evidence impeaching the witness Speegle had been introduced.

It has been held in this state that, where an attempt has been made to impeach a witness by proving former contradictory statements, he cannot be supported by evidence that he has made to other persons declarations consistent with his testimony. This ruling was made in *People v. Doyell*, 48 Cal.

90, 91. But in the same case it was said: "Such declarations may, however, be admissible in contradiction of evidence tending to show that the account is a fabrication of late date, when it may be shown that the same account was given before its ultimate effect and operation, (arising from a change of circumstances,) could have been foreseen; and also, perhaps, in other peculiar cases." 48 Cal. 91. It has been frequently held that, when the witness is charged with testifying under the influence of some motive prompting him to make a false statement, it may be shown that he made similar statements at a time when the imputed motive did not exist. See *Gates v. People*, 14 Ill. 438; *Stolp v. Blair*, 68 Ill. 543; *State v. Dennin*, 32 Vt. 158; *State v. Vincent*, 24 Iowa, 570; Whart. Ev. § 570.

When the evidence objected to was admitted, no evidence impeaching Speegle had been put in. The declarations of Speegle were offered by defendant in putting in his defense, and the impeaching evidence was offered by plaintiff in rebuttal. The impeaching evidence consisted of the depositions of three convicts in the state prison, and was to the effect that soon after certain persons representing the defendant had visited the state prison, and had an interview with Speegle. Each of them had had a conversation with Speegle in which he had said that Barkly had sued Copeland for damages, for saying that he was in with him in stealing cattle; that these representatives of the defendant had told him that if he would swear that Barkly was in with him in stealing the cattle they would get him pardoned right away; that Speegle also stated that Barkly was not in with him, but that if there was any way to get out of prison he was going to do it. This testimony introduced by plaintiff tended to show that Speegle was testifying at the trial under the influence of a promise to procure his pardon in case he would so testify as to inculpate the plaintiff; that his testimony had been given under the influence of a motive prompting him to make a false statement. This state of things would undoubtedly bring the case within the rule allowing the prior declarations of like character to be given in evidence to support his testimony, if the impeaching evidence had been offered before the prior statement had been testified to. Is it error for which a judgment of reversal should be here given, because impeaching evidence was put in before the statements objected to were introduced? There can be no doubt, we think, that, if the court had ruled out the prior declarations of Speegle when offered, it would have ruled correctly. But, having admitted the declarations before the introduction by plaintiff of the evidence to impeach, we do not think we should pronounce a judgment of reversal, when we find in the record, though subsequently introduced, evidence which would have authorized the admission of the prior declarations or statements, if offered before they were testified to. The evidence of the witness Snelling, detailing a conversation had by him with Russell Speegle, which came in after the impeaching evidence had been put into the case, was of the character of those just above considered, and was admissible on the same grounds.

The testimony of Russell Speegle concerning an effort of plaintiff made in June, 1884, to get the witness to steal cattle belonging to Dicus, and drive them to him, was admissible. Speegle details this as a part of the general understanding between him and plaintiff, by which the former was to steal cattle, drive them to plaintiff to be butchered, and the proceeds to be shared between them. We think this evidence was admissible to show the relations and transactions between the witness and the plaintiff as bearing on the question of the stealing of Polk's cattle, and to sustain defendant's plea of justification.

There was no error in admitting the declarations of N. Barkly, plaintiff's driver, to R. Speegle. There was evidence tending to show that the plaintiff had told Speegle, (who testified to these declarations,) that he could trust this driver, and that plaintiff would report through him to Speegle. The tendency

of the above was to show that this driver was to be the medium of communication between Speegle and the plaintiff. The declarations objected to appear to have been made in a report to Speegle of the condition of the cattle stolen by him and turned over to the plaintiff. The above was evidence of such a relation between Barkly and the driver as rendered his declarations admissible.

Plaintiff offered to prove by defendant that in June, 1885, and at the time of the utterance of the language admitted by him in his answer, he was worth, at least in property, \$100,000. The offer was disallowed, and there was exception by plaintiff. In actions of slander and libel such evidence has been held admissible in many of the states. We cite the following cases: *Brown v. Barnes*, 39 Mich. 211; *Hayner v. Cowden*, 27 Ohio St. 292; *Bennett v. Hyde*, 6 Conn. 24; *Buckley v. Knapp*, 48 Mo. 153; *Hosley v. Brooks*, 20 Ill. 115; *Humphries v. Parker*, 52 Me. 502; *Karney v. Paisley*, 13 Iowa, 89; *Adcock v. Marsh*, 8 Ired. 363; *Lewis v. Chapman*, 19 Barb. 252. See, also, 1 Suth. Dam. 743, 745. Such evidence is admitted on the ground that defendant's wealth is an element in his social rank and influence, and therefore tends to show the extent of the injury suffered from the defendant's words, (*Buckley v. Knapp*, 48 Mo. 163; *Bennett v. Hyde*, 6 Conn. 24-27; *Lewis v. Chapman*, 19 Barb. 252;) and, where punitive or exemplary damages are allowed, the evidence is admitted by which to graduate the punishment. 6 Conn., *supra*. In this case, if the jury had rejected the evidence of the mitigating circumstances, it might have found punitive or exemplary damages. We are of opinion the court erred in rejecting the offer of plaintiff to introduce the testimony as to defendant's wealth.

The court committed no error in excluding the testimony of Clark, concerning a conversation had with Speegle the night after the arrest of the latter, as the proper foundation had not been laid for it, by calling Speegle's attention to it.

When the plaintiff had closed his case in rebuttal, the court, against the objection and exception of plaintiff, allowed the defendant, who had been present during the entire trial, to be called, and to testify fully as regards his defense. While this was a most unusual course, and one not to be commended, still we consider it, under the decisions of this court, as within the discretion of the court, and one which, unless such discretion is abused, cannot be reviewed here. As the plaintiff was not inhibited from offering evidence in reply to that of defendant, and, in fact, did offer some evidence in reply, we cannot say that there was here such an abuse of discretion as would justify this court in ordering a reversal.

A large number of requests for directions to the jury were asked by both parties; and while some of those asked by plaintiff, and refused, might well have been given, yet we are of opinion that the instructions as given covered substantially the same points, and fairly presented to the jury the law bearing on the case.

For the error above pointed out the judgment and order must be reversed, and the cause remanded for a new trial.

We concur: McFARLAND, J.; SHARPSTEIN, J.

(73 Cal. 634)

BEARDSLEY, Assignee, etc., v. FRAME and others. (No. 12,199.)

(Supreme Court of California. October 29, 1887.)

APPEAL—NOTICE OF—MUST BE SIGNED BY ATTORNEY OF RECORD—ATTORNEY NOT QUALIFIED TO PRACTICE IN APPELLATE COURT.

In California an appeal from a superior court must be initiated in that court by a notice signed by the appellant's attorney of record in that court; and the fact that such attorney is not qualified to practice in the appellate court will not affect the validity of the appeal.

Commissioners' decision. In bank.

Appeal from superior court, Del Norte county; JAS. E. MURPHY, Judge.

Motion to dismiss appeal.

L. F. Coburn, for appellant. *R. W. Miller*, for respondent.

FOOTE, C. The notice of appeal is the initiatory step taken in the superior court in order to obtain a hearing upon appeal in this court. That notice must be signed by the attorney of record in that court. *Prescott v. Salthouse*, 53 Cal. 221; affirmed in *Whittle v. Renner*, 55 Cal. 395. Being a proceeding which must be commenced in the superior court where the trial was had, it is not necessary that the attorney who there conducts it shall be entitled to practice law, and be heard in that capacity in this court, provided he be qualified to act, and is the attorney of record in the court below.

The motion to dismiss the appeal should be denied.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the motion to dismiss the appeal is denied.

(73 Cal. 610)

CITY AND COUNTY OF SAN FRANCISCO v. LUNING. (No. 11,718.)

(*Supreme Court of California*. October 28, 1887.)

1. TAXATION—ACTION BY CITY AND COUNTY TO RECOVER—LIMITATION OF.

Code Civil Proc. Cal. § 338, provides that an action on a liability created by statute must be begun within three years. Section 339 provides that an action upon a liability not founded upon an instrument in writing must be begun within two years. Section 345 provides that these limitations shall apply to actions by the state, or for its benefit. *Held*, that an action by the city and county of San Francisco to recover city, county, and state taxes, more than seven years after right of action accrued, is barred by these sections.

2. SAME—LIMITATION OF ACTION FOR PERSONAL JUDGMENT.

Pol. Code Cal. § 3716, provides that every tax has the effect of a judgment against the person, and every lien created by the same the effect of an execution, and that the judgment is not satisfied nor lien removed until the tax is paid. Section 3717 provides that a tax upon the personal property shall be a lien on the real property of the owner. *Held*, that an action to recover a personal judgment on the original tax was subject to the statute of limitations, it not being an action on a judgment or to enforce a lien.

In bank. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

John P. Bell and *Louis H. Sharp*, for appellant. *Sidney V. Smith & Son*, for respondent.

McFARLAND, J. It is averred in the complaint that "defendant is indebted to plaintiff" in a certain sum of money for city and county taxes, with certain penalties for non-payment, and interest at a certain rate per month, from the fifth day of August, 1874; and, further, that "defendant is also indebted" in a certain other sum of money for state taxes, with like penalties and interest, from the sixth day of January, 1876. And judgment is prayed for said several sums, with interest and costs. Defendant filed a demurrer by which, in addition to the general ground of demurrer, he also pleads that the alleged cause of action is barred by the provisions of sections 338, 339, and 345 of the Code of Civil Procedure. The demurrer was sustained, and, plaintiff declining to amend, judgment was rendered for defendant. From this judgment plaintiff appeals.

The sections of the Code of Civil Procedure, from 335 to 348, inclusive, being chapter 3, tit. 2, p. 2, prescribe the period within which "actions other than for the recovery of real property" may be commenced. Section 338 provides that "an action upon a liability created by statute" must be commenced

within three years. Section 339 provides that "an action upon a contract, obligation, or liability, not founded upon an instrument in writing," must be commenced within two years. Section 343 is as follows: "343. An action not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued." And section 345 provides that "the limitations prescribed in this chapter apply to actions brought in the name of the state, or for the benefit of the state, in the same manner as to actions by private parties." The complaint in this case was filed April 25, 1883, more than seven years after the cause of action accrued. The action is therefore certainly barred by one of the sections above quoted, unless there be some principle of law, or some other statutory provision, by which it is taken out of the operation of said section.

1. The rule that statutes of limitation do not apply to the state, according to the maxim *nullum tempus occurrit regi*, has no force here in face of section 345, above quoted.

2. Appellant also relies on section 3716 of the Political Code, which provides as follows: "3716. Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all property of the delinquent; the judgment is not satisfied, nor the lien removed, until the taxes are paid on the property sold for the payment thereof." Also upon section 3717, which provides that "every tax upon personal property is a lien upon the real property of the owner thereof, from and after 12 o'clock M. of the first Monday in March of each year." But this is not an action upon a judgment, or to enforce a lien. It is possible that there is a subsisting judgment or lien for the taxes sued for which the tax collector may enforce by sale in the usual way. It is possible an action might lie upon the tax as a judgment or to enforce the lien. It is possible, also, that there is a lien without any provision for its enforcement, in which case it is simply a right without a remedy. But this is merely an action to recover a personal judgment upon the original tax itself, which, by the way, is averred to be an *indebtedness*. The action was brought under the act of April 23, 1880, (St. 1880, p. 136;) but, although taxes are usually collected in this state in a summary manner, there are several other statutory provisions about actions for taxes, and in none of them is it indicated that the action is deemed to be an action upon a judgment, although, in one particular instance only, it is provided that the board of equalization may "direct the *foreclosure of the lien* of such tax by action, which proceeding is hereby authorized to be had." Pol. Code, § 3812. This last provision shows that there is a clear distinction intended between an action for the foreclosure of a lien and an ordinary suit, such as is provided for in sections 3808, 3899, and 3900 of the Political Code, and in the act of 1880, under which this suit was brought. And it will be observed that in the case provided for in section 3900 a general writ of attachment must issue as in an ordinary civil action. It would seem clear, therefore, that a suit merely to recover taxes against a defendant personally, is not an action upon a judgment, or an action to foreclose a lien. The point upon which this case turns was elaborately argued and considered in *State v. Yellow Jacket S. M. Co.*, 14 Nev. 220. The provisions of the statute of limitations were the same there as here. With respect to taxes, the statute of Nevada made a tax a lien on the property indefinitely until it was paid, but did not designate it as a "judgment." The court after a thorough examination of the questions presented, held that the action to recover the taxes was barred by the statute of limitations, even though the lien might not be considered as removed. And the difference above indicated between the statute of that state and this, does not make the principle upon which that case was decided inapplicable to the case at bar. Judgment affirmed.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; MCKINSTRY, J.

(73 Cal. 630)

CAREY v. CAREY. (No. 11,677.)

(Supreme Court of California. October 29, 1887.)

DIVORCE—WILLFUL DESERTION—EVIDENCE.

In an action for divorce for willful desertion, the evidence showed that the plaintiff, after the desertion, had requested the defendant, by letter, to return, and that, although they had met several times on the street, defendant had not spoken to plaintiff, nor in any way signified a willingness to live with him until more than a year after such request, when defendant, by letter, stated that she was ready to live in a fit and proper place with plaintiff, but refused to condone any offense which he might have committed against her or his marriage obligations. *Held*, that the court was justified in finding willful desertion, and in granting a decree for plaintiff.

Commissioners' decision. Department 2.

Appeal from superior court, San Joaquin county; A. VAN R. PATERSON, Judge.

The plaintiff, Wilson Carey, brings this action to obtain a divorce from the defendant, Nancy G. Carey, on the grounds of willful desertion. The plaintiff testified that the defendant had not lived with him for nearly two years, although he had sent her a letter requesting her to return to his home, which was a good house, suitable for her to live in, and located on a ranch on the Sonora road; that he did not get any response to his letter until more than a year after it was sent to her; that, though he had seen her a number of times during the year prior to the commencement of the suit, she had never spoken to him; that defendant had not lived or cohabited with him at all during the two years last past. The letter introduced in evidence bears date July 9, 1883. Plaintiff and two other witnesses, who saw the letter before it was posted, testify that it was written and mailed on that day. On cross-examination, plaintiff testified to having received a letter from his wife, July 19, 1884, dated at Stockton, July 15, 1884, signifying a willingness to reside with the plaintiff in any fit and proper place that he might name, and saying that she would await his call and request to that end; but that she could not condone any offense which he may have committed against her or his marriage obligations. The letter also stated that defendant had no means to take her to plaintiff. Defendant testified that the letter written by plaintiff was received by her July 19, 1883, and that the letter sent by her dated July 15, was mailed July 19, 1884. She testified that she had never refused to live with plaintiff, but that she delayed answering his letter for a year in order to ascertain whether he was acting in good faith; that she had no means with which to go to her husband, but had raised \$800 by mortgage of her property; that she could not go to plaintiff because she did not know where he lived; that she did not consider the homestead, where he had asked her to go, a fit and proper place for her; that she had never had any conversation with plaintiff, though she had met him on the street shortly after receiving his letter; that she would not go to live with him at the homestead. Upon the evidence, the jury found that defendant had refused to live with plaintiff for more than a year previous to bringing the suit, whereupon judgment was rendered for plaintiff.

Louttit, Woods & Levinsky, for appellant. *W. L. Dudley*, for respondent.

BELCHER, C. C. The plaintiff and defendant were married in June, 1879, and thereafter lived together as husband and wife until some time in December, 1882. They had no children, and, so far as appears, no common property. In January, 1883, the defendant commenced an action against her husband for a divorce. It does not appear upon what ground the divorce was asked, but the case was tried in May, 1883, and the divorce denied. In August, 1884, this action was commenced by the plaintiff to obtain a divorce from the defendant on the ground of willful desertion. The defendant, by her answer,

admitted that she had not, since the nineteenth day of December, 1882, cohabited with the plaintiff, but alleged that her failure so to do had been by reason of the refusal and neglect of the plaintiff, and not by reason of any act or fault on her part. After trial the court below, among other things, found "that for more than one year prior to the commencement of this action defendant willfully neglected and refused to live with plaintiff, and at all of said time had the intent to desert him." And as a conclusion of law it was found "that the defendant, Nancy G. Carey, has willfully deserted her said husband, and is, and at the commencement of this action was, guilty of willful desertion, and by reason thereof that the plaintiff is entitled to have the bonds of matrimony between himself and defendant dissolved." Judgment was accordingly entered, dissolving the bonds of matrimony between the parties. The defendant moved for a new trial, and has appealed from the judgment and an order denying her motion. The only point made for the appellant is that the evidence did not justify the decision and the judgment.

It is unnecessary to state the facts shown by the record. It is enough to say that, after carefully reading all the testimony brought before us in the transcript, we are of the opinion that the evidence was sufficient to justify the findings of fact, and the conclusion of law drawn therefrom.

The judgment and order should therefore be affirmed.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(73 Cal. 621)

CITY OF STOCKTON v. WESTERN FIRE & MARINE INS. Co. and others.
(No. 11,864.)

(*Supreme Court of California.* October 29, 1887.)

1. TAXATION—COLLECTION—PLEADING—LEGISLATIVE POWER.

It is competent for the legislature to prescribe the form of complaint to be used in an action by a city to recover delinquent taxes.

2. SAME—COLLECTION—MUNICIPALITIES.

The complaint, in an action for delinquent taxes by a city organized under a special charter, was according to the form prescribed by a section of the charter. There was nothing to indicate that such section had been repealed or modified prior to the adoption of Const. Cal. 1879, or that the city as a corporation ever reorganized under the act of 1883, (Acts Cal. 1883, p. 235,) providing for the organization of cities under general laws. *Held*, that the complaint was not obnoxious to Const. Cal. 1879, art. 11, § 6, providing that "corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization, and classification, in proportion to population of cities, towns," etc.

3. SAME—VALIDITY OF ASSESSMENTS—TIME OF MAKING.

Const. Cal. 1879, art. 13, § 8, provides that "the legislature shall by law require each tax-payer to make and deliver to the county assessor annually a statement under oath, setting forth specifically all the real and personal property owned by such tax-payer, * * * at 12 o'clock meridian on the first Monday of March." Under this section it was claimed that the mortgage assessed by plaintiff, being executed on the thirteenth of March, was not assessable for the taxes of that year. Plaintiff's charter, however, provided that "the city council shall have authority to assess, levy, and collect annually taxes upon all the property within the city taxable for state purposes;" and by another section of the charter: "It shall be the duty of the assessor to prepare between the first day of January and the first Monday in April of each year a list of all the real and personal property within the city taxable for state and county purposes," etc. *Held* that, under these sections, the assessment was valid; and such sections being in force before the adoption of Const. Cal. 1879, were continued in force until repealed by some general law, by virtue of Const. Cal. art. 11, § 6; providing, *inter alia*, that "cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws."

Commissioners' decision. Department 2.

Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

D. P. Terry and *J. C. Campbell*, for appellant. *Frank H. Smith*, for respondent.

FOOTE, C. This is an action instituted by the city of Stockton to recover certain delinquent taxes which had been assessed upon a mortgage for \$35,000, executed by the Masonic Hall Association of said city to the Western Fire & Marine Insurance Company, on the thirteenth day of March, 1884, upon certain real estate and improvements. The defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrers were overruled, and, the defendants failing to answer, judgment passed for the plaintiff, from which this appeal is taken. The technical objections urged as to the form of the complaint are, it seems to us, not well founded. It is competent for the legislature, in such special action as this, to prescribe the form of complaint to be used. *Richardson v. Tobin*, 45 Cal. 31; *Sullivan v. Mier*, 67 Cal. 265, 7 Pac. Rep. 691.

The form of the complaint filed in this action is that prescribed in section 21 of the charter of the city of Stockton, which was approved on the twenty-seventh of March, 1872. It was a general form to be used in all cases for the collection of city taxes authorized to be assessed and levied under that charter. There is nothing in the record, or in the acts of the legislature, to show that, prior to the adoption of the constitution of 1879, that section was modified or repealed. There is no general law passed since that time which so affects it. There is nothing before us which indicates that the city of Stockton, as a corporation, ever reorganized under the act of 1883. Acts 1883, p. 235.¹ It must be true, therefore, that, as a matter of law, the form of the complaint is not obnoxious to anything contained in section 6, art. 11, Const. 1879. *Thomason v. Ashworth*, 14 Pac. Rep. 618.

But the further point is made that the complaint makes it patent that the tax was illegally assessed, because it was done after the first Monday in March of the year 1884. In support of this contention, section 8, art. 13, Const., is cited. It provides that "the legislature shall by law require each tax-payer in this state to make and deliver to the county assessor annually a statement under oath, setting forth specifically all the real and personal property owned by such tax-payer, or in his possession, or under his control, at 12 o'clock meridian on the first Monday of March." It is true that the complaint shows the mortgage was not executed until the thirteenth of March, 1884, and therefore it could not have been assessed for taxation on the first Monday in March of that year. But it does not follow from this that the assessment was invalid.

The charter of 1872 provides, among other things, as follows:

"Sec. 15. The city council shall have full power and authority to assess, levy, and collect annually taxes upon all the property within the city taxable for state purposes, not exceeding 1 per cent. upon the assessed value thereof, which shall be paid into the general fund for current expenses."

"Sec. 17. It shall be the duty of the city assessor to prepare, between the first day of January and the first Monday in April of each year, and present to the city council, with his certificate of its correctness, a list of all the real and personal property within the city taxable for state and county purposes, with a true valuation thereof."

The assessment in controversy was made under the authority given by the sections of the charter of the city of Stockton, *supra*, which existed prior to

¹An act to provide for the organization, incorporation, and government of municipal corporations, approved March 13, 1883.

the adoption of section 8, art. 13, Const. This court, in discussing the character of charters such as the one under consideration, said in *Desmond v. Dunn*, 55 Cal. 246-248: "All such charters must remain in force until superseded or changed in the mode prescribed by the constitution. In the absence of any positive provision to the contrary, this is necessarily implied;" and this particular rule thus laid down has not been overruled. In *Thomason v. Ashworth*, 14 Pac. Rep. 618, the latest declaration upon the matter, this language occurs: "It is argued that, according to the views herein expressed, a city may have its charter changed without its consent. This is a proper deduction from the ruling herein, but this cannot be done by a special or local law applicable alone to a particular charter. The result can only be reached by a general law affecting all corporations or may be all of a class." We do not mean to imply that the legislature, even by a general law, can substitute an entirely new charter for an old one without the consent of the people of the locality. To that extent we understand the decision in *Desmond v. Dunn* to be the law.

It would seem, therefore, under section 6 of article 11 of the constitution, that the sections of the charter heretofore quoted are continued in force. And section 8 of article 13 of the constitution, having reference to prospective assessments for taxation, does not affect the sections of the charter, *supra*, because they were in force prior to its adoption, and are continued in force by section 6 of article 11 of the constitution until modified or repealed by some general law enacted with reference to "all corporations, or may be those of a class."

There is nothing in the complaint which makes it evident that the money assessed for taxation was not within the limits of the city of Stockton on the first Monday of March, 1884; and, there being no answer filed in the cause, there is nothing in the record which shows that any double taxation was in fact levied.

The judgment should be affirmed.

We concur: **BELOHER, C. C.; HAYNE, C.**

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

(73 Cal. 618)

ARNAZ v. GASSEN. (No. 11,846.)

(*Supreme Court of California.* October 29, 1887.)

1. CONVERSION—PURCHASING CATTLE WITHOUT EXAMINING EAR-MARKS.

In an action for the conversion of certain cattle, it appeared that plaintiff lost the number claimed to have been converted; that defendant bought and slaughtered cattle, but kept no book in which he entered the brands of cattle purchased; that he went to defendant's slaughter-house, and found about 60 ears of cattle bearing his mark, and some hides with his brand, and while thus engaged was ordered away by a man who said he had charge of the place; that after the cattle were missed defendant said he bought cattle, and paid for them, and asked no questions, etc., and when called as a witness did not deny the above facts, nor that he received and killed the cattle, but said he didn't know what marks were on the cattle he purchased about the time these were lost, did not examine the brands, nor look for ear-marks, and did not know anybody's ear-mark or brand in the county. He claimed, simply, that he paid value for the cattle. *Held*, that a judgment for plaintiff was sustained by the evidence.

2. APPEAL—HARMLESS ERROR.

Where it appears that the errors assigned could not have prejudiced the appellant, the decision of the lower court will not be disturbed.

Commissioners' decision. Department 2.

Appeal from superior court, Los Angeles county; **A. BRUNSON**, Judge.

Wells, Van Dyke & Lee and *H. T. Gage*, for appellant. *Howard & Scott*, for respondent.

BELCHER, C. C. This is an appeal from a judgment in favor of plaintiff, and from an order denying the defendant's motion for a new trial. The action was brought to recover damages for the alleged conversion of certain cattle. The court found that defendant had wrongfully converted to his own use 25 head of cattle which were the property of plaintiff, and of the value of \$450.

The appellant insists that the findings were not justified by the evidence; but we think they were. It was proved that in the month of September, 1884, 32 head of cattle, consisting of cows, heifers, and steers, were missed from plaintiff's herd; 25 of them being his, 4 his daughter's, and 3 belonging to other parties. The plaintiff had not sold any cattle for a year. Diligent search was made for the lost animals, but they were never found. The defendant was engaged in the business of buying and slaughtering cattle, but he kept no book in which he entered the marks or brands of the cattle slaughtered. Between the ninth and thirteenth of October the plaintiff went, with the man who had charge of his stock, to the defendant's slaughter-house, and there found, as he estimated the number, about 60 ears of animals which had his mark upon them, and also 3 or 4 hides which were marked with his brand. While he was examining the hides, a man came out who said he was in charge of the slaughter-house, and forbade any further examination. The cattle were supposed to have been stolen, and, shortly after they were missed, one of the witnesses, who was employed to inquire into the matter, and see if he could find out anything about them, asked the defendant if he had bought from certain parties any cattle belonging to the plaintiff, and his reply was: "I buy cattle, and pay for them, and I don't ask any questions." The witness further said to him: "You bought cattle from these two young boys?" and the reply was, "I bought cattle. I don't know who I bought them from. I paid for them." The defendant was called as a witness and testified in his own behalf. He did not deny that he had received the plaintiff's cattle, nor that the slaughter-house referred to was his, nor that the marked ears and hides were found there, as testified by plaintiff. On the contrary, he admitted that he bought some twenty odd head of mixed cattle; and in reference to them, on his cross-examination, said: "I don't know anything about what marks these cattle had on them, or brands either. I did not examine the brands; there are so many brands. I do not look for ear-marks. I do not know anybody's ear-mark, or anybody's brand, in the county." The defendant claimed that he paid the full value of all the cattle he received, and seems to have thought, if he did that, he was not liable.

Upon these facts—and they were uncontradicted—it is difficult to see how the court could have come to any other conclusion than that shown by its findings.

It is further insisted that the court erred in overruling objections made by counsel for defendant to certain questions put to witnesses for plaintiff, and in refusing to strike out the answers of the witnesses when given. We are unable to see that the defendant was, or could have been, prejudiced by any of the rulings complained of. It is unnecessary to speak of them separately. Some of the objections were frivolous, and all of them, in our opinion, were properly overruled.

It follows that the judgment and order should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(74 Cal. 20)

Ex parte CAMPBELL on Habeas Corpus. (No. 20,324.)

(Supreme Court of California. October 31, 1887.)

1. INTOXICATING LIQUORS—GENERAL AND LOCAL LAWS—CONSTITUTIONALITY.

Const. Cal. art. 11, § 11, provides that any county, city, town, or township may enforce within its limits all such local police regulations as are not in conflict with general laws. *Held*, that an ordinance of the city of Pasadena prohibiting the keeping of any place for selling or giving away liquors was a police regulation, the power to pass which was, under the constitutional provision, expressly delegated to the municipality, and conflicted with no general law of the state, nor with any clause of the United States constitution. *Ex parte Smith*, 38 Cal. 708; *People v. Martin*, 60 Cal. 156,—followed. *McFarland, J.*, dissenting.

2. APPEAL—PRACTICE—STIPULATIONS.

An appellate court is warranted in refusing to consider a question submitted for decision under a stipulation of facts which by reason of its uncertainty does not present the matter in a full and clear manner.

In bank. Proceedings on *habeas corpus* from county of Los Angeles; W. A. CHENEY, Judge.

Rearden & Ray, for petitioner. *N. P. Conroy*, City Atty. of Pasadena, and *Williams & McKinley*, for respondent.

PATERSON, J. The petitioner is before us on a writ of *habeas corpus* to test the validity of an ordinance of the city of Pasadena, duly passed, approved, and published, for a violation of which he has been duly convicted. The ordinance was passed February 19, 1887, and took effect on the first Monday in May, 1887. The following provisions only are germane to the matter before us:

"Section 1. It shall be and is hereby made unlawful for any person or persons, either as owner, principal, agent, servant, or employe, to establish, open, keep, maintain, or carry on, or assist in carrying on, within the corporate limits of the city of Pasadena, any tippling-house, dram-shop, cellar, saloon, bar, bar-room, sample-room, or other place where spirituous, vinous, malt, or mixed liquors are sold or given away; * * * provided that the prohibitions of this ordinance shall not apply to the sale of liquors for medicinal purposes by a regularly licensed druggist, upon the prescription of a physician entitled to practice medicine under the laws of the state of California; nor shall such prohibitions apply to the sale of such liquors for chemical or medicinal purposes."

Violations of the ordinance are declared to be misdemeanors. The complaint under which petitioner was convicted charged that the said Campbell, at the time and place aforesaid, (May 3, 1887,) did keep and maintain a certain dram-shop, saloon, and bar-room, where spirituous and malt liquors were then sold, said defendant being then and there the owner thereof; that said defendant was not then and there a regularly licensed druggist, and the liquors then and there sold by him were not sold for either chemical or medicinal purposes.

In addition to the facts above stated, counsel for the petitioner and for the people have stipulated "that there has not since the first day of May, 1887, been any ordinance of the city of Pasadena requiring a license to sell vinous, malt, or mixed liquors in any quantity. That there was an ordinance of the city of Pasadena requiring a license to retail spirituous, vinous, malt, and mixed liquors, passed in June, 1886, which was in force up to the first day of May, 1887; and the said city issued a license under said ordinance to petitioner to retail and sell spirituous, vinous, malt, and mixed liquors up to the first day of May, 1887; but said ordinance was repealed February 19, 1887, the repeal taking effect May 1, 1887. That the petitioner has paid all county and municipal taxes assessed against the spirituous, vinous, malt, and mixed liquors owned, kept, and sold by him in said saloon in said city of Pasadena."

It is claimed by the petitioner that the ordinance is void, because it conflicts with section 13, art. 1, of the constitution of this state, which provides that no person shall be deprived of life, liberty, or property without due process of law. It has been held that an act which substantially destroys the property in intoxicating liquors owned and possessed by persons within the state when the act took effect, by preventing the sale, keeping, or giving away of the same, except for medicinal purposes, is violative of this provision of the constitution, and in its application to such liquors is inoperative and void. *Wynehamer v. People*, 13 N. Y. 378; *Bertholf v. O'Reilly*, 74 N. Y. 516.

That question, however, is not properly before us in this proceeding. It is not shown by the record when, if ever, the petitioner became the owner of the liquor sold. The last paragraph of the above stipulated facts, as to payment of taxes, was intended, no doubt, to present the question arising out of ownership for an opinion, but the language is so uncertain in its effect that it ought not be taken as the basis of a decision upon so grave and important a constitutional question. In all inquiries upon matters of this kind the facts should be full and clear, or the court should refuse to consider the question. *Bartemeyer v. Iowa*, 18 Wall. 129. The same may be said of the contention that the ordinance is void under section 8, art. 1, subd. 3, Const. U. S., because no distinction is made between imported wines and liquors, remaining in the original and unbroken packages, and other wines and liquors; there is nothing to show the character of the liquors sold by the petitioner. Furthermore, the petitioner is charged with keeping a *bar-room*, and we consider the case only upon that basis. It is further claimed that the ordinance is void, because, "under the municipal corporation act, the city of Pasadena was not authorized to pass the ordinance, (St. 1883, c. 49, § 862, subd. 1-10;) for, if the legislature had intended to confer the power to prohibit the sale of wines and liquors upon cities of the sixth class, (of which Pasadena is one,) it would have said so in direct terms, as was done in the case of cities of the fourth class."

Prior to the adoption of the constitution of 1879, the local authorities possessed only such powers as were expressly, or by necessary implication, conferred upon them by their charters. It is now provided that "any county, city, town, or township may make and enforce within its limits all such local police, sanitary, and other regulations as are not in conflict with general laws." Article 11, § 11, Const. Under this provision, every county, city, town, or township may adopt and enforce such constitutional police regulations as are not in conflict with general laws. It has the same powers over its own local police and sanitary affairs as were formerly granted by the legislature, and, unless the exercise thereof will conflict with the operation of general laws, it may make and enforce the same through its local government. That such a law as the one before us is not repugnant to any clause of the constitution of the United States there can be no doubt. The supreme court of the United States has decided uniformly that "the usual ordinary legislation of the states regulating or prohibiting the sale of intoxicating liquors raises no question under the constitution of the United States prior to the fourteenth amendment of that instrument. The right to sell intoxicating liquors is not one of the privileges and immunities of the citizen of the United States, which by that amendment the states were forbidden to abridge," (*Bartemeyer v. Iowa*, *supra*; *License Cases*, 5 How. 504; *Beer Co. v. Massachusetts*, 97 U. S. 32;) and that the power to license, regulate, or prohibit *tippling-houses* is a constitutional right, which may be enforced as a police regulation through proper legislation, is no longer an open question in this state. In *Ex parte Smith*, 38 Cal. 708, it was said: "Legislatures have enacted a variety of laws, which undoubtedly, in a general sense, affect the rights of life, liberty, property, safety, and happiness by way of restraint. Of such are laws regulating the slaughter

of animals, the interment of the dead, the erection of buildings in cities and towns of inflammable material, the manufacture and keeping of gunpowder and other explosive compounds, the vending of poisons and other noxious drugs, the sale of intoxicating beverages to certain classes of persons, as Indians, and even to all classes of persons, as in the case of the prohibitory liquor laws of Maine and Massachusetts." *Ex parte McClain*, 61 Cal. 437.

Unless we are prepared, therefore, to overrule the decisions of our own state, and disregard the opinions of the supreme court of the United States, we must hold that the ordinance in question is free from objection so far as its constitutionality is concerned; that it is not violative of any clause of the constitution of the United States, and that it is in its scope and operation within the police powers which may be lawfully enforced under the provisions of the constitution of this state.

There is but one question remaining to be considered: Is the ordinance "in conflict with general laws?" Section 11, art. 11, Const., clearly subordinates the powers conferred upon counties, cities, towns, and townships to the general laws of the state. It is claimed that the ordinance before us is in conflict with general laws, because "the one prohibits, the other makes full provision for, the granting of licenses for the sale of spirituous, vinous, and malt liquors." In support of this contention, counsel cites sections 3356, 3381, 3382, 4045, 4408, Pol. Code, and subdivision 93, § 25, of the county government act, (St. 1883, p. 303.) The provisions of the Political Code referred to are unconstitutional, and no longer operative. This was decided in *People v. Martin*, 60 Cal. 156, where it is said that "the taking of the power to impose such taxes [licenses] from the legislature, and vesting it in the local authorities, is but another of the many evidences to be found in the new constitution of the intention to bring matters of a local concern home to the people." Those sections of the Code, therefore, stand annulled by the constitution.

Section 25 of the county government act confers upon the boards of supervisors, in their respective counties, power to make and enforce "all such local police, sanitary, and other regulations as are not in conflict with general laws." There is nothing in the case before us to show whether the board of supervisors of Los Angeles county have ever made any regulations with respect to the sale of wines or liquors in saloons and bar-rooms; but manifestly, such regulations, if made, could not operate to divest the authorities of the city of the right to legislate upon the same subject, and enforce such regulations within the city limits. The regulations of the board of supervisors would not be a general law, within the meaning of the provisions of section 11, art. 11, Const.

Our attention has not been called to any general law from which an intention on the part of the legislature to prohibit such ordinances as the one before us—local police regulations in cities—can be inferred. It is true, as claimed by the petitioner, the legislature has by many acts manifested the policy of encouraging the growth of the grape, and the manufacture of wines and brandies, by our people, and has considered the liquor traffic heretofore as a legitimate source of revenue; but no act now in force and effect is by its express terms, or by implication, a limitation upon the powers of the municipalities of the state to regulate or prohibit the sale of intoxicating liquors in bar-rooms. The legislature has prohibited the sale of liquors to minors, and in the lobbies of theaters, near camp-meetings, and in and about certain public buildings and institutions of learning. It has also repealed what was known as the "Sunday Law," and by an act recently passed has made it unlawful to sell, or offer to sell, under the name of wine, or under any name designating pure wines, any substance or compound except pure wine or pure grape must, as defined in the act; and has appropriated a large sum of money for the use of the state board of viticulture. All these are indicative of a policy to regulate.

There is nothing in these acts inconsistent with the constitutional authority vested in the municipalities to make and enforce such local regulations respecting saloons, etc., as may be deemed best by the local legislative bodies. Section 11 of article 11 is itself a charter for each county, city, town, and township in the state, so far as its local regulations are concerned, and nothing less than a positive and general law upon the same subject can be said to create a conflict within the meaning of that section. *Ex parte Ah Toy*, 57 Cal. 92.

There is nothing in this case which requires us to determine any other question than the right of the city to prevent tippling-houses, dram-shops, and bar-rooms,—a question entirely different from that sought to be raised by petitioner, arising out of the ownership and manufacture of wines, etc.

Not only is there nothing in the provisions of the ordinance before us inconsistent with general laws, but its provisions are in harmony with the authority expressly vested in cities of the sixth class by section 862 of the municipal corporation act of March 13, 1883, which provides that the board of trustees shall have power "to pass all ordinances not in conflict with the constitution and laws of this state, or of the United States." This act of March 13, 1883, is in harmony with, and passed in obedience to, the provisions of section 6, art. 11, Const. In cases of this kind we have nothing to do with the policy of the law. That is a matter for the legislature. In determining the question whether there is a *conflict*, we look only at the law itself, which is the best and only evidence of the policy of the state on the question before us.

The petitioner is remanded to custody.

We concur: SEARLS, C. J.; MCKINSTRY, J.; THORNTON, J.; TEMPLE, J.; SHARPSTEIN, J.

McFARLAND, J. I dissent. There is no pretense that the ordinance in question is the result of the exercise of the power to *regulate*, or to raise revenue for municipal purposes by license or tax. Its clear purpose is practically to destroy the ownership of certain commodities which, in other parts of the state, are recognized and dealt with as property as fully as is flour, or bacon, or sugar. One of them—wine—is the product of a leading industry. It provides that these commodities shall not be sold or given away at any place within the bounds of the municipality. The power to sell or dispose of property gives to it its main valuable quality; and to take away this quality is to substantially confiscate it. Without discussing the many other grave constitutional questions which the case presents,—the discussion of which other duties prevent,—I will content myself with saying here that in my opinion the ordinance is "in conflict with general laws." The text of a state constitution is necessarily terse and concise, and it may be assumed that its framers, in stating a rule or principle, used as few words as would fairly express the idea intended. The evident intention of the clause above quoted was to prevent any confusion or discord or incongruity between the general legislation of the state in its broad sovereign capacity, and the special legislation of its dependent municipalities. An ordinance, therefore, may be in conflict with general laws, although the latter may not in express terms forbid the passage of the former. Whatever is inconsistent or inharmonious or at variance with or contradictory of or repugnant to the general policy of the state, as expressed in its general laws, is "in conflict" with those laws. And that there is a conflict in this sense between an ordinance which substantially declares that certain commodities shall not be property, and general laws of the state which not only impliedly, but expressly, declare that they *are* property, seems to be too clear for discussion. From the first to the last session of the legislature of this state, wines and liquors have been recognized as property, and as a legitimate source of revenue. The policy of the state has been to encourage, not to cripple, their manufacture.

v.15p.no.7—21

Prior to the new constitution, the state usually licensed their sale. Since the new constitution was adopted, that source of revenue has been turned over to the counties. The county government bill, which is a "general law," expressly authorizes the county governments to license such sale; and the city of Pasadena is not authorized by its charter to suppress it. The state, too, has provided for a "State Board of Viticulture," and appropriated to its use a large sum of money. Among the duties prescribed for this board is the selecting of persons competent to lecture and impart instruction "in methods of culture, pruning, fertilizing, fermenting, distilling, and rectifying." It is also provided that the board of regents of the University of California shall provide for special instruction "in the arts and sciences pertaining to viticulture, the theory and practice of fermentation, distillation, and rectification, and the management of cellars, to be illustrated," etc.; also for an examination and report upon the woods of the state "procurable for cooperage;" also for an analysis of "soils, wines, brandies, and grapes." And, furthermore, the legislature, at its recent session, passed an act expressly providing for the sale of wine, and for the prevention of fraud "in the manufacture and sale thereof." St. 1887, p. 46. It expressly provides that the state comptroller shall furnish printed labels to be put on the bottles and packages "in which wine is sold." Section 7. Section 6 provides that "*in all sales, and contracts for sale, production, or delivery, of products defined in this act, such products, in the absence of a written agreement to the contrary, shall be presumed,*" etc. Section 8 provides that "it is desired and required that all and every grower, manufacturer, trader, handler, or bottler of California wine, *when selling, or putting up for sale, any California wine, * * * shall plainly stencil, brand,*" etc. The act is quite a long one, and provides in detail for the sale of wine, and the prevention of its adulteration. Now, suppose that the legislature had passed another act providing that neither spirituous, vinous, nor malt liquors should be sold or given away at any place, is there any sensible man who would not say that the two acts were "in conflict?" But the provision above supposed has been put into an ordinance of the city of Pasadena; and is not the conflict clearly there?

The notion of local self-government was never intended to be pushed to the extreme of disregarding and defeating the will of the legislature, which speaks and acts for the state.

In my opinion the petitioner should be discharged.

(74 Cal. 30)

PEOPLE v. LEE CHUCK. (No. 20,311.)

(Supreme Court of California. November 1, 1887.)

1. HOMICIDE—EVIDENCE—CROSS-EXAMINATION OF STATE'S WITNESS—FACTS MATERIAL TO DEFENSE.

On the trial of an indictment for murder, where the theory of the defense is that there had been a controversy between two societies called the "Bo Sin Sear Society" and the "Guy Sin Sear Society," deceased and a prosecuting witness belonging to the former, and the defendant to the latter; that the members of the former society were specially hostile to the defendant; that the witness and deceased, as representatives of the former society, had met defendant and others, as representatives of the latter society, to settle the controversy; and that at the meeting the witness and deceased threatened the life of defendant,—it is proper, on cross-examination of such witness, and for the purpose of showing his hostility, to ask questions tending to prove such state of facts and threats, although such evidence may tend to prove a fact material to the defense.

2. SAME—SELF-DEFENSE—THREATS—EVIDENCE.

Where, on the trial of an indictment for murder, the evidence for the prosecution shows that, at the time of the killing, defendant was incased in a steel armor, and armed with four pistols, it is competent for defendant to explain this fact by showing that he had had reason to think his life in danger, and for that reason had so

armed himself. And evidence tending to show that two organizations, of which deceased was a member, had threatened defendant's life, and that defendant had been informed of such threats, is competent for that purpose.

3. SAME—INSTRUCTIONS—STATING THAT DEFENDANT HAS NOT DENIED THE KILLING.

On the trial of an indictment for murder it is improper for the court, in charging the jury, to say that the defendant did not dispute that he killed the deceased, where such admission was neither made at the trial, nor implied in the theory of the defense.

4. SAME—ADMISSION OF KILLING IMPLIED BY THEORY OF DEFENSE.

Where the theory of defendant, in an indictment for murder, is that he and others were walking peacefully along a street, when they were surprised by shots fired by deceased, and that thereupon defendant and his companions began firing, and were fired at by deceased and others with him, and that in the affray deceased was killed, but by whom was uncertain, this theory does not imply an admission that the deceased was killed by defendant.

In bank. Appeal from superior court, city and county of San Francisco; D. J. TOOHY, Judge.

McAllister & Bergin, Lyman A. Mowry, and Wm. A. Nygh, for appellants. Geo. A. Johnson, Atty. Gen., for the People.

TEMPLE, J. The defendant was convicted for the murder of Yin Yuen, who was killed at about noon, on Washington street, in San Francisco. The witnesses who were present when the homicide was committed are Chinese, and there is a wide discrepancy in their testimony, although the evidence of all the witnesses on either side harmonizes wonderfully with the testimony of the other witnesses on the same side. On the part of the prosecution it is made to appear that defendant, with several other Chinamen, was standing on Washington street when the deceased came peaceably along, and, just as he passed the defendant on the sidewalk, defendant presented his pistol and fired; that Yin Yuen instantly fell, and defendant again fired at him; and thereupon the others who were standing there, some five or six, commenced firing at the deceased, who was lying helpless on the ground. The defendant's witnesses all state that some five or six Chinamen were standing at the same point on Washington street, when the defendant with two other Chinamen came along up Washington street. As they passed the group, Yin Yuen fired a shot at the defendant, who stepped into the street, and looked around. As he did so Yin Yuen fired the second shot, and thereupon defendant and his two friends drew their pistols, and commenced firing, as did also the other Chinamen who were with Yin Yuen. That the two groups fired several shots at each other, and that during the firing Yin Yuen fell.

On the trial Chow Hin was the principal witness on the part of the prosecution. According to his own testimony, he was in company with Yin Yuen, or immediately behind him, walking along Washington street, at the time Yin Yuen was attacked and killed by the defendant. The defense attempted to show, on cross-examination of this witness, that he was hostile to the defendant. I will quote from the bill of exceptions sufficient to show the nature of the controversy: "*Question.* Who is the person who keeps that book? *The Court.* What is the object of it? *Counsel for Defendant.* The object is this, your honor: We are seeking to show the feeling of this witness, and the *animus* which he has in this prosecution. He is a member of the Bo Sin Sear society. There has been a feud between that society and the Guy Sin Sear society for a long time. The deceased was a member of the Bo Sin Sear society. They had quarreled for two months previous to this shooting. They had been out to the cemetery together to settle their disputes, and had gone through with certain ceremonies. Lee Chuck was out there; this witness was out there. They attacked Lee Chuck the day previous on Jackson street. They also threatened Lee Chuck on the very day previous to this shooting that he should not leave. This witness is a member of that society. The deceased is another. We want to show his connection with the society; we want to

show his previous quarrels. We want to show what his *animus* is. We want to show that this society has subscribed money to carry on this prosecution, and we want to show this man does not stand here as an impartial witness; that he stands here as a member of the Bo Sin Sear society, with a bitter feud on the part of the society against the Guy Sin Sear society, and against Lee Chuck as a member thereof. That the Bo Sin Sear society has been indulging in threats against the Guy Sin Sear society, the result of which was that Lee Chuck went and got a coat-of-mail, and armed himself with three or four pistols, in order to protect himself, and was attacked on Washington street in this city. We have a right to show the *animus* of the witness, and show his feelings toward the defendant." The objection that the evidence was incompetent, irrelevant, and immaterial was sustained by the court, and the defendant excepted.

The question was repeated in various forms, with the same result. The last two questions and the rulings were as follows: "*Question.* Did you and the deceased, two or three months before this shooting, go out to the cemetery as members of the Bo Sin Sear society, and meet there Lee Chuck and certain members of the Guy Sin Sear society? Did you go through there certain ceremonies, such as cutting a chicken's head, and trying to settle the feud between those two societies? Did you part in enmity, and did you and the deceased on that occasion make distinct threats against the life of Lee Chuck? *The Assistant District Attorney.* The same objection, your honor. *The Court.* Same ruling and exception. *Counsel for Defendant.* We shall except on the part of the defendant. *Q.* Did you and the deceased, representing the Bo Sin Sear society, with a party of other men, go out to the cemetery two or three months before this shooting? Did you meet there Lee Chuck and a number of men representing the Guy Sin Sear society? Did you have any angry controversy at that time? Did you and the deceased both then make threats at Lee Chuck? Did the deceased then draw his pistol on Lee Chuck, and threaten to shoot him at that time? *The Assistant District Attorney.* The same objection, your honor. *The Court.* Same ruling. *Counsel for Defendant.* We except on behalf of the defendant."

There may be some matters in the original offer which would not be proper evidence on cross-examination, but this cannot be said of the subsequent questions. It is implied that there was a feud between two Chinese societies, and that the society of which the deceased and the witness were members were specially hostile to the defendant, and it was sought to be shown, in connection with this, that the deceased and the witness, when the two societies met to arrange their controversy, threatened the defendant. This evidence was clearly admissible. It is no objection to such evidence that it would tend to prove some fact material to the defense, if it were also under the rules of evidence legitimate cross-examination.

The case of *Thornton v. Hook*, 36 Cal. 223, only sustains the proposition that the court, having a certain discretion to control the order in which testimony may be introduced, may sometimes refuse to allow cross-examination as to matters which would more properly be received as direct testimony from the party seeking to cross-examine. Here the object was to show that the witness was hostile. The defendant could not justly be compelled to recall and make the witness his own to do that. The court erred in sustaining the objection.

Since the case must be reversed on other grounds, it is not necessary to notice the unfortunate remark of the court, made while counsel for the defense was opening his case to the jury, further than to say that the line of defense there indicated seems to have been a proper one, and the judge was not justified in discrediting it in any way.

It appeared from the evidence of the prosecution that, at the time of the homicide, Lee Chuck was incased in a steel coat-of-mail, and was armed with

four pistols. These were brought in and displayed before the jury. They were intended to have, and doubtless did have, great weight in convincing the jury that Lee Chuck had prepared himself for the deadly encounter in which Yin Yuen lost his life. To explain this fact, and to show that the defendant had reason to think his life in danger, and for that reason, and not to prepare himself to make a murderous assault upon the deceased, defendant put on a coat-of-mail and armed himself, the defense offered to show that the Bo Sin Sear society and another organization of which Yin Yuen was a member, had threatened to take the life of defendant, and that defendant had been informed of the fact. This evidence was objected to as incompetent, and the objection was sustained. This ruling cannot be maintained. The fact of the extraordinary armor worn by the defendant at the time of the homicide was important evidence for the prosecution. To refuse to permit the defendant to show that the preparation was for a different purpose, and for reasons which implied no intent to assault the deceased, was a denial of a most essential right.

It is claimed that the court erred in its charge to the jury. The first objection is stated in the bill of exceptions as follows: "The charge of the court to the jury in these words: 'It is not disputed by the defense that on the twenty-eighth day of July, 1886, Yin Yuen, the person named in the information, was shot and killed on that day by the defendant,'—was an incorrect statement of facts made to the jury, and an incorrect statement of the position taken by the defense. Neither defendant nor his counsel did ever admit on the trial of this action that the deceased, Yin Yuen, was killed on the twenty-eighth day of July, 1886, by defendant. The claim of the defense was that on the twenty-eighth day of July, 1886, an affray was commenced on Washington street by Yin Yuen and his associate shooting at Lee Chuck and some two associates who were with him, and that in the course of said affray, so commenced by Yin Yuen, deceased, Yin Yuen, was killed; that neither the defendant nor his counsel, or either of them, in the course of the trial of this case, ever admitted that Yin Yuen was killed by Lee Chuck. This incorrect statement of fact to the jury in charging the jury was never subsequently corrected by the court in any further charge, or in any further observations made to the jury."

The statement fails to show any such admission on the part of the defense, and no such admission was involved in the theory of the defense. On the contrary, the theory of the defense, which was sustained by the testimony of several witnesses, was that the defendant and two others were walking peacefully along the street when they were surprised by shots fired by Yin Yuen; that thereupon they all three commenced firing and were fired at by Yin Yuen, and five or six others, with whom Yin Yuen seemed to be associated. In this affray Yin Yuen was killed, but by whom did not appear. On the other hand, the theory of the prosecution was that defendant shot deceased while he was going peacefully along from his work, and that Yin Yuen did not shoot at defendant, and that there was no affray at all, the shots all being fired at Yin Yuen by defendant and his partisans. It is plain, therefore, that this assumption was not justified by the facts, and that it was favorable to the theory of the prosecution.

Other instructions are objected to, but we do not deem it necessary to discuss them. Some of them, if isolated from the others, are probably defective; but on the whole we think the law was fairly presented on the points complained of. The cause is remanded and a new trial ordered.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; MCKINSTRY, J.; PATERSON, J.; THORNTON, J.

(15 Or. 345)

CRANE v. LARSEN and others.

(Supreme Court of Oregon. October 25, 1887.)

1. **PLEADING—ANSWER—ANOTHER ACTION PENDING—DEFENSE AVAILABLE IN EQUITY.**
In Oregon the defense that "there is another action pending between the same parties, for the same cause," is made applicable to suits in equity as well as actions at law.
2. **SAME—ANSWER MUST SHOW THAT SUIT PENDING IS SUBSTANTIALLY IDENTICAL.**
In Oregon it is not necessary that the parties to two suits should be identical in order to plead as a defense the pendency of another action "between the same parties, and for the same cause," but the answer should aver facts showing clearly that the former action or suit was, in substance, between the same parties, and for the same cause.
3. **SAME—CONSOLIDATION OF SUITS.**
Where two suits can be consolidated, and the controversy closed in one action, the court should either stay the proceedings in one suit until the prior one is determined, or join the two.

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.
H. Y. Thompson and Watson, Hume & Watson, for respondent. *Geo. W. Yocum*, for appellants.

THAYER, J. The respondent commenced a suit in the said circuit court for Multnomah county, against the appellants, for a settlement of partnership business arising out of an alleged partnership between the said parties. The appellants interposed as an answer the following matter, viz., (omitting title:) "Now, on this day, come the above-named defendants, and for answer to the plaintiff's complaint, state that at the time of this suit there was, and now is, another suit pending in the said circuit court of the state of Oregon, for the county of Multnomah, between the same parties to this suit, and for the same cause, in which said suit, pending as aforesaid, the defendants in this suit are plaintiffs, and the plaintiff in this suit is one of the defendants in said suit pending at the time of the commencement of this suit. And these defendants allege that the same subject-matter involving the settlement of the partnership affairs set forth and stated in the complaint in this suit, is set forth and stated in the complaint in said former suit as the cause of suit; and that the plaintiff in this suit appeared in said former suit, by her attorneys, and filed her answer thereto; and that said former suit is now, and has been at all the times herein mentioned, pending in said court, and still remains undetermined. Wherefore defendants pray that the complaint of the said plaintiff may be dismissed, and that defendants may recover their costs and disbursements herein."

The respondent demurred to the answer upon the following grounds: (1) That the said answer did not state facts sufficient to constitute a defense; (2) that it showed upon its face that the former suit pleaded therein was not between the same parties to this suit; (3) that said answer showed upon its face that the plaintiff in this suit was not the plaintiff in said former suit.

The court sustained the demurrer, and the respondents having refused to further plead, their default was entered, and the case referred to a referee to state an account between the parties, which the referee reported to be \$3,519 in favor of the respondent and against the appellants. The court confirmed the report, and entered the decree thereon from which the appeal is taken.

The only question of law for our determination is the sufficiency of the answer as a defense to the suit. The respondents' counsel make two points upon the question of its sufficiency: (1) That the answer shows that the suit herein is not between the same parties as the former suit, and (2) that a defendant, who is plaintiff in a former suit, has no right to interpose such a defense when sued by the former defendant, although the two suits involve the same subject-matter.

The appellants' counsel contend that the same decree of strictness, as to the rule that parties must be the same in both cases, is not observed in equity as at law, and that, therefore, the first ground is not maintainable; and they deny that the second ground is correct. The defense, "that there is another action pending between the same parties for the same cause," under the Code of this state, is made applicable to suits in equity as well as actions at law, and, in view of that fact, I am not able to discover how any discrimination can be made in the two classes of procedure, as contended for. The Code, in certain respects, maintains a distinction between actions and suits; but in others the same provisions are made applicable to both. In its interpretation the rules that formerly prevailed may be consulted, doubtless, with profit; but to undertake to apply the more technical rules of the common law to law cases, and the more liberal ones of equity to equity cases, when the statutes provide the same mode of procedure for both, would, it seems to me, be judicial legislation. The Code provides that "the forms of pleading in court of record, and the rules by which the sufficiency of the pleadings is to be determined, shall be those prescribed by the Code." Section 62, Civil Code. Rules which governed under a former system, therefore, in regard to the effect of the pendency of a former action or suit as an abatement of a subsequent one, are important only as aids in the construction of present ones. The letter of the Code in such cases must govern where its meaning is obvious, and, where its meaning is doubtful, resort must be had to those tests which the wisdom of ages has established as the most reliable means of ascertaining legislative intention. The Code allows the fact that there is another action or suit pending between the same parties, for the same cause, to be pleaded by way of answer, when it does not appear upon the face of the complaint. The meaning of this provision is plain to any person of ordinary intelligence. The evident object of it was to prevent unnecessary litigation; to avoid a second lawsuit where the identical matter was at issue between the same parties in a former one; and, if there were other parties in the former suit not included in the subsequent one, it would not necessarily prevent the pendency of the former one from being a defense to the latter; nor would the fact that the parties, plaintiff and defendant, were reversed in the two suits, prevent the defense, if the issue in the two were the same, and the same relief attainable.

I do not believe, either, that it is necessary that the parties should be identical in both suits, in order to admit the defense. I think privies would be included as well. I think the term "parties" includes privies. If A., therefore, were to commence an action against B., and then assign his cause of action, or some part thereof, to C., and the latter commence an action thereon, the defense of a former action pending between the same parties, for the same cause, would be available under a fair construction of the provision of the Code referred to. But the answer in such cases should aver facts showing clearly that the former action or suit was in substance and effect between the same parties, and for the same cause. It would not be sufficient to allege the mere deduction from facts. Under the former equity practice the defendant's plea had to set forth with certainty (1) the commencement of the former suit, its general nature, and the character and objects and relief prayed; (2) that the second suit was for the same subject-matter as the first; (3) a statement, not only that the same issue was joined in the former suit as in the second, and that the subject-matter was the same, but also that the proceedings in the former suit were taken for the same purpose. And the plea had to aver, also, that there had been proceedings in the suit such as appearance, or process requiring an appearance, at least: Story, Eq. Pl. § 737. The truth of the plea, then, had to be established by proof.

The defendant, at the time of filing the plea, had to obtain an order of reference to a master to examine and report whether the plea be true, and procure his report to that effect; and if he neglected to procure such report

within 20 days, or the report was against the verity of the plea, it would be considered as overruled, and the complainant might proceed as if no such plea had been filed. 1 Barb. Ch. Pr. 125. I am of the opinion that the answer was not sufficient to justify an abatement of the subsequent suit; that, under the circumstances of the case, the appellants should have set forth the facts of the former suit fully; should have stated the nature and object of the suit, and the relief demanded, so that the court could have seen, from an inspection of it, that the respondent could have litigated her claim therein, and have obtained all the relief she could obtain in the subsequent one. The averments of the answer, under the peculiar circumstances of the case, are too much in the nature of conclusions. The former suit is in their favor, and against the respondent and another or others. This is apparent from its language; and the circumstance is such as to require, as I view it, a full statement of facts as to the nature and object of the suit, and of the issue joined therein.

We do not approve, however, of the course pursued by the circuit court in allowing the two cases to proceed independently of each other. Such a practice would necessarily lead to confusion and embarrassment. The court should either have stayed proceedings in the subsequent suit until the prior one was determined, or have consolidated the two, and had the controversy closed out in one litigation. The matter is too important to be determined virtually upon mere technical pleadings. The decree appealed from should be set aside, the case remanded to the court below, with directions to consolidate the two suits, and order another reference to take an account between the parties; that the appellants have the right to appear at the hearing before the referee, and establish any proper claim they may have against the respondent growing out of the affair between the parties relevant to the cases; but that they be required to pay the taxable costs and disbursements of the reference already had, as a condition of the right herein granted; neither party to recover costs of appeal, and each to pay one-half of the clerk's fees in this court.

(5 Utah, 366)

Ex parte CLAWSON upon Habeas Corpus.

(Supreme Court of Utah. November 5, 1887.)

CRIMINAL PRACTICE—SENTENCE—COMMUTATION—STATUTES GOVERNING.

Petitioner was in prison on a sentence rendered in 1884. He applied for discharge under the territorial statute of Utah, (section 3 of "An act to lessen the terms of sentence of convicts for good conduct," approved March 11, 1886.) *Held*, that the right of a prisoner to discharge was controlled by the statutes in force at the time of his sentence.

J. G. Sutherland and *J. O. Broadhead*, for petitioner. *Geo. S. Peters*, for the United States.

BOREMAN, J. The petitioner is in prison on two charges,—one being for polygamy, on which he was sentenced to three and a half years in the penitentiary; and the other, for unlawful cohabitation, on which he was sentenced to six months in the penitentiary. Both sentences were rendered on the third day of November, 1884. He claims to be entitled to his discharge from imprisonment by reason of deductions from his terms of imprisonment on account of good conduct. This claim is based upon both territorial and United States statutes. The territorial statute is section 3 of "An act to lessen the terms of sentence of convicts for good conduct," approved March 11, 1886, and found in the Utah Laws of 1886, p. 6. It is urged that this territorial statute is applicable by reason of the provisions in Rev. St. U. S. §§ 5543, 5544, and of 18 St. at Large, p. 479; the latter being a substitute for the above-named section 5543. These sections of the United States statutes provide that, where the territory has adopted any rules for lessening the terms of service for good conduct, such rules shall apply to United States prisoners. That is estab-

lished as the general rule, therefore, applicable to United States prisoners. The territorial rule or statute which the petitioner asks to apply to his case was enacted subsequently to the day of sentence. At the time of the sentence there were territorial statutory rules upon the subject; but the statutes then existing have been since repealed, and the present ones adopted.

As we look at the matter, the sentences were rendered in view of the rules then existing, and they thus, in effect, became a part of each sentence. Although such statutes have been repealed by the legislature of the territory, the acts of congress referred to gave vitality to them, so far as sentences rendered during their existence were concerned. If we should allow the act of the legislature passed since the sentence to control, it in effect is to say that the legislature can, after judgment, nullify the judgment, and set the prisoner free. If the legislature can reduce the sentence at all, subsequent to the sentence, it can reduce it to an unlimited extent. This would be encroaching upon the authority of the executive, as it is the province of the executive, and not of the legislature, to reprieve or pardon. It would also be allowing the legislature to interfere with the judicial branch of the government, and to usurp its duties, and to make a sentence and judgment different from that entered in court. We are borne out in our view by the case of *Ex parte Darling*, 16 Nev. 98, and by the case of *Com. v. Johnson*, 42 Pa. St. 448.

The case of *State v. Peters*, 4 N. E. Rep. 81, was referred to as enunciating the contrary doctrine. The point was passed upon incidentally, but it was not necessary to a decision of the question in issue. That was not a case where the period of imprisonment was reduced by legislature subsequent to the sentence, but where, as part of the prison regulations, the legislature, subsequent to the sentence, authorized the parol of the prisoner within certain enlarged limits. He still, however, was a prisoner, and subject to all the prison rules. The term of his sentence was not lessened, and the case was not analogous to the one at bar.

We do not think the prisoner is entitled to his discharge at present, as his right to a discharge is controlled by the territorial statutes in force at the time the sentences were rendered. He is therefore remanded to the custody of the United States marshal.

ZANE, C. J., and HENDERSON, J., concur.

(10 Colo. 258)

RHODES and others v. HUTCHINS.

(*Supreme Court of Colorado*. October 18, 1887.)

1. PLEADING—COMPLAINT STATING NO CAUSE OF ACTION—OBJECTION AFTER JUDGMENT.

Under Code Colo. § 60, the claim after judgment that a complaint is insufficient can only be sustained on the ground that the facts contained therein, even if well stated, constitute no cause of action.

2. SAME—COMPLAINT IN ACTION ON NOTE.

A complaint stating, in effect, that the defendants made and delivered a promissory note to plaintiff, setting forth a copy of the note, and the amount claimed thereon, with interest from a certain date; that no part of the same has been paid, —contains sufficient facts to sustain a judgment under Code Colo. §§ 80, 81.

Commissioners' decision.

Appeal from county court, Arapahoe county.

This was an action by Hutchins against appellants upon a promissory note. The allegations of the complaint were as follows:

"*First*. That the amount involved in this action does not exceed the sum of \$2,000.

"*Second*. That the defendants are indebted to the plaintiff on a certain promissory note, payable to the plaintiff or order, of which the following is a

copy, with no credits or indorsements thereon; that the payee, by the name, style, and description of S. A. Hutchins, mentioned in the promissory note herein set forth, and Samuel A. Hutchins, the plaintiff above named, are one and the same person.

"\$1,050.

DENVER, COLO., December 3, 1881.

"One year after date, we or either of us promise to pay to the order of S. A. Hutchins, ten hundred and fifty dollars, at the Exchange Bank of Denver, Colorado, with interest at the rate of ten per cent. per annum, from date until paid; value received.

A. S. RHODES.

CONRAD FRICK.

"J. H. LESTER.

ISAAC BRINKER.'

"M. B. CARPENTER.

"*Third.* That there is due and owing the plaintiff from defendants on said note the sum of \$1,050, and interest thereon from December 3, A. D. 1881.

"*Fourth.* That defendants have not yet paid the sum of money above mentioned, or any part thereof, to said plaintiff.

"Whereupon the plaintiff asks judgment against these defendants for the sum of \$1,050, with interest thereon, and the costs of suit."

The defendants answered to the same as follows: "The defendants, for answer to the complaint, say that they alone are not indebted to the plaintiff on a note or otherwise for the sum mentioned; that as to whether or not the copy of note in said complaint mentioned is a true copy of a note they signed, or whether or not S. A. Hutchins and Samuel A. Hutchins are one and the same person, these defendants have not and cannot obtain sufficient information or knowledge, save that in the complaint, upon which to base a belief, and on information and belief deny the same; that these defendants do not alone owe, nor is there due from them on said note, or any note alone, the sum of ten hundred or other dollars." Both were verified.

To which answer plaintiff filed a motion as follows: "And now comes the plaintiff, by Edward O. Wolcott, his attorney, and moves the court—*First*, that the answer of the defendants heretofore filed herein be stricken out, upon the ground that the same is sham and irrelevant; *second*, that the defendants' said answer be stricken out, upon the ground that the same is immaterial and insufficient; *third*, that the plaintiff have judgment upon the pleadings against the defendants for the amount demanded in this complaint; *fourth*, that the plaintiff have judgment against the defendants for the amount demanded in this complaint."

The same was duly heard; whereupon the court adjudged as follows: "It is considered by the court that the said motion be, and the same is hereby, granted, and that judgment be entered herein in favor of said plaintiff against said defendants in the sum of \$1,257.08; wherefore it is ordered that the plaintiff have and recover, of and from the said defendants, the sum of \$1,257.08 together with his costs in this behalf incurred to be taxed; and that execution issue therefor." Defendants excepted, and bring the case here on appeal.

The errors assigned are as follows: "(1) The court erred in sustaining the motion and striking the answer from the files. (2) The court erred in rendering judgment for appellee. (3) The court erred in striking the answer, and rendering judgment for appellee, because the complaint did not state facts sufficient to constitute a cause of action. (4) The complaint was made up of conclusions of law, and stated no facts, and not sufficient to constitute a cause of action." The errors assigned as to the sufficiency of the complaint are the only errors argued and relied upon by counsel for appellants.

M. B. Carpenter, for appellants. *E. O. Wolcott*, for appellee.

STALLCUP, C. Section 65 of our Code provides for striking sham answers. The action of the court, on motion of plaintiff to strike the answer and give judgment on the pleadings, was in effect to adjudge that the same was a sham answer, and that, upon the pleadings, the plaintiff was entitled to judgment.

It seems to be conceded in the argument of counsel here that the answer was a sham answer, but it is contended on the part of appellants that the complaint was insufficient to support the judgment, and for that reason the judgment should be reversed. The omission of Lester in the action was warranted by section 14 of the Code. The court was not asked to require the complaint reformed or improved in its structure. The assignment of its insufficiency after judgment can only be sustained on the ground that the facts contained therein, even if well stated, constitute no cause of action. Section 60, Code; *Bethel v. Woodworth*, 11 Ohio St. 396.

In effect, it is stated in plaintiff's complaint that defendants made and delivered to plaintiff their certain written promise, by the terms of which there is due and owing to him from defendants the sum of \$1,050, and interest thereon from the third day of December, 1881, and that such sum remains unpaid. A copy of said promise or promissory note is set out in the complaint, by which it is shown that defendants did so promise, and that the said sum is accordingly due to plaintiff thereon from the said defendants; and it is stated to be a true copy; and then it is stated that no part of the same has been paid. So, under the liberal construction required by our Code, we feel bound to hold that the complaint does contain facts sufficient to sustain the judgment. Sections 80, 81, Code.

The judgment should be affirmed.

We concur: MACON, C.; RISING, C.

BY THE COURT. For the reasons assigned in the foregoing opinion the judgment below is affirmed.

(10 Colo. 265)

CRANE and others v. ANDREWS and others.

(*Supreme Court of Colorado. October 18, 1887.*)

1. PLEADING—ANSWER EVASIVE AND FRIVOLOUS—STRIKING FROM FILES.

In an action by a partnership upon an appeal-bond, an answer alleging that defendants have no knowledge of the partnership; denying indebtedness on the bond, or any liability thereon or breach of its conditions; alleging that plaintiffs never recovered judgment as alleged; that defendants are not sure they have discovered the meaning of the complaint; and that the bond mentioned in the complaint is unintelligible and inoperative,—is evasive and frivolous, and should be stricken from the files.

2. APPEAL-BOND—ACTION ON.

An appeal-bond, the condition of which is "to prosecute the appeal with effect, and without delay, and pay whatever judgment might be rendered against appellant on the trial or dismissal of his appeal in the district court," is clearly enough expressed to support an action, when there is a neglect to pay the judgment rendered in the district court.

3. SAME—LIABILITY ON APPEAL-BOND NOT LIMITED TO PENALTY—COSTS.

The penalty in an appeal-bond is not the limit of the liability of the obligors therein, in an action thereon, but recovery may include the costs of the suit and damages for the detention of the debt assumed in the bond.

4. SAME—SURETIES' LIABILITY CO-EXTENSIVE WITH PRINCIPALS'.

There is no distinction between the extent of the liability of the principal and surety in an appeal-bond.

Commissioners' decision.

Appeal from county court, Lake county.

In 1880, Crane & Co. sued Andrews & Co. in the county court of Lake county, and obtained a judgment against them for \$276.35, from which Andrews alone appealed to the district court of said county, and executed an appeal-bond in the penal sum of \$600, with J. J. Moynahan and S. D. Bowker as sureties. On the trial of the case in the district court, judgment was rendered against Crane & Co., which, on appeal to this court by Crane & Co., was reversed, and remanded for a new trial. The case was retried in the

district court of Lake county on the twenty-sixth day of April, 1883, and judgment rendered for Crane & Co. in the sum of \$399.25 and costs. This judgment was not paid by Andrews & Co., nor the sureties, nor any of the costs in the district court, nor in this court, except \$2.50. Whereupon suit was brought upon the appeal-bond in the district court of Lake county. To the complaint defendants interposed a demurrer that—*First*, "the complaint does not state facts sufficient to constitute a cause of action; and, *second*, that said complaint is ambiguous, unintelligible, and uncertain;" which was overruled, and defendants filed the following answer:

"STATE OF COLORADO, COUNTY OF LAKE, SS.—IN THE DISTRICT COURT OF SAID COUNTY.

"Martin H. Crane et al. vs. E. H. Andrews et al.

"E. H. Andrews and J. J. Moynahan, two of the defendants in the above entitled action, answering the plaintiffs' complaint, herein, say (1) that they have not information sufficient to form a belief as to whether the plaintiffs were or are partners, as is alleged in said complaint, nor can they obtain any; that they were not at any time whatsoever indebted to the plaintiffs in any sum of money whatsoever, on the pretended bond mentioned in said complaint; that they have never incurred any liability upon said alleged bond, nor has there ever been any breach of the condition thereof on the part of these defendants; that the plaintiffs never 'received' or recovered a judgment in the district court against the defendant Andrews for the sum of \$599.25, as seems to be intended to be alleged in said complaint, although these defendants are not sure that they have discovered the meaning of such complaint. (2) And for a further defense to this action these defendants say that the pretended bond mentioned in the complaint herein is unintelligible and inoperative, and that no liability has been incurred by this defendant on account thereof. Wherefore these defendants pray judgment."

Upon the motion of the plaintiffs, this answer was stricken from the files, on the ground that it was frivolous and evasive, and presented no issue of fact; and defendants electing to stand by their answer, judgment was rendered against them on the tenth day of April, 1884, upon the bond, for the sum of \$657.30, to which defendants excepted, and appealed to this court, and assign three errors in the judgment and proceedings below: "*First*, the district court erred in striking out the answer of the defendants; *second*, the district court erred in giving judgment for the plaintiffs; *third*, the district court erred in the amount of the judgment rendered."

Maxwell & Phelps, for appellants. *Wm. Fletcher*, for appellees.

MACON, C. The answer is evasive, frivolous, and largely made up of legal conclusions, which must have been advanced in the argument on the demurrer, and overruled by the court, and it is not attempted to be defended by appellants in this court. The district court did right in striking it from the files.

The second assignment goes to the sufficiency of the bond in suit to maintain the action against the obligors. While it is a peculiar instrument in some of its terms and conditions, and incomplete, affording less protection to the appellees than a bond in the statutory form would have done, it contains the conditions to prosecute the appeal with effect, and without delay, and pay whatever judgment might be rendered against appellant on the trial, or dismissal of his appeal in the district court; and it is for the breach of the latter condition that this suit was instituted. The conditions of an appeal-bond are separate, and it is seldom that all are broken by the obligor, but suit for breach of any material condition therein may be maintained. In this case the condition broken, as alleged in the complaint, is the neglect to pay the judg-

ment of \$399.25, and the costs in the district court, and those in this court, which were all due, and should have been paid, according to the terms and conditions of the bond, on the twenty-sixth day of April, 1883; the obligation to do which is clearly enough expressed in the bond. The district court did not err in holding the bond sufficient to support the action.

The third assignment is founded upon the position that the penalty in the bond is the limit of the liability of the obligors therein, in an action on the bond, and that this limited recovery includes the costs of the suit, and damages for the detention of the debt assumed in and by the bond; and as the judgment here is for more than the penalty of the bond sued on, it is erroneous. It is needless to cite authorities to the doctrine that at this time the penalty in such bond is not considered as the debt, and is not the measure of recovery where the sum secured is less than the penalty. But where such sum is equal to or greater than the penalty, the amount of the latter may be recovered, with damages for the detention thereof, from the breach of condition to the time of trial, with costs of suit. This rule has not been settled without great conflict of decision, and is not the rule in some of the United States, and cannot be said to be settled in England.

Sutherland, in his book on Damages, p. 14, vol. 2, states it thus: "The weight of American authority, however, is in favor of allowing the interest as damages beyond the penalty. The penalty is the limit of liability at the time of the breach. Interest is afterwards given, not on the ground of contract, but as damages for its violation, for delay of payment after the duty to pay damages for breach of the condition to the amount of the penalty had attached,"—citing a large number of cases in support of his position. The courts of the United States also give interest in addition to the penalty where the sum secured by the bond is equal to or greater than the penalty. *U. S. v. Arnold*, 1 Gall. 348, per STORY, J.; *Ives v. Bank*, 12 How. 159. Nor is there any distinction between the extent of the liability of the principal and that of the surety on such bonds. In most of the cases cited in Sutherland on Damages, *supra*, the surety was involved, and interest was allowed against him.

As the judgment in this case was not so great as the sum of the judgment for \$399.25, with interest thereon from April 26, 1883, when the same was rendered, to the tenth of April, 1884, when the judgment under review was rendered; the costs in the district court and in this court; nor so large as the penalty of the bond sued on, with interest from the date of the breach of its condition, to-wit, the twenty-sixth day of April, 1883, to the date of the judgment complained of,—there is no error by reason of the amount of the latter judgment, and it should be affirmed.

We concur: RISING, C.; STALLCUP, C.

BY THE COURT. For the reasons assigned in the foregoing opinion the judgment of the district court is affirmed.

(10 Colo. 254)

SOUTH PUEBLO NEWS PRINT. & PUB. CO. v. MOORE.

(Supreme Court of Colorado. October 18, 1887.)

1. VENUE IN CIVIL CASES—CHANGE OF—MODIFICATION OF ORDER—REQUIRING PAYMENT OF COSTS.

In Colorado, when a county court by one order grants an unconditional change of venue, and afterwards, by another order, requires the party seeking the change to perfect it by paying accrued costs, the latter order is in effect a mere modification of the former, and is invalid; the county court having no power to require payment of costs as a condition precedent.

2. SAME—CHANGE FROM COUNTY TO DISTRICT COURT.

By Gen. St. Colo. c. 22, § 20, changes of venue from county courts may be taken to the county court of any adjacent county, provided that, if no substantial objec-

tion is shown, the change shall be taken to the district court of the same county. A county court ordered a change of venue to "the district court of the Third judicial district," which district included several counties. *Held*, that the statute did not authorize the change to any district court but that of the county where the cause was pending, and that the order was uncertain as to the court or county to which the change was granted.

Commissioners' decision.

Error to Pueblo county court.

On the twentieth day of September, 1883, the following order was entered in the case: "Now, on this day, this cause coming on to be heard, plaintiff and defendant being present by their attorneys, J. F. Drake, Esq., attorney for plaintiff, and Patton & Urmy, attorneys for defendant; and thereupon the attorneys for the defendant filed a motion for a change of venue; and the court, after hearing the motion and affidavit of A. Corder, Esq., read, and the argument of counsel thereon, ordered that the said motion be, and the same is hereby sustained, and that the said cause be removed to the district court of the Third judicial district." On the twenty-second day of November, 1883, and at the September term of said court, the following order was entered in the case: "Now, on this day, comes the plaintiff, by his attorney, J. F. Drake, Esq., and moves the court for an order on the above-named defendant, to perfect its application for a change of venue to the district court, by requiring said defendant to pay costs in the above-entitled action forthwith; and, in case of default of such payment, to set the said case for hearing at an early day. And thereupon the court having heard the motion read, and the arguments of the plaintiff's counsel thereon, and being fully advised in the premises, it is ordered by the court that the said motion be, and the same is hereby sustained." On the twenty-third day of November, 1883, and at the September term of said court, the following order was entered in the case: "Now, on this day, the defendant having failed to comply with the preceding order requiring the defendant to perfect its change of venue by paying all costs forthwith, it is ordered by the court that this cause be, and the same is hereby, set for hearing on the merits on Saturday, November 24, at 2 P. M." On the eleventh day of April, 1884, the cause coming on for hearing, the defendant not appearing, a jury being waived, the case was tried to the court, and judgment was entered against the defendant, and in favor of the plaintiff, for the sum of \$284.83, and costs of suit.

The case is brought here upon a writ of error, and the following errors assigned: "(1) The court erred in making a rule on defendant, requiring it to pay the costs theretofore accrued in said cause, as a condition precedent to preparing a transcript and sending the same to the district court, after a change of venue had been granted. (2) The court erred in making a rule on defendant, or taking further proceedings upon the motion of defendant, after a change of venue had been granted. (3) The court erred in proceeding further in said cause after a change of venue had been granted, except to prepare a transcript of the proceedings in said cause, and transmit the papers in the same to the district court. (4) The court erred in proceeding to set the said cause for hearing over the protest of defendant after a change of venue had been granted. (5) The court had no jurisdiction to proceed in said cause after a change of venue had been granted. (6) The court erred in hearing said cause. (7) The court erred in entering judgment in said cause."

Patton & Urmy, for plaintiff in error. *J. F. Drake*, for defendant in error.

RISING, C. The first assignment of error raises the only question we deem it necessary to consider. The order entered on the twentieth day of September was an absolute and unconditional order for a change of the place of trial of the action. The order entered on the twenty-second day of November, and at the same term of court, was, in effect, a modification of the order of the

twentieth of September, although it purports to be an order requiring the defendant to perfect the change of venue under the order made for the change. If the court did not err in making the order of November 22d, then the order entered on the twenty-third day of November was not erroneous. It follows, then, that in considering the first assignment of error we have only to look to the order granting a change of the place of trial, and the order requiring the payment of costs by the defendant, as a condition precedent to entitle it to perfect the change, to determine the question raised. If there is no authority of law for the imposition of such terms, then the action of the court cannot be sustained. In the case of *O'Connell v. Gavett*, 7 Colo. 40-42, 1 Pac. Rep. 902, this court held that, upon the granting of an application for a change of the place of trial under the Code, the general rule that costs must abide the event of the suit must apply, and that there was no authority for requiring the payment of accrued costs as a condition upon which the change could be had. The modification of the order, imposing, as terms, the payment of costs, was erroneous.

It is urged by defendant in error that the order changing the place of trial was void for uncertainty, in that it directed the removal of the case to the district court of the third judicial district, and did not specify the county in said district in which the trial should be had. Section 20 of chapter 22 of the General Statutes provides that "changes of venue from any of the county courts may be taken for the same causes provided for changes of venue in the district courts, and the venue, in all cases, shall be changed to the county court of any adjacent county wherein the cause or causes necessitating such change do not exist; provided, that, if no substantial objection is shown to exist thereto, the venue shall be changed to the district court of the same county." While the third judicial district includes several counties, the statute did not authorize the court to remove the case to the district court of any county other than the same county in which the cause was pending; so that, under the statute, there was uncertainty as to the court or county to which the order for removal referred.

The judgment should be reversed.

We concur: MACON, C.; STALLCUP, C.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment of the county court is reversed.

(10 Colo. 250)

THORNILY v. PIERCE and another.

(*Supreme Court of Colorado*. October 18, 1887.)

1. EXCEPTIONS, BILL OF — REFUSAL OF JUDGE TO SIGN — AFFIDAVITS OF ATTORNEYS — MUST BE DISINTERESTED.

Under Code Civil Proc. Colo. § 195, which authorizes either party to a suit, upon the refusal of the trial judge to sign a proposed bill of exceptions, to make such bill a part of the record by procuring and attaching to the bill "the affidavit of two or more attorneys of the court, or other persons who were present" at the trial, that the bill "is correct and true," the affidavits of attorneys who had no participation in or connection with the case tried are required; and the affidavit of one such other person is not sufficient.

2. APPEAL — FROM JUSTICE OF THE PEACE — VERDICT IN EXCESS OF JUSTICE'S JURISDICTION — DISMISSAL.

Plaintiffs, in an action of replevin before a justice of the peace, recovered judgment for \$265. Defendant appealed to the county court, where a verdict was rendered for plaintiffs for \$365, an amount in excess of the justice's jurisdiction. Plaintiff did not offer to remit the excess. *Held*, that the court should have dismissed the action.

Commissioners' decision.

Error to San Juan county court.

L. C. Northrup, for plaintiff in error. *Hudson & Slaymaker* and *C. M. Frazier*, for defendants in error.

MACON, C. This was an action of replevin for certain goods and chattels claimed by plaintiffs below, Pierce and Thomas, under a sale to them by G. J. Thomas, and held by the defendant below, as sheriff of said county, under certain writs of attachment issued by the creditors of said G. J. Thomas. The action was commenced before a justice of the peace of said county, and judgment rendered therein against plaintiff in error, from which he appealed to the county court of said county, where the action was tried to a jury, and a verdict found for defendants in error for the sum of \$365. A motion for a new trial was filed by defendant below, and overruled by the court, and judgment rendered upon the verdict for the whole amount found by the jury, to which defendant excepted, and comes to this court. No written pleadings, save the affidavit in replevin, were filed in the justice's court, or the county court. By the transcript sent up from the justice's court to the county court it appears that no claim was made by the plaintiffs below for any special damages growing out of the detention of the goods by the defendant; but the value of the property was stated to be \$265. In the county court, so far as we can ascertain by anything before us in the record, no claim for special damages was made.

The county judge refused to sign and seal the bill of exceptions presented by defendants' counsel, so far as the same purported to set forth the evidence given on the trial, but signed and sealed what purports to and is intended to be a bill of exceptions, so far as to show the instructions given to the jury by the court. Upon the refusal of the county judge to sign the bill of exceptions, as aforesaid, defendant endeavored to avail himself of the provisions of the Code of Civil Procedure, § 195, which authorizes a party, upon the refusal of the judge to sign the bill of exceptions, to procure the affidavits of "two or more attorneys of the court, or other persons who were present at the trial," to make affidavit of the truth of the facts set forth in the bill of exceptions. In this endeavor defendant failed. The statute evidently requires that the "two or more attorneys of the court" should be those who had no participation in, or connection with, the case in which their affidavits are sought. *Simon v. Weigel*, 10 Iowa, 505; *St. John v. Wallure*, 25 Iowa, 21. In this instance the two attorneys who made these affidavits were the two who conducted the case before the county court, and who are in this court prosecuting this writ of error.

Plaintiff in error also has filed in this court the affidavit of one Bradford, who was then under-sheriff of said San Juan county. It being seen that the affidavits of the two attorneys alluded to are not sufficient, is the affidavit of one "other person" sufficient? We think not, for the reason that the statute uses the term "other persons," which is in its plain meaning plural; and because, if two or more attorneys of the court are required in such case, there can be no reason why at least two "other persons" should not be necessary.

As to the first assignment that the court erred in not dismissing the cause for the reason that the justice of the peace had no jurisdiction of the matter, we think the point is well taken. The trial was had before the justice of the peace on the thirtieth day of May, and in the county court on the thirteenth day of June following. Before the justice of the peace, the plaintiffs recovered \$265, and on the trial in the county court, about two weeks later, they recovered \$365. Upon the coming in of the verdict, which was \$65 beyond the jurisdiction of the justice, and upon failure of the plaintiffs to remit this excess of \$65, the court should have dismissed the suit.

The judgment should be reversed, and a new trial granted.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment is reversed, and the cause remanded.

HELM, J., (dissenting.) I concur in the conclusion that the judgment must be reversed, but do not accede to the assumption that by remitting the excess over \$300, of the verdict in the county court, plaintiff could have cured the jurisdictional defect in question. I have serious misgivings as to the correctness of the legal proposition thus implied.

The reversal is based upon the ground that there was a want of jurisdiction over the subject-matter. If this were not so, the judgment could not be reversed, because the objection was not taken in the court below; and it is a rule of practice too well established to admit of discussion, that where the parties appear and trial is had, no other objection relating to jurisdiction, save this, can be for the first time presented in the supreme court.

When the verdict for \$365 was returned to the county court, it became the duty of that court to dismiss the action, because under the statute the justice of the peace had no jurisdiction over the subject-matter. Gen. St. §§ 1924, 1988. I understand the law to be that where the jurisdiction of a court is regulated by statute, the court is imperatively limited to the subject-matter thus specified. It cannot, even by express stipulation of the parties in writing, be clothed with jurisdiction over a subject-matter not covered by the legislative enactment.

If I am right in these views, it inevitably follows that plaintiff in the present action was wholly powerless to cure the defective jurisdiction, and validate the proceeding, by remitting \$65, or any other sum, from the verdict. I must not be understood as saying that a creditor cannot forgive a portion of his just debt, and thus bring his cause within the jurisdiction of a justice; but, if such be his purpose, he must remit before he begins his suit. Having done so in some proper manner, his cause of action is within the statutory jurisdiction prescribed for the court, and the proceeding becomes regular from its inception.

The test of jurisdiction in cases like the one at bar is the verdict of the jury in the county court. If the plaintiff proves himself entitled to more than \$300, it is his own fault that his recovery becomes void. If, on the other hand, a perverse jury or court, as the case may be, insists upon giving him a larger verdict or judgment than he proves, and one for more than \$300, I know of no remedy for him, except through a new trial.

The case of *Cramer v. McDowell*, 6 Colo. 369, is not relied on in the principal opinion. The intimation in that opinion on this subject is used by way of argument, rather than as announcing a rule of law; but if it fairly leads to an inference contrary to the foregoing conclusion, I think the language there used should be qualified.

(10 Colo. 220)

CRAIG v. SMITH and another.

(Supreme Court of Colorado. October 18, 1887.)

1. PARTNERSHIP—ACTION AGAINST—JUDGMENT AGAINST INDIVIDUAL PARTNER.

Suit was brought against a firm to collect an alleged partnership debt. Service was had on one partner only, and judgment was rendered against him as for an individual debt. *Held*, that he was not a party to the suit, and it was error to render a judgment against him alone.

2. ABATEMENT—ANOTHER ACTION PENDING—REQUISITES.

The defendant set up a plea in abatement that there was another suit pending between the same parties for the same cause of action. It did not appear but that the other suit had been discontinued. Neither did it appear that the record of the proceedings in the other court were offered on the trial below; nor was such record, even if so offered, preserved in the bill of exceptions. *Held*, that the plea in abatement could not be sustained.

3. WRITS—DEFECTIVE SERVICE—WAIVER.

The justice in an action for a debt claimed to be due from a partnership, where only one of the partners had been served with process, continued the hearing. The v.15p.no.7—22

defendant appealed from the justice to the county court, and then secured a change of venue to the district court, when he appeared, and the cause was then tried on its merits. *Held*, that the defendant had waived the right to be heard as to the alleged erroneous proceeding.

Appeal from district court, Conejos county.

This suit was brought before a justice of the peace against "P. L. Craig and W. B. Broad, partners using the firm name of Broad & Craig," for a certain demand alleged to be due Smith & Wilson. Service of process was secured only upon Craig, one of the partners. The return of the constable recited the fact that such service was had "by reading the within to the within-named defendant, and by leaving with him, P. L. Craig, of the firm of Broad & Craig, a copy of the same." Judgment was rendered by the justice of the peace for plaintiff for \$188.25, and an appeal taken to the county court. Motion in said court to dismiss; overruled. Change of venue taken by Craig to the district court. Motion to dismiss renewed in the district court, and denied. Trial had, and verdict and judgment against "defendant P. L. Craig" for \$168.25. Appeal by Craig to supreme court. Remaining facts sufficiently stated in the opinion.

C. C. Holbrook, for appellant. *Wells, Smith & Macon*, for appellees.

HELM, J. This action was brought against the firm of Broad & Craig to collect an alleged partnership debt. Judgment was rendered against Craig, the partner served with process, as if for an individual debt.

The evidence is not before us. Whether it established a debt against the firm, a joint liability of Craig and the firm, or simply a personal liability on the part of Craig, it was error to render judgment against Craig alone, because he was not a party to the suit. *Freem. Judgm. § 141*, and cases cited. Craig was served with process solely as a partner, and as a partner he responded and defended. His objection to individual liability through a personal judgment could not have been interposed earlier in the proceedings than it was, because prior to judgment there may have been nothing to apprise him of an intention to hold him for the amount recovered, except as he might be held through a judgment against the firm. The individual property of Craig, as one of the partners, aside from his interest in the partnership property, might be subjected to the payment of a partnership debt; but this fact does not affect his right to have the judgment for a firm debt entered against the firm, and the whole partnership property thus made liable for such debt; nor can it render valid a judgment against one not a party to the record.

For this error the judgment must be reversed. But in view of a retrial in the court below, it becomes necessary to notice two of the remaining questions presented for consideration.

The objection, in the nature of a plea in abatement, relating to the pendency of another suit between the same parties, and involving the same cause of action, cannot be sustained. *First*, because the showing made in support of the motion or plea was insufficient. It does not appear but that the suit begun before Justice MOON had been discontinued by virtue of the statute (section 1941, Gen. St.) when the summons in the present action issued from the office of Justice LEWIS. *Yentzer v. Thayer*, 14 Pac. Rep. 53. *Second*, because we are not advised that the record of the proceedings before Justice MOON was offered in evidence, or properly presented at the trial in the district court. And, *third*, if that record was in evidence, it is not preserved in the bill of exceptions, and for this reason could not be here considered.

By taking his appeal from the justice to the county court, asking and securing a change of venue to the district court, and appearing and trying the cause in the latter court on its merits, without objecting to the action of the justice in continuing the hearing before him, Craig waived the right to be now heard as to the alleged erroneous proceeding.

The judgment of the district court is reversed, and the cause remanded.

(10 Colo. 243)

WHITSETT, Ex'x, etc., v. UNION DEPOT & R. Co. and others.

(*Supreme Court of Colorado.* October 18, 1887.)

1. MUNICIPAL CORPORATIONS—STREETS—VACATION—INJUNCTION.

The amended charter of the city of Denver 1877, § 40, provides that the city has the power to abolish and alter streets by ordinances not repugnant to the constitutions of the United States and Colorado. The city vacated certain streets, and allowed the Union Depot Company to erect buildings thereon. Plaintiff filed a bill to set aside the vacation, enjoin the erection of the buildings, and for damages to lots owned by him abutting on the streets, but not in the portions vacated and obstructed. *Held*, that plaintiff's bill was properly dismissed on demurrer, there being no allegation that his injury was different in kind from that of the general public.

2. SAME.

The city council had the right to provide for the use to be made of a street when vacated, with due regard to private and public rights.

Error to district court, Arapahoe county.

Wells, Macon & McNeil, for plaintiff in error. *Teller & Orahoad* and *B. M. Hughes*, for defendant in error.

BECK, C. J. Richard E. Whitsett, since deceased, brought an action in the district court of Arapahoe county to enjoin the defendant in error, the Union Depot & Railroad Company, from completing the structure then commenced, and since completed, which extends across Seventeenth street, in the city of Denver, near its westerly terminus, and known as the "Union Depot;" and to compel said defendant, and the Denver, South Park & Pacific Railroad Company, to remove the obstructions which they had erected and placed in said street, and the other streets and alleys mentioned in the complaint. Damages, general and special, were prayed for injuries alleged to have been sustained by the plaintiff, and for such as might be sustained before final judgment in the action. The complaint avers that plaintiff is the owner of certain lots described therein, which abut on the streets obstructed, on which are buildings for residence and business purposes; that his lots on Seventeenth street are situated beyond said obstructions from the business center of said city, so that, by reason of the obstructions therein, he, his tenants, and other citizens, cannot pass continuously along said street to and from the business center of the city, as they otherwise could and were accustomed to do, but are compelled to go around the obstructions, and are thus made to travel a greater distance in passing to and from said business center. The complaint sets out in detail the history of the location of the Denver city town-site, in the year 1859, upon the unsurveyed public domain; the survey, subdivision, and platting thereof into lots and blocks, intersected by streets and alleys; the recognition and approval of said subdivision and plat by the residents of said town-site, and by the authorities of the city of Denver; the incorporation of said city thereafter, under the name of the "City of Denver," by an act of the territorial legislature passed in 1861; the entry by the probate judge of Arapahoe county at the United States land-office, in 1865, of said town-site, under and in pursuance of the town-sites acts of congress; the conveyance by said probate judge to the parties entitled thereto of the several lots and blocks occupied by them respectively, and the further conveyance in fee to the city of Denver, by said probate judge, of all the streets, alleys, and public grounds located and set forth in said survey and plat. Plaintiff avers that, ever since the survey and subdivision of the town-site, he has been a resident of Denver; but does not say that he was an occupant of either of the lots alleged to be injured by the construction of the union depot, or that he acquired his title thereto from the probate judge, or from any of his successors in office. He inserts the legal proposition that the probate judge, after his entry of the town-site, and that the city of Denver, since the conveyance to it of the

streets, alleys, and public grounds referred to, held, and that said city now holds, all the several streets and alleys surveyed and set down in the said plat, (which included those now obstructed,) in trust, that the same should be ever kept and used solely as public highways; and, upon the abolition or vacating of any of said streets and alleys by lawful authority, to release and convey over to the lawful owners of the abutting lots all that part of the streets and alleys so vacated, from the boundary of such lots to the center of said streets and alleys respectively.

Prior to the happening of the grievances complained of the city council of the city of Denver had, by an ordinance passed on or about the fifth day of January, A. D. 1880, vacated a portion of the streets and alleys mentioned in the complaint, for the purpose of enabling said defendant, the Union Depot & Railroad Company, to build a union railroad depot at that point in the city, and to erect and make such other structures and improvements as were necessarily appurtenant to a union railroad depot. By this ordinance parts of Seventeenth and Wewatta streets were declared vacated, as were also the alleys in the four blocks abutting thereon, upon which the building and its appurtenances were to be constructed. After describing the parts of the streets and alleys vacated, its language is that they "be, and the same are hereby vacated and abolished, and the same appropriated to the Union Depot & Railroad Company and its successors, for its and their sole use, occupancy, and benefit, so long as it or its successors shall use the same for the purposes of maintaining a union depot, with necessary tracks, sidings, and switches, leading to and from and about the same, for the use of railroads, to be held, used, and occupied henceforth by said company, its successors and assigns, for the uses and purposes aforesaid: provided, that if the said company, its successors and assigns, shall cease to use and occupy the said parts of said streets and alleys for the purposes aforesaid, then this grant to it and them shall cease and determine; but that the destruction of the proposed depot by fire shall not operate to determine this grant to it, its successors or assigns, unless it or they or either of them shall fail, neglect, or refuse to build the same in a reasonable time after such destruction." While the plaintiff's lots abut on the streets vacated, none of them abut on the portions thereof vacated. The streets surrounding the several blocks in which his lots are situated remained open and unobstructed.

The ground stated in the complaint as the basis of the claim for special damages is that the plaintiff, on a certain day, was passing along Seventeenth street in a carriage, about his lawful business, and at the point in question was obliged to turn out of said street, and go around the obstructions placed therein, by a longer way than the lawful highway, and to pass over the railway tracks unlawfully placed in said street. The prayer of the complaint is that said ordinance be declared null and void; that the defendants mentioned be restrained from erecting further obstructions in or from occupying said streets and alleys; that they be required to abate and remove all obstructions which they have or shall have erected in Seventeenth street, or in any of said other streets and alleys, before final judgment; for \$500 damages, and for other relief.

The defendants demurred to the complaint, on the ground that the matters and things therein stated were not sufficient in law to be answered unto. The court sustained the demurrer, and, plaintiff abiding thereby, the court gave judgment, dismissing the action. Plaintiff then brought the cause to this court for review by writ of error. After the suing out of the writ of error the death of the plaintiff in error was suggested, and Emma C. Whitsett, executrix of the estate of the deceased, was duly substituted as plaintiff in error.

The errors assigned are that the court erred in sustaining the demurrer and in dismissing the complaint. The case presented differs in no material par-

ticular from the numerous cases wherein the authority of municipal corporations to vacate and abolish streets and alleys has been called in question. The rule established by these adjudications is that, in the absence of any constitutional restriction, the power of the legislature to vacate streets and highways, or to invest municipal corporations with this power, cannot be doubted. 2 Dill. Mun. Corp. § 666; *McGee's Appeal*, 8 Atl. Rep. 237, and authorities cited; *People v. Supervisors*, 20 Mich. 95; *Gray v. Land Co.*, 26 Iowa, 387; *Hoboken v. Hoboken*, 36 N. J. Law, 540; *Brook v. Horton*, 68 Cal. 554, 10 Pac. Rep. 204.

Section 25 of article 5 of our state constitution prohibits the legislature from exercising this power directly. This section provides that "the general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * Vacating roads, town plats, streets, alleys, and public grounds." But this instrument contains no prohibition against the delegation of this power to municipal corporations. On the contrary, the restriction against the vacating of streets and highways by local or special legislative acts is an implication of the power of the legislature to authorize such acts to be done. As held in *Paul v. Carver*, 26 Pa. St. 223, this power must reside somewhere in every well-regulated government. There being nothing in our constitution prohibiting its exercise, except by special legislative act, we conclude the various municipalities may exercise this power when duly invested therewith.

The city of Denver was invested by its original charter of November 7, A. D. 1861, with authority "to open, alter, abolish, widen, extend, establish, grade, pave, or otherwise improve and keep in repair, streets, avenues, lanes, and alleys, sidewalks, drains, and sewers." Laws 1861, p. 487. This provision has been continued in the several amendments since made, including the amended charter approved April 6, 1877. Section 40 of the latter act provides that "the city council shall have power, within the jurisdiction of the city, by ordinance not repugnant to the constitution of the United States or the constitution of the state of Colorado," "to open, alter, abolish," etc., "streets, avenues, lanes, and alleys." While the invalidity of this ordinance was asserted by the plaintiff, he did not question its formal and legal adoption by the city council.

The point is made by counsel for plaintiff in error that the city council was not authorized by its charter to grant the exclusive right of occupancy of the streets vacated to a private corporation, and to authorize the erection of permanent obstructions therein. A municipal corporation is not warranted by law in exercising its power to vacate streets in an arbitrary manner, and without regard to the interest and convenience of the public, or of individual rights. But when the power to vacate exists and has been exercised with due regard to the interests both of the public and of private rights, the fact that the vacating ordinance provides for the use which is to be made of the street, or the portion thereof vacated, does not aid a property holder who seeks to annul the ordinance, on the ground that he is interested in keeping the street open. The object to be accomplished in the present case may fairly be said to be one of great interest and convenience to the public. The establishment and construction of a union railroad depot for the use of all railroads entering within or centering in the city is a convenience not only to all residents of the city, but to the public generally. We are therefore of opinion that the privileges granted to the Union Depot Company afford no ground for equitable interposition. If the plaintiff suffered no special injury peculiar to himself, and distinct from the general inconvenience experienced by the public, by the acts complained of, he has no standing in equity for injunctive relief. High, Inj. § 528.

The rule laid down in *City of Chicago v. Building Ass'n*, 102 Ill. 393, and in support of which many authorities are cited, is that, for any act obstructing

a public and common right, no private action will lie for damages of the same *kind* as those sustained by the general public, although in a much greater degree. As we have already seen, none of the lots owned by the plaintiff abut on those portions of the streets or alleys mentioned which were vacated by the ordinance passed by the city council, but all are situated in other blocks. The streets in front of his several lots remained open and free from obstructions. These facts bring the case within the principle of the authorities cited, and within the case of *City of East St. Louis v. O'Flynn*, 10 N. E. Rep. 395, wherein the court say: "Here plaintiff's lot is not adjacent to the streets or alleys vacated. It is in another block. The access to and egress from his lot is not affected by the vacating ordinance passed by the city. The street in front and the alley in the rear of his property remain open as before, affording the same access to and egress from it. The inconvenience that would be occasioned to the plaintiff in going from the street in front of his house to a particular part of the city, on account of vacating and closing up certain streets and alleys in another block, is the 'same *kind*' of damage that would be sustained by all other persons in the city that might have occasion to go that way; and, although the inconvenience he may suffer may be greater in degree than to any other person, that fact would not give him a right of action."

For the reasons assigned we are of opinion that the action of the district court in sustaining the demurrer and dismissing the complaint was proper. The judgment is therefore affirmed.

(10 Colo. 222)

HOWLETT v. TUTTLE.

(*Supreme Court of Colorado*. October 18, 1887.)

APPEAL—NEGLECT TO FILE BRIEFS—DISMISSAL.

Where a cause is submitted upon briefs to be filed within a time fixed by the court, and the appellant makes no attempt to comply with the order of submission, the case will be dismissed for want of prosecution; following *Railway Co. v. Woy*, 7 Colo. 556, 5 Pac. Rep. 815.

Commissioners' decision. Appeal from district court, Arapahoe county. *B. M. & C. J. Hughes*, for appellant. *John W. Horner*, for appellee.

MACON, C. In April, 1884, this cause was submitted on briefs to be filed within a time fixed by the court. The appellant made no attempt to comply with the order of submission until November, 1885, when he tendered for filing the abstract of the record. Afterwards, on January 29, 1886, he filed a motion to vacate the order of submission, and for further time to file arguments. This motion was never raised in this court, and has never been passed upon. In this state of the case, under the rule enforced in *Railway Co. v. Woy*, 7 Colo. 556, 5 Pac. Rep. 815, this appeal should be dismissed.

We concur: RISING, C.; STALLCUP, C.

By THE COURT. For the reasons assigned in the foregoing opinion the appeal from the district court is dismissed, at the costs of the appellant.

(10 Colo. 228)

FILLMORE and others v. WELLS and others.

(Supreme Court of Colorado. October 18, 1887.)

1. ATTORNEY AND CLIENT—ATTORNEY'S LIEN ON JUDGMENT—DECREE AWARDING INTEREST IN LAND.

Gen. St. Colo. § 85, provides that "attorneys * * * shall have a lien * * * upon any judgment they may have obtained belonging to any client for any fee due, * * * or professional service rendered, * * * which said lien may be enforced by the proper civil action." *Held*, that a decree awarding to plaintiffs in an action an interest in land was subject to a lien for the fee of their attorneys under this section.

2. SAME—SUIT IN EQUITY TO ENFORCE LIEN.

A suit in equity to determine the contested questions of plaintiffs' employment, and the amount of their compensation, as attorneys, and to enforce their lien, is "a proper civil action" within the meaning of the statute.

3. SAME—SERVICES OF ATTORNEY IN SUIT BY MINORS—EMPLOYMENT BY GUARDIAN—CHARGE UPON MINOR'S ESTATE.

A suit was brought in the name of certain minors, by request of their guardian. The minors were the real parties in interest. It did not appear that there was any intention on the part of the attorneys to look to the guardian for compensation, nor on the part of the guardian to become personally liable therefor. *Held*, that the court of equity would charge the estate of the minors with such compensation.

4. SAME—PARTIES TO ATTORNEY'S SUIT—SUCCESSIVE GUARDIANS.

Plaintiffs were employed by K., the guardian of certain minors, to prosecute a suit for them. K. resigned during its pendency, and several guardians assumed the position successively; the last being one P. *Held*, that the guardians preceding P. were not necessary parties to an action by plaintiffs for their fees.

5. SAME—AMOUNT OF ATTORNEY'S COMPENSATION—WEIGHT OF EXPERT TESTIMONY—REFEREE'S FINDINGS.

The findings of a referee as to the amount reasonably due attorneys for services, in accordance with the weight of expert testimony, will not be set aside.

6. PLEADING—DEMURRER FOR MISJOINDER OF PLAINTIFFS—ANSWER—DEMURRER CANNOT BE ARGUED ON APPEAL.

Defendants demurred to the complaint on the ground of misjoinder of parties plaintiff. The demurrer was overruled, and defendants answered, and went to trial. *Held*, that by so doing they waived their rights to be heard on the demurrer on appeal.

Appeal from district court, Arapahoe county.

In the year 1875, Wells & Smith, attorneys at law, instituted a suit in equity in behalf of John Norman and John Septer Fillmore, then minor heirs of John S. Fillmore, deceased, against John J. Reithman, to recover certain premises situated in the city of Denver, and also rents and profits wrongfully collected and withheld. They were employed for this purpose by the guardian of said minor heirs. Various steps were taken in the suit, extending through a series of years, but finally terminating successfully. In the year 1880, a decree was entered finding the plaintiffs, the said heirs, entitled to the undivided one-half interest of the premises in controversy, and also to the sum of \$7,998.71 as their share of the rents previously accruing therefrom. The case was taken to the supreme court, both by appeal and error; and the said attorneys, together with Macon, (who had some years previously become a member of the firm, and participated in the proceedings,) conducted both appellate cases for the heirs. During the spring of 1882 the decree of the lower court was affirmed.

The guardian at the time suit was instituted was Elizabeth M. Kershow. While the suit was pending she resigned said office, and S. Beulow Irwin became her successor. Afterwards the said Irwin resigned, and Levin C. Charles became his successor. Finally the said Charles also resigned, and the defendant Patterson succeeded to the guardianship of the wards. The complaint alleges that the employment of plaintiffs as attorneys by Kershow was duly recognized, and continued by each of the succeeding guardians, includ-

ing the said Patterson. A small retainer of \$250 was paid to Wells & Smith before the institution of the proceedings above described, but no other fee or compensation of any kind whatever has been received by them, or by Wells, Smith & Macon.

On the first day of November, A. D. 1882, plaintiffs instituted this suit in equity, making the said guardian Patterson, and the said wards, also the said Reithman, parties defendant. They seek to have the amount of their fees or compensation determined, and also to have the same adjudged a lien upon the sum to be paid by Reithman under the decree, and upon the realty recovered as above stated, through their exertions. A reference was had by consent. The proofs were taken and reported, together with findings and a decree awarding plaintiffs Wells & Smith the sum of \$500, and Wells, Smith & Macon the sum of \$5,500; also recognizing an attorney's lien, under the statute, upon the judgment or decree rendered in the former suit; and providing that the said Reithman pay into court, for the benefit of plaintiffs, the said sum of \$6,000; that, upon his failure so to do, execution should issue, and, if the amount were not made out of his estate, then the premises so recovered as aforesaid by the wards should be sold by the sheriff to pay the same. The findings and decree, after full examination, were duly approved and entered as the findings and decree of the district court. From that decree the present appeal is taken.

A demurrer to the complaint was at the proper stage of the proceedings overruled. The grounds of the demurrer argued in the supreme court were: The misjoinder of parties plaintiff, and the misjoinder of causes of action; also the non-joinder of proper parties defendant, to-wit, the three guardians who served as such, and passed out of office prior to the institution of the present suit, and also prior to the conclusion of the former suit in equity.

The law relating to attorney's liens, under which this action was brought, is section 85, Gen. St. It reads as follows: "All attorneys and counselors at law shall have a lien upon any money or property in their hands, or upon any judgment they may have attained, [obtained,] belonging to any client, for any fee or balance of fees due, or any professional service rendered by them in any court of this state; which said lien may be enforced by the proper civil action."

All remaining facts essential to a correct understanding of the case are sufficiently stated in the opinion.

H. C. Dillon, for appellants. *Wells, Smith & Macon*, for appellees.

HELM, J. The nature and scope of the attorney's lien at common law have been considered in a large number of cases. Upon some of the various questions involved in such consideration there is no little contrariety of judicial opinion. But this lien in Colorado is regulated by statute; and several of the matters upon which such diversity of opinion exists are thus effectively put at rest.

Our statute recognizes both the general and special branches of the attorney's lien as it was enforced at the common law; but in some important particulars this lien under the statute is much more complete and satisfactory than it is at the common law. The statutory lien is not limited to costs, or to taxable fees. It reaches all fees due for services rendered, whether the amount of such fees has been agreed upon, or is to be settled in suit as upon a *quantum meruit*. Nor is it limited to compensation for services rendered by the attorney in procuring the judgment upon which he relies. In this respect it is more comprehensive than the mechanic's lien; it covers a balance legally due him for any and all professional services theretofore rendered his client. While the meaning of the statute in these respects is clear, some other matters connected with the principal subject are not left wholly free from doubt. Counsel for appellant have succeeded in presenting several

questions that are both interesting and perplexing. These questions will be briefly considered in their appropriate order.

First. Does the lien given by this statute upon judgments include a decree awarding plaintiff an interest in lands, and thus subject the realty recovered to the payment of the attorney's fee?

There are a few decisions which seem to sustain the attorney's right to look, through his lien, to the land for his taxable fees, in such cases; but the weight of authority undoubtedly sanctions the proposition of counsel for appellant, that no such privilege is awarded by the common law. Whether the discrimination thus made in favor of money judgments is based upon satisfactory reason or sound principle we need only consider in so far as it aids us in giving a proper construction to the statute, for we are not now dealing with the common law. This statute recognizes no distinction between judgments for money or personal property, and decrees or judgments by which the ownership or possession of land is awarded to plaintiff, or his interest therein is preserved. It gives the attorney a lien upon "any judgment" obtained by him, and belonging to his client. The language used is clear and comprehensive; it seems to cover all kinds of judgments, regardless of the subject-matter to which they relate. We do not feel at liberty to say that it was the legislative intent to exclude from the operation of the statute all judgments or decrees involving the ownership or preservation of land. Had such been the legislative purpose, different language would have been used in framing the section. This view of the provision is not only consistent with established rules of statutory construction, but, in our judgment, it also comports with an equitable administration of justice in the premises.

The custom of advocates to render their services *quiddam honorarium* does not exist in this country. We doubt very much if counsel for appellant, who discourse with such evident admiration upon this practice as it existed centuries ago in Rome, in France, and in England, would be willing to see it established in Colorado. The advocate or counselor who should here to-day imitate Cicero, and give his services gratuitously, relying solely upon the gift which, in the language of Sir JOHN DAVY, "guileth honor as well to the taken as the guier," would soon find the wolf at his door, unless, like Cicero, he had other sources of revenue. It may, from counsel's standpoint, be a humiliating fact, but it is a fact, nevertheless, that in this respect the legal profession occupies the *status* with us of other employment followed for a livelihood. The attorney is considered worthy of his hire, and is not in danger of disbarment if he contract in advance for his fees, and collect them by suit, when necessary, after the service is rendered.

The attorney's lien, in so far as it relates to judgments, may be accurately defined as a right conferred by statute, or recognized by the common law, to have his compensation or costs, or both, directly secured by the fruits of the judgment. To declare him entitled to a lien upon the judgment, without permitting him, through such lien, to reach and control the subject-matter of the recovery, would be bestowing upon him the shadow, and withholding the substance. He would be no better off than are other general creditors of his client. What equitable consideration supports the conclusion that he should be secured in this way by the fruits of a money judgment, and yet, as to the fruits of a decree or judgment relating to realty, that he should occupy the attitude of a mere general creditor? The fruits of the latter judgment are often far more valuable to his client than are the fruits of the former. Cases involving the title to or the possession of real estate present questions quite as complicated and difficult, and demand of the attorney quite as much learning and labor, as do those relating to damages for torts, or for the violation of simple contracts.

The strongest objection stated in the decisions to recognizing the attorney's lien, where fees are not taxable, in this class of cases, is based upon the prop-

osition that the lien is secret. It is asserted that, as a consequence of this secret lien, the judgment debtor, or the innocent purchaser of the land in controversy, may suffer wrong through the assertion of the lien after a *bona fide* settlement of the judgment, on the one hand, or purchase of the land, on the other. It is even declared in one case, that "every tract of land which had once been a subject of litigation would lose most of its exchangeable value from an apprehension of some latent lien in favor of some attorney." *Humphrey v. Browning*, 46 Ill. 476. If, under our statute, a consequence so grave as the foregoing could follow the recognition of the lien, and if there were room in the language used for construction, we would hesitate long before applying the law in this and similar cases. But however it may be at common law in Illinois, or other states where this view concerning the secret lien and its effect is adopted, the objection has with us no particular force; because, while our statute gives the lien upon the judgment, and, as between attorney and client, nothing need be done prior to its enforcement, as to innocent purchasers of the fruits of the judgment we hold that it may be otherwise.

In *Smelting Co. v. Pless*, 9 Colo. 112, 10 Pac. Rep. 652, we declared that the judgment debtor is entitled to notice of the attorney's intention to enforce his lien, and that if, without such notice, the debtor make a *bona fide* payment or settlement of the judgment, the attorney cannot look to him. The reasons stated in that opinion with reference to the attitude and liability of the judgment debtor apply with even greater force to an innocent purchaser for value of the land recovered or preserved by a decree or judgment.

We have no statute regulating attorney's fees, and making them a part of the judgment. With us this is solely a matter of contract between attorney and client. The judgment debtor and the innocent purchaser are total strangers to this contract. If no fees are due the attorney, no lien exists. The debtor or purchaser does not necessarily know that the fees were not fully paid or secured in advance, and that the attorney is in position to invoke the statute. Neither are they aware that he will enforce the lien, if he has the right to do so. There is nothing compulsory in this particular; he may or may not, as he chooses, subject the fruits of the judgment to the payment of his fees. While the lien upon the judgment undoubtedly exists if there is a balance due the attorney for services, yet the right to enforce it against the subject-matter of the recovery may, in our opinion, be waived. It is unfortunate that the statute neither specifies a time for the enforcement of the lien, nor a method of giving notice of the purpose to do so. But it is unquestionably true that the legislature never intended the lien to be a perpetual incumbrance upon the fruits of the judgment, regardless alike of the attorney's laches in asserting his intention, and the rights of innocent purchasers for value.

We think that if the attorney neglects to proceed to the enforcement of his lien until the debtor has in good faith discharged his liability under the judgment, or a third person has in good faith, and for valuable consideration, purchased the fruits thereof, he should be held to have waived the right to look to the debtor, on one hand, or to such fruits, on the other, for his compensation. That is to say, if, without notice that the attorney intends to enforce his lien, the judgment debtor make a *bona fide* settlement of the judgment, or an innocent third person purchase the property, the statutory right is lost. Of course, any collusive settlement or purchase made for the purpose of depriving the attorney of the benefit of his lien would not be in good faith, and would be of no avail against him.

Again, an objection to recognizing the attorney's lien where his fees are not taxable is thus stated in *Forsythe v. Beveridge*, 52 Ill. 268: "There would be cases in which a very unreasonable portion of the fruits would be demanded by the attorney, and collected under the pressure he could bring to bear upon his client." This objection is declared by the learned court to be of "great

weight." Its force is in nowise diminished by the fact that a judgment, as in the case at bar, relates to realty, and not to money damages only. Conduct of the kind mentioned would merit and receive the severest judicial censure, and the guilty party would soon find himself in professional disrepute. But it is sufficient for us to say, with reference to this specific objection—*First*, that, as already declared, fees to be determined as upon a *quantum meruit* are clearly covered by the statute considered; and, *second*, that such determination takes place in court under rules of evidence and principles of procedure calculated to insure justice between parties litigant.

Second. A second question fairly presented by the record and arguments before us is, can a *suit in equity* be maintained by the attorney for the enforcement of his lien, when the employment is questioned, and the amount of his compensation is unliquidated?

Counsel contend that since a court of equity is not the proper forum to entertain inquiries into questions of contract, nor the proper tribunal to hear evidence, and determine the reasonable value of services rendered, these matters ought to have been adjudicated in a court of law. They say that plaintiffs should have brought their action in a legal forum, and there had all controversy concerning the contract, as well as the amount of compensation, first determined; and that then they might perhaps have instituted proceedings in equity for the enforcement of their lien, if any lien they had. The distinction between *causes of action* at law and in equity doubtless remains. No attempt has been made to abolish it, and any such attempt would be futile. The Code merely abolishes forms of action, substituting, for the numerous common-law forms, but one general method of pleading, whether at law or in equity. And unless a court of equity would, before the Code, have been properly clothed with jurisdiction over the cause of action stated in the complaint before us, the action cannot be maintained in equity under the Code. *Bank v. Ford*, 7 Colo. 314, 3 Pac. Rep. 449.

The attorney's lien, whether under the statute or at common law, is equitable in its nature. Even the decisions in this country, which confine its existence and application to the narrowest limits, always speak of it as an equitable lien, right, or privilege. It is not property *in* the thing which gives a right of action at law. It is a charge *upon* the thing which is protected in equity. Courts of law may recognize it when the *res* is in possession of the lienor, and the owner is seeking to deprive him of such possession. But where the thing is not in possession, and some affirmative action is required by the attorney, he, like other lien claimants, must seek relief in equity. In some instances, a formal suit should be instituted; in others, an application to the court rendering the judgment, for the proper order, would be sufficient.

The main purpose of plaintiffs in this case is to utilize their lien by subjecting, through it, the rents and real estate, if need be, recovered by their exertions, to the payment of their claim for services. Since the employment by the different guardians, and the amount of compensation, are controverted matters, it becomes incidentally necessary to investigate and determine these questions. If plaintiffs intruded themselves into the cases without employment, and their voluntary services were objected to and repudiated, or if they have been paid all those services are reasonably worth, the statute gives them no lien. But, since a court of equity is the only forum that can enforce by proper decree the lien rights, we are of opinion that this is one of the cases wherein such court may take and retain jurisdiction for all purposes. Having assumed jurisdiction to enforce the lien, it would be encouraging a multiplicity of suits, and, in this as in other respects, contrary to established procedure in equity, to say that the court of equity shall not determine the incidental, though material, legal questions involved. Appellants waived the right, if any such right they had, to have a jury summoned to try any of the questions of fact presented, by consenting in open court to the trial by the

referee of "all the issues of law and of fact." We do not say that plaintiffs could *not* have proceeded otherwise; but we are of the opinion that, under the circumstances, the suit is "a proper civil action," within the meaning of the statute.

Third. It is asserted that, under the contract of employment, plaintiffs are bound to look to the several guardians alone for their compensation; that while, perhaps, the guardians may secure reimbursement from the wards' estate, yet neither the wards nor their estate can by plaintiffs be directly proceeded against and held liable. It is obvious that this objection, if well taken, is decisive against plaintiffs' right of action in the present suit; for if plaintiffs can neither look to the wards nor their estate for the compensation demanded, of course no lien can be decreed, and this equitable action must fail.

Counsel's proposition is based upon the rule that at common law the guardian can, in general, make no contract binding upon the person or estate of the ward. *Simmons v. Almy*, 100 Mass. 289; 1 Pars. Cont. 134-136; Schouler, Dom. Rel. 463; *Stevenson v. Bruce*, 10 Ind. 397; *Tenney v. Etans*, 14 N. H. 343. This rule seems to be sanctioned by a strong preponderance of authority, so far as *common-law actions* are concerned. In such actions, the guardian's contract and liability, except for necessities under certain circumstances, are in general dealt with by the creditor as purely *personal*. But this is not an action at law, nor is it against the wards or their estate, generally. It is a suit in equity for the enforcement of a statutory lien upon a specific portion of the wards' property. The land and the rents recovered in the original Reithman suit belong to a trust-estate; but, by virtue of the statute, they are nevertheless, it is claimed, incumbered with the attorney's lien.

We have already decided that, in general, the attorney's lien upon a judgment recovered by him, and belonging to his client, reaches the fruits of such judgment, though really be the subject-matter in controversy. We have also held that this lien may be enforced, by a suit in equity, directly against the property burdened therewith. Are these conclusions regarding the force and effect of the statute erroneous, and is the statute itself inapplicable, where the fruits of the judgment recovered, whether consisting of money or land, become part of a trust-estate?

The statutory guardian in Colorado is invested with the general charge and management of the ward's estate, *real* as well as *personal*. Such control is, of course, subject to the limitations, express and implied, contained in the statute. The guardian is also authorized to prosecute and defend all cases relating to the ward's estate. It is his duty to recover the ward's real property when wrongfully appropriated or withheld, and to demand, sue for, and receive all moneys belonging to the ward.

It might have been better had Mrs. Kershow first obtained from the probate court an express command or license to institute, and prosecute to judgment, the original suit against Reithman; but she and the other guardians would have been derelict in the discharge of their official duty had they failed, either with or without such consent, to proceed as they did. Their power and authority in the premises, however, could not now be successfully questioned, nor is there any attempt to challenge them. That suit was instituted for the benefit of the wards. The relation of attorney and client may have existed between plaintiffs and the guardians; yet the suit was prosecuted in the name of the wards, and they were the *real clients*, as well as the real parties in interest. The services of plaintiffs added greatly to the value of the wards' estate, without in the least benefitting the guardians, who neither sought nor derived any personal advantage through the suit. In making and continuing the contract of employment with plaintiffs, the guardians acted solely in their official capacity. There appears to have been no intention, either on the part of plaintiffs to look to the guardians alone for compensation, or on the part of the guardians to incur individual liability in

connection therewith. This compensation will ultimately become a charge upon the whole of the estate, should the right to treat it as a direct and superior charge upon a specific part of the estate be denied. Sustaining the lien avoids circuitry of proceeding, as well as increased expense and annoyance; therefore the true interest of the wards themselves, like that of all other persons concerned, will be best subserved by recognizing the application of the statute.

While the guardian who employs counsel in behalf of the estate is ordinarily regarded as the client, a court of equity, acting under the lien statute, should so far disregard this technical rule as to recognize the clientage of the real party in interest; and, after careful deliberation, we have no hesitancy in declaring that such a court, governed by the considerations above mentioned, and others that might have been but are not stated, should enforce the lien in the present as in other cases. It is believed that this is a question of first impression in Colorado; and, if the above conclusion can be said to conflict with the position sometimes taken in relation to the attorney's charging lien and trust funds, we feel at liberty to recognize the foregoing modification thereof,—sanctioned, as we think, by reason as well as the statute.

Fourth. If the views above stated be correct, it follows that the three guardians preceding Patterson are not necessary parties defendant to the present proceeding. Their official character wholly terminated prior to the rendering of the decree in the first suit against Reithman; and, if they were liable at all, their liability is ignored by plaintiffs, so far as this proceeding is concerned.

Fifth. The objection of counsel for appellant to the testimony of plaintiffs themselves must be overruled. If the present suit can be regarded as in any sense within the purview of section 3641, Gen. St., relied on by appellants in support of this objection, the evidence mentioned was nevertheless admissible; for the facts to which plaintiffs testified, "occurred" subsequent to the decease of the defendants Fillmores' ancestor; and hence this testimony is within the first exception stated in the section named.

Sixth. The assertion that there was a misjoinder of parties plaintiff will not be sustained. It has been said that "the court exercises a sound discretion, without adhering to any inflexible rule, in determining whether there has been a misjoinder of parties in equity." 1 Daniell, Ch. note 3, p. 303. The supposed misjoinder in this case is due to the admission of Macon into the firm of Wells & Smith after the employment began; thus in effect creating a new partnership. The object of both plaintiff firms was to secure a lien upon the same funds and the same premises for services rendered to the same parties in the same proceeding. Both firms, and the individuals composing them, were in exactly the same manner interested in the result of the suit, and in the property sought to be subjected to the attorney's lien. Under these circumstances, and in view of the equitable principle above stated, we would hesitate in holding that there was such a misjoinder of parties plaintiff as rendered the complaint, or the proceeding in equity, obnoxious to objection, by demurrer or otherwise.

But it is unnecessary to further discuss or to determine this question of pleading. The alleged misjoinder appears on the face of the complaint. When the demurrer was overruled, appellants filed their answer and went to trial. By so doing they waived their right to be heard in this court upon the present objection. Bliss, Code Pl. § 417; *Tennant v. Pfister*, 45 Cal. 270; *Schoelkopf v. Leonard*, 8 Colo. 159, 6 Pac. Rep. 209; *Webb v. Smith*, 6 Colo. 365; *Green v. Taney*, 7 Colo. 278, 3 Pac. Rep. 423.

Seventh. As to the alleged conflict between the testimony of Wells, on one side, and Patterson, Irwin, and Charles, on the other, it is sufficient to say that, so far as there is any real and material inconsistency, the testimony of Wells is fortified by that of other witnesses, and also by circumstances in evi-

dence. We would not feel justified in holding that the referee and the court erred in their finding as to the making and continuance of the original contract.

Eighth. Finally, it is claimed that the compensation allowed in this case is excessive. The amount is large, but the services extended through a series of years, in different courts. Some of the questions litigated in the original suit seem to have been complicated and difficult. The result of the proceeding was a victory for the wards, and the fruits of the victory were upwards of \$20,000 in value. Upon the question as to what would be a reasonable compensation for all the services rendered, 10 disinterested witnesses were sworn as experts, all of whom rank among the leading members of the bar of the state. Eight of these experts estimated the value of such services at various sums, not less than \$6,000, nor more than \$8,000; the two others estimated the same at from \$2,500 to \$3,000. It is evident that the referee and court found in accordance with the decided weight of expert testimony; and, under all the circumstances disclosed, we are not prepared to say that their finding and judgment are wrong.

We have not overlooked the fact that the attorney's lien statute, as adopted in 1861, readopted in 1868, and republished in 1877, contained the adverb or conjunction "when," instead of the relative pronoun "which," (found in the General Statutes,) at the beginning of the last clause thereof. But this is a matter of no consequence, for with either of the words the legislative meaning is clearly the same. That body intended, in the part of the section referred to, to say that the lien conferred therein should be enforced by the proper civil action.

Perceiving no fatal error in the record before us, the decree of the district court will be affirmed.

(10 Colo. 261)

MARIX v. STEVENS.

(*Supreme Court of Colorado.* October 18, 1887.)

1. PLEADING—COMPLAINT—ACTION TO RECOVER RENT.

A complaint which alleges "that defendant (on a day named) rented and leased of the plaintiff two rooms for lodgings, and agreed to pay plaintiff in advance the sum of \$60, as rent therefor, for the month next ensuing; that defendant so leased and rented and had the right to the possession of said rooms, and the use and enjoyment thereof, at all times during the month ensuing; that defendant has not paid said sum of \$60, or any part thereof,"—contains a statement of facts sufficient to show a right of recovery.

2. SAME—DEMURRER.

An objection by demurrer that such complaint is ambiguous, unintelligible, and uncertain, in failing to show whether defendant used and enjoyed the premises, or merely had the right to the possession, use, and enjoyment, is not well taken.

Commissioners' decision. Appeal from superior court of Denver.

The complaint alleges that defendant on the twenty-seventh day of January, 1883, rented and leased of the plaintiff two rooms for lodgings, and agreed to pay plaintiff, in advance, the sum of \$60 as rent therefor, for the month next ensuing; that defendant so leased and rented, and had the right to the possession of, said rooms, and the use and enjoyment thereof, at all times during the month ensuing, from said twenty-seventh day of January, 1883; that defendant has not paid said sum of \$60 or any part thereof. Defendant demurred to the complaint, alleging for cause that it failed to state a cause of action; and that it was ambiguous, unintelligible, and uncertain, in failing to show whether defendant used and enjoyed the premises, or merely had the right to the possession, use, and enjoyment of the same. Demurrer overruled, and, defendant failing to plead, judgment rendered for plaintiff, from which judgment defendant appealed, and assigned for error the action of the court in overruling the demurrer to the complaint.

Smith & Austin and Ward & Reuter, for appellant. Jno. W. Horner and Peter Palmer, for appellee.

RISING, C. It is urged by appellant, in argument, that the allegations of the complaint do not show a contract for the leasing of realty, but a contract for lodging, personal in its nature, and upon which defendant can only be held liable in damages for breach of contract, as upon actions for the breach of contracts for the purchase of personal property.

There is nothing in the complaint showing that the defendant was a mere lodger, or that the contract was a contract for lodging. It states a cause of action for the non-payment of a definite and certain sum, due and payable under a contract of lease of certain real estate. The allegations of the complaint that defendant rented and leased of the plaintiff two rooms; that defendant agreed to pay the plaintiff the sum of \$60, in advance, as rent for said premises for the ensuing month; that said sum had not been paid,—contain a statement of facts sufficient to show a right of recovery. The further allegations of the complaint, that defendant so leased and rented said premises, and had the right to the possession thereof, and to the use and enjoyment of the same, at all times during said month, are wholly unnecessary and immaterial averments, in no way limiting or controlling the other statement of facts. In passing upon a demurrer to a pleading, on the ground that it does not state facts sufficient to constitute a cause of action, the court will only inquire whether it can gather from the pleading the requisite facts, ignoring all immaterial matter and unnecessary allegations. Bliss, Code Pl. § 425; *Herfort v. Cramer*, 7 Colo. 483, 488, 4 Pac. Rep. 896.

The second ground of demurrer, that the complaint is ambiguous, unintelligible, and uncertain, in failing to show whether defendant used and enjoyed the premises, or merely had the right to the possession, use, and enjoyment of the same, is not well taken. The facts admitted by the demurrer are that defendant leased of the plaintiff, certain realty, for a definite term, at an agreed rent, and that said rent is due and unpaid. The action is brought to recover such rent, and is based upon the express agreement to pay a fixed and certain sum. The allegations relating to the use and enjoyment, or the right to the use and enjoyment of the premises, constitute no part of the facts upon which the cause of action rests, and hence there can be no conclusion of law from such allegations, upon which an issue of law can be joined. These allegations might have been stricken out on motion.

The judgment should be affirmed.

We concur: MACON, C.; STALLCUP, C.

BY THE COURT. For the reasons assigned in the foregoing opinion the judgment of the superior court of the city of Denver is affirmed.

(10 Colo. 264)

MALLAN v. HIGENBOTHAM and another, Copartners, etc.*(Supreme Court of Colorado. October 18, 1887.)***PRACTICE—NOTICE OF MOTION—WITHDRAWING DEMURRER AND FILING ANSWER WITHOUT NOTICE.**

Under Code Colo. § 397, "every direction of the court made in writing, and not included in a judgment, is an order, and an application for an order is a motion;" and under sections 398 and 399 notice must be given of all motions in a case. Therefore it is error for a court, after the statutory time for answering has expired, to allow a defendant without notice to the plaintiff to withdraw a demurrer previously filed, and to file an answer and cross-demand to the complaint.

Commissioners' decision. Error to district court, Lake county.

Enos Miles, for plaintiff in error. *E. M. Hulbard*, for defendants in error.

STALLCUP, C. The main question raised by the assignments of error, and discussed and fairly presented for the opinion of this court by the briefs of the respective counsel, is whether there was error in the following proceedings of the district court, to-wit: *First*, was it error for the court, after the statutory time for answering the plaintiff's complaint had expired, and without notice to the plaintiff, to permit the defendants to withdraw their demurrer previously filed, and to file instead an answer to the complaint, accompanied by a cross-demand against the plaintiff? *Second*, was it error for the court, on motion of the defendants, and without notice, to rule the plaintiff to reply to said answer and cross-demand within a stated time, and afterwards on like motion, and without notice, to enter the plaintiff's default for failure to comply with the rule, and thereupon to give judgment for the defendants for the amount of their cross-demand?

Section 397 of the Code is as follows: "Every direction of the court made or entered in writing, and not included in a judgment, is denominated an order; an application for an order is a motion;" and sections 398 and 399 require notice of all motions in a case, except those made during the progress of a trial, and provide how the same shall be given. We are not all of the opinion that an order and notice are necessary to authorize a party to withdraw his demurrer, and so dispose of it, and therefore do not determine the same. We are all of the opinion that after the withdrawal of a demurrer, after the expiration of the statutory time for answering, notice to the adverse party, as required by sections 398 and 399, is necessary to warrant the court in granting the motion for the order allowing the filing of an answer. It therefore follows that the order in this case granting the motion to file the answer and cross-demand was a necessary order, to be made upon motion therefor, and of which the plaintiff was entitled to notice as provided by sections 398 and 399, and the subsequent proceedings upon such answer and cross-demand, to and including the judgment against the plaintiff, were unwarranted, and therefore erroneous. *Cates v. Mack*, 6 Colo. 401.

The judgment should be reversed, and the case remanded.

We concur: **RISING, C.; MACON, C.**

BY THE COURT. For the reasons assigned in the foregoing opinion the judgment of the district court is reversed, and the cause remanded for a new trial.

(73 Cal. 635)

PEOPLE v. KETCHEM. (No. 20,332.)

(Supreme Court of California. October 29, 1887.)

1. INDIANS—HOMICIDE OF ONE INDIAN BY ANOTHER—JURISDICTION OF STATE COURT.

Where both defendant, in a prosecution under an indictment for murder, and the deceased, are full-blooded Indians, but it does not appear that defendant is a member of any tribe of Indians having its chief and tribal laws, nor that his ancestral tribe had been treated with by the government, but it does appear that he had lived among the whites several years, the state courts of California have jurisdiction to punish him for the crime.¹

2. CRIMINAL PRACTICE—TESTIMONY OF DEFENDANT'S WIFE—ERROR CURED BY DEFENDANT'S ADMISSIONS.

Where the testimony of the wife of a defendant accused of murder is admitted against his objection, on the ground of Pen. Code Cal. § 1322, providing that a wife shall not testify against her husband in a criminal action if he object, though the admission of such testimony is erroneous, yet it is cured by the husband subsequently testifying in his own behalf to substantially the same facts.

Commissioners' decision. In bank.

Appeal from superior court, Humboldt county; J. J. DE HAVEN, Judge. *J. N. Gillett*, for appellant. *Geo. A. Johnson*, Atty. Gen., for respondent.

BELCHER, C. C. The defendant was charged with the crime of murder, and convicted of manslaughter. He moved for a new trial, and has appealed from the judgment and order denying his motion.

Defendant is an Indian 29 years of age, and was born and raised in the county of Humboldt. He was accused of killing another Indian, named Billy Barlow. At the trial, after several witnesses had been examined to prove the commission of the alleged offense, an Indian woman named Jennie Bill Ketchem was called and sworn as a witness for the prosecution. The defendant objected to her testifying upon the ground that she was his wife, and, therefore, under section 1322 of the Penal Code, incompetent to be a witness against him. In support of the objection it was proved that some three or four years before the time of the homicide the defendant asked the witness to be his "woman," and she said "All right." He also asked her father and mother if he might have her for his woman, and they consented. Before that, she had lived with another Indian for about four years, but he had left her. She then lived with defendant as his woman in a cabin built by him for that purpose, until a few weeks before the homicide, when he went away and left her. While they were so living together she had two still-born children. Before leaving, he told her that he was going to leave her, and afterwards told several other parties that he would never live with her any more. Defendant admitted that he made the statements imputed to him, but said he was joking when he made them, and that he intended all the time to return and live with her. It was further proved that what is called the "marriage relation," among the Indians was formed by a male taking a squaw and living with her, and that he could dissolve the relation whenever he chose to do so by leaving her, and could then take another squaw.

Upon these proofs the court overruled the objection, and the defendant reserved an exception. The witness was then examined and cross-examined, and thereupon the prosecution rested. The defendant then offered himself, and was sworn and examined as a witness in his own behalf. He admitted that he killed Billy Barlow, and testified to all the facts connected with the killing substantially as his alleged wife had testified to them.

Whether, in view of the fact that they were Indians, the defendant and his

¹ Under the act of congress of March 3, 1885, the state courts have no jurisdiction over the Indians within the state, and on their reservations, for crimes committed by and against each other, so long as they maintain their tribal relations. *U. S. v. Kagama*, 6 Sup. Ct. Rep. 1109; *Ex parte Cross*, (Neb.) 30 N. W. Rep. 428.

"woman" should be regarded as husband and wife, within the meaning of those words as used in section 1322 of the Penal Code, is a question which we do not deem it necessary to decide. The question, so far as we are advised, has never before arisen in this state, and upon somewhat similar facts the courts in other states have ruled differently. See *Johnson v. Johnson*, 30 Mo. 72; *Smith v. Brown*, 8 Kan. 610; *Wall v. Williams*, 11 Ala. 839. *Contra: Roche v. Washington*, 19 Ind. 53; *State v. Ta-cha-na-tah*, 64 N. C. 614. If it be conceded that the parties were husband and wife, and that the court therefore erred in overruling the defendant's objection, still the error was rendered harmless and immaterial, when the defendant voluntarily became a witness for himself. Under his own testimony he was clearly guilty of manslaughter, if not of murder, and could not therefore have been prejudiced by the ruling. *People v. Montgomery*, 53 Cal. 576; *People v. Marsteller*, 70 Cal. 98, 11 Pac. Rep. 508; *People v. Daniels*, 70 Cal. 521, 11 Pac. Rep. 655.

The point is also made that the trial court had no jurisdiction of the case, because both the defendant and the party killed were full-blooded Indians; and in support of this position counsel cite *State v. McKenney*, 18 Nev. 182, 2 Pac. Rep. 171. In that case it was claimed that the state courts had "no jurisdiction of crimes committed by one Indian against another, when both are members of an organized tribe having laws for the government of their own internal affairs." And in commencing its opinion the court said: "Let it be remembered that what follows is intended to apply to the case before us, where one Indian belonging to a tribe which is recognized and treated with as such by the government, having its chief and tribal laws, is accused of killing another of the same tribe. * * * It does not refer to a case where an Indian leaves his tribe and joins the whites." Evidently the law as declared in that case, whatever might be said of the conclusion reached, has no application to this case. Here it does not appear that the defendant is a member of any tribe of Indians having its chief and tribal laws, nor that the tribe of which his ancestors may have been members was ever recognized or treated with by the government. On the contrary, it appeared that he had lived among the whites for several years. He had his own cabin, and about three acres of land around it, which he cultivated and on which he raised vegetables. He was asked what he did to support his woman, and replied: "I sheared sheep around, and hunted and worked for anybody. Herded sheep for anybody."

In our opinion the court below had jurisdiction to try the case, and the judgment and order should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

SEARLS, C. J., and TEMPLE, J. We concur in the foregoing opinion, upon the ground that the witness Jennie Bill Ketchem was not shown to be the lawful wife of the prisoner, and was therefore a competent witness.

(73 Cal. 614)

VANDOR v. ROACH, Adm'r. (No. 11,323.)

(Supreme Court of California. October 29, 1887.)

1. GIFT—CAUSA MORTIS—FRAUD OR INCAPACITY OF DONOR, MATTER OF DEFENSE.

One claiming property by gift *causa mortis*, is not under obligation to disprove fraud or prove a sound and disposing mind on the part of the donor, as fraud or incapacity are matters to be set up and proved as a defense.

2. SAME—WHAT CONSTITUTES A GIFT.

A person on his death-bed took from under his pillow a package and handed it to plaintiff saying: "These bonds are for you," or words to that effect. *Held*, that the transaction sufficiently manifested an intention to make a gift.¹

3. SAME—ACTION TO RECOVER GIFT.

In an action against an administrator to recover five United States bonds of a certain denomination, which plaintiff claimed were given to her by deceased *causa mortis*, the complaint showed that plaintiff possessed five bonds, and showed their numbers, and defendants admitted the allegation, and did not prove that deceased owned other bonds, while there was evidence tending to show that the bonds claimed were the identical ones given. *Held*, that the court was justified in finding the bonds claimed were the ones given.

Commissioners' decision. Department 1.

Appeal from superior court of the city and county of San Francisco; J. F. SULLIVAN, Judge.

T. C. Van Ness, for appellants. *M. C. Hassett*, for respondent.

HAYNE, C. The plaintiff claimed that the defendant's intestate gave to her, on his death-bed, five United States bonds which stood in his name. There was no indorsement or written transfer, and she brought this action to obtain a decree directing the administrator "to make a good and sufficient transfer of said bonds to plaintiff, by his assignment in writing." The court below gave judgment for the plaintiff, and the defendant appeals.

The only points made on behalf of the appellant are the following:

1. It is argued that the burden of proof was upon the plaintiff to show that "the gift was fair," and that there was no evidence on the subject. If this means that it was incumbent upon plaintiff to show that there was no fraud practiced upon the deceased, we cannot agree to it. Fraud is never presumed. And if there is nothing in the circumstances to create a suspicion of wrong, we cannot see why the plaintiff should be required to go further and negative possibilities. Nor can we agree to it if it means that the plaintiff is required to show that the deceased was of sound and disposing mind at the time of the gift. Soundness of mind is presumed until the contrary appears. In the case of a will, proof that the testator was of sound mind is required by express provision of the statute. There is no such provision as to gifts *causa mortis*. The point was expressly decided in *Bedell v. Carll*, 33 N. Y. 586, in which case the court said: "He establishes a *prima facie* case when he shows that the disposition has been attended by all the requisites which the common law prescribes to give it validity. Certainly he is not required to prove affirmatively that the donor was of sound disposing mind and memory when he made the gift, and that the delivery of the subject was his free and voluntary act. These are matters of defense equally applicable to gifts *inter vivos* and *causa mortis*."

2. It is argued that what was done did not show sufficient intention of giving. The counsel says that "the operative words of a gift are: 'I give' or 'I have given;'" and that these words are wanting. But we do not think that any formula or set phrase is necessary. It is sufficient if there was delivery, and any words importing an intention to give. The only evidence on the subject was that of the physician, who testified that the dying man took a package from under his pillow, and handed it to the plaintiff, saying: "These bonds are for you." The witness did not pretend to give the precise words uttered, but stated that this was the substance of what was said. This, we think, was a sufficient manifestation of intention to give.

¹To sustain a gift, the intention of the donor must be established by clear and precise evidence. Appeal of Madeira, (Pa.) 4 Atl. Rep. 908. And a *donatio mortis causa* must be completely executed, precisely as required in the case of gifts *inter vivos*, subject to be divested by the happening of any of the conditions subsequent. *Basket v. Hassell*, 2 Sup. Ct. Rep. 415; *Shucklesford v. Brown*, (Mo.) 1 S. W. Rep. 390.

3. It is urged that there was nothing to identify any particular bonds. But the complaint alleges that the deceased "was the owner of five United States registered bonds, issued under an act of congress in the year 1877, and more particularly designated and known by the name of 'four per cent. consols of the United States,' and by the numbers 131,641, 131,642, 131,643, 131,644, and 131,645, each of said bonds being issued to said Frederick Biringer, and standing in his name in the registry department of the United States government." This is expressly admitted by the answer. And the statement shows that "plaintiff put in evidence five United States bonds, \$1,000 each, numbers 131,641, 131,642, 131,643, 131,644, and 131,645, being the same as set out in the complaint." It does not appear that deceased had any other bonds. And the evidence tends to show that the ones mentioned in the pleadings and produced by plaintiff at the trial, were the ones given to her. The physician did not know what was in the package which he saw delivered, but heard the deceased refer to it as "these bonds;" and he thought he recognized the package produced at the trial as the one he saw given by the deceased. The plaintiff testifies that after the package was received by her, she mislaid it, but subsequently found it in the bed-clothes which deceased had used. She says that the bed-clothes had been taken to the basement, and that she "went down and found the package and *these bonds*."

Upon the whole we think there was a *prima facie* case, and, as no contradictory evidence was put in, the court below properly rendered judgment for the plaintiff. We therefore advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(73 Cal. 625)

PRICE v. BEAVER. (No. 11,889.)

(Supreme Court of California. October 29, 1887.)

1. PUBLIC LANDS—APPLICATION FOR PURCHASE OF SWAMP LAND—AFFIDAVIT OF "NO SETTLERS."

Under Pol. Code Cal. § 3443, providing that a person who makes application to purchase swamp or overflowed land must show in his affidavit for that purpose that he "knew the land applied for, and the exterior bounds thereof, and that he knew of *his own knowledge* that there were no settlers thereon," a person is qualified to make this affidavit by information obtained by going upon the land, and examining it as indicated by a guide, unless it is proved that the guide pointed out the wrong land. The knowledge required is not necessarily derived from a personal survey.

2. SAME—AFFIDAVIT BY FEMALE APPLICANT.

The provision of Pol. Code Cal. § 3444, as to the affidavit to be filed by one seeking to purchase swamp or overflowed land, requiring that, "if the applicant is a female, such affidavit must show that she is entitled to purchase real estate in her own name," is complied with by a statement in such affidavit that applicant "is an unmarried woman, over the age of eighteen years, a citizen of the United States, and a resident of the state of California, of lawful age."

Commissioners' decision. Department 2.

Appeal from superior court, Tulare county; W. W. Cross, Judge.

Chas. E. Wilson and C. A. Webb, for appellant. Lambertson & Taylor, for respondent.

BELCHER, C. C. The defendant, on the twenty-fifth day of May, 1885, filed in the office of the surveyor general of the state her application to purchase 640 acres of swamp and overflowed land, situate in Tulare county. The land sought to be purchased had been segregated as swamp and overflowed land, by authority of the United States, for more than six months, and was subject

to sale by the state to any qualified applicant. The defendant was qualified to purchase the land, and her affidavit properly stated all the facts required in such case to be stated therein. The plaintiff, on the seventeenth day of June, 1885, made application to purchase the same land. He was also a qualified purchaser, and his application was sufficient and proper in form. On demand of the plaintiff, the question as to which of the parties had the better right to purchase the land, was referred by the surveyor general to the superior court of Tulare county for determination. Proper pleadings were filed by the parties, and after a full hearing of the case, the court, among other things, found as follows:

"*Third.* That said defendant is a native-born citizen of the United States, and was, at the time of filing said application to purchase said land, of the age of thirty-one years, an unmarried female, and a resident of the state of California; that at said time she knew the land applied for, and the exterior bounds thereof, and knew, of her own knowledge, that there were no settlers thereon; that she desired to purchase said land under the law providing for the sale of swamp and overflowed and tide lands, and that she did not own swamp and overflowed lands which, together with that sought to be purchased, and applied for in said application, would exceed six hundred and forty acres; that she did not know of any valid claim to the said land other than her own; and that there was no other valid claim to said land at the time said defendant filed her application, or at any time since.

"*Fourth.* That the said land is not suitable for cultivation."

And as a conclusion of law, the court further found "that the application of the defendant, Hattie M. Beaver, to purchase the east half of section 19, and the west half of section 20, in township 22 south, range 23 east, Mount Diablo base and meridian, (the land in question,) is good and valid, and said defendant has a right to purchase the same, and that she is entitled to have her said application approved by the surveyor general of said state of California," etc.

Judgment was entered in favor of the defendant. The plaintiff then moved for a new trial, and, his motion being denied, appealed from the judgment and order.

It is claimed for the appellant that the finding "that at said time she knew the land applied for and the exterior bounds thereof, and knew, of her own knowledge, that there were no settlers thereon," was not justified by the evidence; and this is the principal point made for a reversal of the judgment.

We do not think the judgment should be reversed for the reason urged. It was proved that the defendant was the widow of John H. Beaver, who had filed an application to purchase the land in question, and died in April, 1885. The defendant was a witness in her own behalf, and on her direct examination testified that at the time of making her application she knew the land applied for, and knew the exterior bounds of the land, and that there were not any settlers on it at that time; that, about a week before she made her application, she went on the land with J. W. Beaver, the brother of her deceased husband, and went where he said the corners of the land were. On cross-examination she said that when she was on the land her brother-in-law showed her certain stakes, but she didn't remember the marks on them and couldn't say whether they were section stakes or not; that she depended on her brother-in-law, and, as a matter of fact, did not herself know any of the exterior boundary lines of the two half sections applied for.

J. W. Beaver was called as a witness, and testified that about the fifteenth of May, 1885, he went with defendant to look at the land, and showed her, at that time, what he supposed to be the land now in controversy, and that he afterwards went back to the place for the purpose of determining whether he had correctly shown her the land in controversy or not. On his cross-examination he said, in substance, that he found a section corner between sections

19 and 20; that there was a stake there with marks on it, which he did not remember, and that he believed the stake was pulled up and lying by the corner; that he did not know whether the stake was a corner stake or not, and only judged from the marks; that he and defendant went over the land in search of the other corners, but he did not know that they found any stakes, except the one at the junction of sections 17, 18, 19, and 20; he thought they found a stake directly east,—a half-mile stake,—but as to that was not positive; that they did not measure, or follow the exterior boundary lines of the land; that he informed defendant what he supposed to be the boundaries and boundary lines, but that he was not a surveyor, and had never seen the land surveyed, and did not at that time know its exterior boundaries; that he could see two or three miles in every direction, and did not see any evidence of any settlement, except what his brother had put there.

Another witness was called, and testified that he knew the land described in the complaint, and saw it surveyed; that he was with the surveyors, and saw them set the corner stake between sections 19 and 20 on the north; that about a month and a half before the trial he went on the land with J. W. Beaver for the purpose of showing it to him, and positively identifying it as the land which defendant made application to purchase; that he had lived on the land for five months in a house which defendant's husband had built; that he found a stake at the north-east corner of section 19, which had been pulled up, but was lying on the ground just where it was stuck to mark the true corner.

This was substantially all the evidence introduced upon the question in hand, and in our opinion it was sufficient to justify the finding complained of.

It is true, the Code requires any person desiring to purchase swamp and overflowed land to state in his affidavit "that he knows the land applied for, and the exterior bounds thereof, and knows, of his own knowledge, that there are no settlers thereon." Pol. Code, § 3443. And it is also true that in cases of this kind each party is an actor, and must allege and prove that he has strictly complied with the law. But it is not required that the purchaser of swamp land shall know "of his own knowledge" the land applied for, and the exterior bounds thereof. Ordinarily he does not, and, unless he is a skilled surveyor, must gain this information from others. Having gained it, however, he can and must then state, if such be the fact, that he knows of his own knowledge that there are no settlers on the land. The defendant was shown by her brother-in-law what he supposed to be the corners and boundary lines of the land in controversy. She relied and acted upon the information thus received, and there was no attempt to show that it was not correct. It is not pretended that she did not go upon the land which she desired to purchase, nor that she was incorrectly informed as to its bounds or limits, nor that there were any settlers on the land. The claim is only that J. W. Beaver did not *at the time know* the true lines and corners, and so, however correct her information may have been, her application must fail. If this be the correct view, then it must follow that, if defendant had employed a surveyor to show her the land, and he had made mistakes as to the corners and lines, and had incorrectly located its bounds, her application could be successfully assailed by any subsequent applicant. We do not think that such a result was intended by the law-makers, or should receive sanction from the courts.

The point is also made that the defendant's application was insufficient because she did not state in her affidavit that she was entitled to purchase real estate in her own name. Defendant stated in her affidavit that "she is an unmarried woman, over the age of eighteen years, a citizen of the United States, and a resident of the state of California, of lawful age."

The Code (section 3444, Pol. Code) provides: "If the applicant is a female, such affidavit must also show that she is entitled to purchase real estate in her own name."

It is urged that an unmarried woman, though she be more than 18 years of age, and a citizen and resident of the state, is not necessarily entitled to purchase real estate in her own name, because "she may be incompetent—an idiot or lunatic, for instance," and it is therefore necessary that she should state in her affidavit that she is entitled to purchase, etc. There is nothing in this point. The Code, as we have seen, says that the affidavit must *show* a female is entitled to purchase, not simply state that fact. The defendant's affidavit fully complied with the law in this respect, and was sufficient. She was presumed to be of sound mind, and was not called upon to negative in her affidavit the fact that she was an idiot or lunatic.

The judgment and order should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

GOLDTREE and others v. THOMPSON and others. (No. 11,749.)

(Supreme Court of California. October 4, 1887.)

WILL—ACTION TO CONSTRUE—JURISDICTION OF SUPERIOR COURT.

Siddall v. Harrison, ante, 130, followed.

Commissioners' decision. Department 1.

Appeal from superior court, San Luis Obispo county; D. S. GREGORY, Judge.

Graves, Turner & Graves, for appellants. *Wm. Shipsey*, guardian *ad litem*, for minors.

FOOTE, C. According to the views expressed by this court in Department 1, in the case of *Siddall v. Harrison*, ante, 130, filed October 7, 1887, the present action was not one of which the trial court had rightful jurisdiction. Therefore, in accordance with the reasons stated in the opinion in the cause *supra*, it would seem to follow that the judgment herein should be reversed, and the cause remanded, with directions to the court below to dismiss the action.

I concur: BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded, with directions to the court below to dismiss the action.

(74 Cal. 100)

In re LOWENTHAL, on *Habeas Corpus*. (No. 20,362.)

(Supreme Court of California. November 8, 1887.)

CONTEMPT—OBSTRUCTING EXECUTION OF WRIT—JURISDICTION OF COURT TO PUNISH.

Petitioner was tried before the superior court for contempt against that court in obstructing and taking from a police officer, by means of legal process, certain personal property taken by such officer under a search-warrant issued by the presiding judge of the superior court, and fined and committed to the county jail. *Held*, on *habeas corpus*, that the superior court had jurisdiction of the subject-matter and person of petitioner, and had authority to render such judgment, and that the petitioner would be remanded.

In bank. *Habeas corpus*. Superior court of the city and county of San Francisco; J. V. COFFEY, Judge.

E. B. Stonehill, Dist. Atty., and *Matt. I. Sullivan*, for respondent. *J. F. Dunn*, for petitioner.

BY THE COURT. The petitioner was fined and committed to the county jail for a term of five days for a contempt of the process of the superior court, department 9, in and for the city and county of San Francisco. The alleged contempt of petitioner consisted in obstructing and taking from a police officer, by means of legal process, certain personal property taken by such officer under a search-warrant, issued by J. V. COFFEY, presiding judge of said superior court, for the purpose of securing certain documents and papers averred to have been used as a means of committing a felony. Petitioner had a hearing before the superior court, and upon the testimony, *pro* and *con*, was found guilty and sentenced as hereinbefore stated.

We have examined the record with some care, and are of opinion the superior court had jurisdiction of the subject-matter, and of the person of the petitioner, and that the judgment rendered was such as, upon the showing made, the court was authorized to make. The increasing volume of business brought before this court under the original jurisdiction conferred upon it, and the time necessarily consumed thereby, to the exclusion of other and equally important business, prompts us to brevity of opinion in cases where, like the present, our jurisdiction is not appellate. These are some of the considerations which restrain us in the present case from arguing *in extenso* from the premises up to the conclusions we have reached.

The petitioner is remanded to the custody of the sheriff.

THORNTON and TEMPLE, JJ., expressing no opinion.

(74 Cal. 49)

EUREKA & T. R. Co. v. McGRATH and others. (No. 11,679.)

(*Supreme Court of California.* November 4, 1887.)

1. APPEAL—FROM ORDER REFUSING TO ANNUL JUDGMENT.

A judgment against the defendants condemning a right of way for plaintiff's road through defendants' land was recovered by plaintiff, and defendants' damages were assessed at \$600. Afterwards plaintiff moved the court that "the judgment entered in said action be set aside and annulled." After a hearing on the motion, the court made and entered the following order, "that the motion of plaintiff to annul the judgment in this action be denied and dismissed." *Held* that, as plaintiff could have appealed from the judgment, he could not appeal from the order.

2. RAILROAD COMPANIES—CONDEMNATION PROCEEDINGS—SUBSEQUENT CHANGE OF LINE—ANNULING JUDGMENT.

Plaintiff recovered a judgment condemning a right of way through defendant's land, but afterwards determined to change its line, and filed a petition and made a motion to have the judgment rendered set aside and annulled. The court entered an order denying plaintiff's petition and motion. *Held* that, although the motion was based upon new matter occurring subsequently to the judgment, there was no statutory provision for such a motion, or for the proceedings which plaintiff sought to institute.

In bank. Appeal from superior court. Humboldt county; JOHN J. DE HAVEN, Judge.

S. M. Buck and *J. A. McQuaid*, for appellant. *Horace L. Smith*, for respondents.

McFARLAND, J. The plaintiff, a railroad corporation, on the seventeenth day of February, 1885, filed its complaint in the court below, asking a judgment condemning a right of way for its road through and over a lot of land belonging to defendants in the city of Eureka. Defendants answered, denying all the averments of the complaint, (except ownership of the lot,) and claiming \$1,600 damages in case of condemnation. The case was tried with a jury, and all the facts necessary to support a judgment for plaintiff were found in its favor, and defendants' damages were duly assessed at \$600. Judgment upon the verdict was duly entered on August 29, 1885. The judgment, after reciting the proceedings in the case, decrees that plaintiff is en-

titled to use and enjoy the strip of land described in the complaint as the right of way for the construction of its railroad, upon paying to defendants, or depositing in court for them, the full amount of compensation or damages assessed by the jury. Plaintiff then duly moved for a new trial, which was denied, and thereafter, on October 1, 1885, it appealed to this court "from so much of the judgment as directed the payment to defendants of the damages assessed by the jury." It gave a bond to stay execution during the pending of the appeal, in form as provided in section 942, Code Civil Proc. On the eleventh of January, 1886, the appeal was dismissed by this court because the transcript was not filed in time.

After the appeal had been dismissed, viz., on January 30, 1886, plaintiff filed a petition in the court below in which it was stated that "since the trial of said action, plaintiff has determined to change its line where it passes through defendants' land, as described in the complaint herein, and substitute a line further north, which will not require of defendants' land more than a narrow strip from the north-east corner of said lot, not exceeding 10 feet in width, if any." It also served defendants with notice that upon said petition, and upon other matters and proceedings, it would, on the fourth day of February, 1886, move the court "that the judgment entered in said action on the twenty-ninth day of August, 1885, be set aside and annulled."

After a hearing of this motion—at which hearing plaintiff introduced a resolution of its board of directors declaring its determination to change its line of road as stated in said petition—the court, on March 5, 1886, made and entered on its minutes an order "that the petition and motion of plaintiff to annul the judgment herein be denied and dismissed." From this order denying the motion to annul the judgment the plaintiff now appeals; and respondent moves to dismiss the appeal, on the ground that the order appealed from is not an appealable order.

In *Tripp v. Railroad Co.*, 69 Cal. 631, 11 Pac. Rep. 219, the appeal was from an order refusing to set aside a former order dismissing the action as to certain defendants; and the court says: "As to the order of dismissal, when entered, it was a final judgment which was itself appealable. The appeal should have been prosecuted from such judgment. This court, as it is well settled, will not take the jurisdiction of an order refusing to set aside a judgment or order itself appealable." And the court in its opinion refers to *Henly v. Hastings*, 3 Cal. 342; *Holmes v. McCleary*, 63 Cal. 497; and *Railroad Co. v. Railroad Co.*, 65 Cal. 295, 4 Pac. Rep. 18,—all of which cases clearly sustain the rule. In the case at bar, therefore, as the judgment sought to be set aside by the motion was itself appealable, there is no appeal from the order denying the motion, and the appeal should be dismissed. Counsel for appellant contends that, as his motion was based upon new matter occurring subsequently to the judgment, therefore the rule above stated does not apply. But, as there is no statutory provision for the motion which he made, or for the proceeding which he sought to institute, how can he invoke for this particular new matter any new rule that does not apply to any other kind of new matter?

Whether or not a railroad corporation, after having pushed a condemnation proceeding to the extreme of a money judgment in favor of the defendant therein, upon which an execution may issue, has the right, in any way, to avoid such judgment by a determination to change the line of its road; and if there be such right, what, if any, is the remedy,—these are questions which we are not called upon here to determine.

Appeal dismissed.

We concur: SEARLS, C. J.; PATERSON, J.; SHARPSTEIN, J.; TEMPLE, J.; MCKINSTRY, J.

(73 Cal. 639)

GROSS v. KELLEHER. (No. 12,338.)*(Supreme Court of California. October 31, 1887.)***FORCIBLE ENTRY AND DETAINER—APPEAL—STAY OF PROCEEDINGS—DISCRETION OF TRIAL COURT.**

Defendant appealed from a judgment in an action for unlawful detainer, and the court granted a stay of proceedings upon his filing a bond. The sureties failed to justify and the court set aside the order for a stay. Code Civil Proc. Cal. § 1176, provides that an appeal by defendant shall not stay proceedings unless the trial court so directs. Defendant moved for leave to file a new undertaking for a stay. *Held*, that a stay of proceedings in an action of forcible entry and detainer, pending an appeal, was not a matter of right but of discretion with the trial court.

In chambers. Proceedings on application to file undertaking on appeal from superior court of the city and county of San Francisco; T. H. REARDEN, Judge.

Moses G. Cobb, for appellant. *Joseph Mee*, for respondent.

SEARLS, C. J. This is a proceeding under an order on the plaintiff and respondent to show cause why the appellant should not be allowed to file a new undertaking on appeal, and why proceedings on the judgment should not be stayed upon filing a satisfactory undertaking. Respondent has appeared, and from the showing it appears that the action is for an unlawful detainer in which respondent recovered a judgment against his tenant, the appellant, for restitution of certain leased premises, and for certain rents, etc. The court below made an order for a stay of proceedings upon filing an undertaking in the sum of \$2,000. The bond was filed. Respondent excepted to the sufficiency of the sureties, who, by a mistake as to the place at which they were to appear, failed to appear and justify. The court thereupon set aside the order staying proceedings, and execution issued. The appeal having been perfected, appellant applies to this court for leave to file an undertaking for a stay of execution.

In ordinary cases for the recovery of real estate, if the judgment be for the delivery of possession thereof, the party against whom the judgment is rendered is entitled, on appeal, to a stay of proceedings of right upon filing an undertaking in such sum as the judge of the court may fix. In that class of cases this court has held that where a defective undertaking was filed in the court below, the defect could be cured here by filing a proper undertaking. *Hill v. Finnigan*, 54 Cal. 311, 493; *Schacht v. Odell*, 52 Cal. 449.

In actions of forcible entry and unlawful detainer, however, a stay of proceedings pending an appeal is not a matter of right. Section 1176, Code Civil Proc., provides as follows: "An appeal taken by the defendant shall not stay proceedings upon the judgment unless the judge or justice before whom the same was rendered so directs." As this case now stands there is no order of the court or judge staying proceedings. For me to make the order here would be to override the discretion of the court below, which may have been for good reasons properly exercised.

The order to show cause will, therefore, be discharged except so far as to permit appellant to file an undertaking, on appeal, in the sum of \$300, to cover the costs of appeal.

(74 Cal. 9)

JAHANT v. CENTRAL PAC. R. CO. (No. 11,868.)*(Supreme Court of California. October 31, 1887.)***RAILROAD COMPANIES—STOCK KILLING—PLEADING AND PROOF.**

In an action against a railroad company for damages for killing stock, the complaint alleged that the defendant carelessly and negligently managed and ran its locomotive and cars, and killed the stock, which had casually, and without fault of the owner, strayed upon the track. *Held*, that the evidence of the carelessness of the company should be confined to the running and management of the loco-

motive and cars, and that it was not permissible to show that the stock came through an open gate upon the track, there being no averment that the gate was left open by the negligence of the company, which operated as a proximate cause of the killing.

Commissioners' decision. Department 2.

Appeal from superior court, San Joaquin county; A. VAN. R. PATERSON, Judge.

W. L. Dudley, for appellant. J. C. Campbell, for respondent.

FOOTE, C. This is an action for the recovery of damages against the defendant, a railroad company, for the killing of two horses by its locomotive and cars. The cause was tried by a jury, who returned a verdict in favor of the plaintiff, upon which a judgment was duly rendered. From that, and an order denying a new trial, the defendant has appealed. The cause of action, as stated in the complaint, is as follows: "That on or about the twenty-sixth day of September, 1884, the plaintiff was the owner and possessed of certain live stock, to-wit: Two horses, of the value of \$350, and which horses, casually, and without the fault of said plaintiff, strayed in and upon the track and ground occupied by the railroad of the said defendant, in Liberty township, county of San Joaquin, state of California. That the said defendant, by its agents and servants, not regarding its duty in that respect, so carelessly and negligently ran and managed its said locomotive and cars that the same ran against and over the said horses of the said plaintiff, and killed and destroyed the same, to the plaintiff's damage, \$350." These allegations were denied by the answer. The court, against the objection of the defendant, allowed evidence to be introduced that a certain fence along-side its track was not kept in repair, and that the horses of the plaintiff came through a gate in that fence, which had been left open, out upon the track, and were there killed by the locomotive and cars. It was found by the jury, upon special issues, that the horses did come through that gate, and upon the track, and were there so killed; that the horses when first seen by the engineer were on the track; that at that time the train was running at the rate of 25 miles an hour; that when the train struck, or hit and killed, the horses, it was running 20 miles an hour; that the engineer, as soon as he saw the horses, used all possible means at his command to stop the train.

As it seems to us, under the pleadings, evidence of the carelessness of the defendant should have been confined to such as referred to *its careless and negligent running and management of its locomotive and cars*, by means of which only was it alleged in the complaint, that the horses of the plaintiff were run against, and over, killed, and destroyed. While under this allegation it might have been competent, according to the rule laid down in *McCoy v. Railroad Co.*, 40 Cal. 535, to have shown by evidence that no proper fence existed along-side the defendant's track, it was not permissible to show, as was done, that the horses came through an open gate out upon the track, and were killed, without any averment whatever in the complaint that the gate was left open, or allowed to remain open, through carelessness or negligence on the part of the defendant, which operated as a proximate cause of the animals being killed.

It becomes unnecessary to determine any other point made by the appellant, but for the reasons heretofore stated, the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: BELOHER, C. C.; HAYNE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

(74 Cal. 36)

SCHAMMEL v. SCHAMMEL. (No. 11,470.)

(Supreme Court of California. November 2, 1887.)

DIVORCE—ALIMONY AND ATTORNEY'S FEES—CONFLICTING AFFIDAVITS.

An order for payment of alimony and attorney's fees to a wife pending an action for divorce against her husband, where the affidavits upon which it is based are conflicting, will not be reversed. Following *White v. White*, 14 Pac. Rep. 393.

Commissioners' decision. In bank.

Appeal from superior court of the city and county of San Francisco; M. A. EDMONDS, Judge.

Fisher Ames and Dunne & Davidson, for appellant. *Jas. C. Cary, J. D. Sullivan*, and *Davis Louderback*, for respondent.

FOOTE, C. This is an appeal from an order granting a wife counsel fees and alimony pending an action for divorce against her husband. The affidavits filed upon the hearing of the motion are conflicting, but it is evident that the trial judge must have arrived at the conclusion that, notwithstanding the defendant's sworn statements to the contrary, he was an unkind, cruel, and abusive husband and father; that his promises to pay \$100 a month, at his office, for the support of his wife and her two daughters, were not to be relied on; that his wife was sick, and bed-ridden, and could not apply for the proposed allowance; that of his daughters, one had just cause, at the least, to fear the worst kind of abusive language from her father if she went to his office, and that the other daughter was too young a child to be intrusted with such matters. The court must also have come to the conclusion that the defendant had under his control a very considerable estate in the nature of community property, and that his income from rents, salary, and other sources amounted to about \$432 per month; that under these circumstances the sum of \$125 per month, for the support and maintenance of a sick woman, his wife, pending her action for a divorce, was not more than the defendant should have been ordered to contribute for such purpose. And we cannot say that such conclusions were not warranted by the evidence.

It does not appear that the allowance for attorney's fees was excessive, the very voluminous record in this case illustrating the fact that the defendant was most persistent and determined in resisting his wife's effort to succeed in her cause, and that very considerable labor and time must have attended the efforts of his wife's counsel to obtain for her urgent needs that which was necessary to save her from dependency upon her friends for the means of sustaining life.

Upon the whole matter, under the rule laid down by this court in the case of *White v. White*, 14 Pac. Rep. 393, we see nothing which would warrant us in reversing the order of the court below, and it should be affirmed.

We concur: **BELCHER, C. C.; HAYNE, C.**

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

(74 Cal. 52)

Estate of CAHILL, Deceased. (No. 11,382.)

(Supreme Court of California. November 5, 1887.)

1. WILL—CONTEST—SPECIAL QUESTIONS TO JURY—INDEFINITE ANSWERS.

Where, in an action to contest a will on the ground of undue influence, contestant, under a stipulation between the counsel that "the foregoing questions shall be and are the issues of the contest in the matter of the estate of Ellen Cahill, deceased," submitted to the jury the following question: "Did the said Ellen Cahill, at the time of signing the instrument offered for probate, sign or execute the same under undue influence of either James H. Nolan, or of Annie Nolan, or of any other

person?" to which the jury responded, "Yes." *Held*, that the verdict was not too indefinite to warrant a judgment setting aside the will, and the setting aside of the verdict, because too indefinite, was error.

2. INFANCY—ACTION BY—FAILURE TO APPOINT GUARDIAN AD LITEM.

In a contest of a will by a minor, no guardian *ad litem* was appointed until the time of the trial, and no objection had been made previously to the want of such an appointment, nor was objection made at the time. *Held*, that the failure to appoint the guardian did not affect the jurisdiction of the court, and was not good ground for setting aside the verdict.

3. APPEAL—MATTERS APPARENT OF RECORD—REASONS FOR SETTING ASIDE VERDICT.

An agreement that the trial court may have set aside a verdict on its own motion, under Code Civil Proc. Cal. § 662, on the ground that the jury acted "under a misapprehension of the instructions, or under the influence of passion or prejudice," is not well founded, when it appears from the record that the order setting aside the verdict was not made at the time of its rendition, and was made upon the formal written application of a party, and where the printed reasons given by the court for making the order show that it was not on the grounds named.

4. SAME—BILL OF EXCEPTIONS—EVIDENCE.

Where a notice of motion to set aside a verdict states that it is to be made upon the minutes of the court, but contains no specification of the insufficiency of the evidence under Code Civil Proc. Cal. § 659, subd. 4, such motion shall be denied, and an appellant from the order setting aside the verdict is under no obligations to furnish any of the evidence in his bill of exceptions.

Commissioners' decision. Department 2.

Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

M. C. Hassett, for contestant. *Wm. F. Sayers*, for respondent.

HAYNE, C. William P. Cahill, a minor, commenced a contest to set aside the will of Ellen Cahill, deceased, on the ground of undue influence. No guardian *ad litem* was appointed to commence the proceedings, the written grounds of opposition being signed with his own name. The proponent filed an answer, in which no objection was made for the want of a guardian *ad litem*. After the issues were settled,—Milton C. Babb acting as attorney for the contestant,—the matter came up for trial, and then the court, upon petition of the contestant, made an order "that M. C. Hassett be, and he is hereby, appointed guardian *ad litem* of said William P. Cahill, to appear and act for him in the contest of said William P. Cahill to the proposed last will and testament of Ellen Cahill, deceased." As will be observed, this order did not purport to relate back to the commencement of the proceedings. So far as the record shows, no objection on account of there being no guardian *ad litem* at the commencement of the proceedings was made at any stage of the trial. The jury found that the will had been obtained by undue influence. The finding on this subject was as follows: "Did the said Ellen Cahill, at the time of signing the instrument offered for probate, sign or execute the same under undue influence of either James H. Nolan, or of Annie Nolan, or of any other person? *Answer*. Yes." The proponent moved to set aside the verdict, and the court below granted the motion on the ground of there having been no guardian *ad litem* at the commencement of the proceedings, and upon the ground of the indefiniteness of the verdict. In this latter regard the court said in its opinion, which is printed in the brief of counsel: "It is not specified whether the undue influence was exercised by James H. Nolan or Annie Nolan, or of some other person. This verdict is necessarily too indefinite to warrant any judgment whatever." The contestant appeals from the order setting aside the verdict.

1. We do not think that the verdict was too indefinite to warrant a judgment setting aside the will. It affirmed that the testatrix, in making it, was acting under the undue influence of James H. Nolan, or of Annie Nolan, or of some other person. The material point is that there was undue influence. It is not necessary that the undue influence should have been exercised by a

beneficiary under the will. Undue influence by any one, whether he gains by the will or not, is sufficient ground for setting it aside. It is perfectly true that, as an allegation in the statement of the grounds of opposition, it would be too indefinite if objected to; for it would make it necessary to go over too wide a field of evidence, and there would be nothing to apprise the proponent of the particular case to be made against him. It would therefore be ground of demurrer. The issues submitted to the jury should likewise be sufficiently definite to narrow the case within reasonable limits; and, probably, in such a case as this, if objection had been made to the form of the issue, the objection would have been allowed. But there was no such objection. On the contrary, the attorney for the proponent expressly stipulated in writing that "the foregoing questions *shall be and are the issues* of the contest in the matter of the estate of Ellen Cahill, deceased." In the face of such a stipulation as this, the proponent cannot be allowed to object to the form of the issues, unless they are so uncertain as to render it impossible to say what the jury meant by their verdict, which we do not think is the case here.

2. Was the fact that no guardian *ad litem* was appointed for the contestant until the case was called for trial sufficient reason for setting aside the verdict? If this circumstance went to the jurisdiction of the court, and so rendered the proceedings for contest void, there can be no doubt of the correctness of the action of the court below; but if it was a mere irregularity, the proponent should have brought the matter to the attention of the court, and applied for relief as soon as the matter came to his knowledge; he could not go on and take the chances of a verdict in his favor, and keep the objection in reserve. See cases collected in Hayne, New Trial, § 27. The question stated, therefore, resolves itself into this: Did the matter go to the jurisdiction of the court? We think it did not.

The provision of the Civil Code is that "a minor may enforce his rights by civil action, or other legal proceedings, in the same manner as a person of full age, except that a guardian must conduct the same." Civil Code, § 42. And in the Code of Civil Procedure it is provided that "where an infant or an insane person is a party, he must appear either by his general guardian or by a guardian *ad litem* appointed by the court in which the action is pending in each case. * * *" Section 372. And directions are given concerning the manner of the appointment. Code Civil Proc. § 373. So far as the mere language of these provisions goes, it would seem that the appointment is to be made after the commencement of the suit. But it has been held that the appointment of the guardian must be alleged in the complaint. *Crawford v. Neul*, 56 Cal. 321. In this case it was said that the necessity to show the due appointment of the guardian *ad litem* remains as at common law.

The old equity rule is stated by Story as follows: "An infant is incapable by himself of exhibiting a bill, as well on account of his supposed want of discretion, as of his inability to bind himself, and to make himself liable to the costs of the suit. When, therefore, an infant claims a right, or suffers an injury, on account of which it is necessary to apply to a court of equity, his nearest relation is supposed to be the person who will take him under his protection, and institute a suit to assert his rights, or to vindicate his wrongs; and the person who institutes a suit on behalf of an infant is therefore termed his 'next friend,' (*prochein ami*.)" Story, Eq. Pl. § 57. If the appointment was not made, the defendant could demur or put in a plea in abatement. *Id.* §§ 494, 725.

The common-law rule is stated by Tidd as follows: "An infant, or person under the age of twenty-one years, not being capable of appointing an attorney, must sue by his *prochein ami* or guardian. * * * An infant *defendant* must in all cases appear and defend by guardian. * * * If he appear by attorney, it is error; though, if an infant *plaintiff* appear by attorney, it is cured by the statute of jeofails." Tidd, Pr. (9th Ed.) 99.

It will be observed that the main reason given by these two learned authors is that the infant cannot appoint an attorney. The appointment of an attorney was one of the acts of an infant which was absolutely void at common law. And our Code provides that "a minor cannot give a delegation of power." Civil Code, § 33. But, as will be remembered, the minor did not appoint an attorney to commence the proceedings here. He commenced them *in propria persona*. It is not necessary, therefore, to consider what would be the result if the contest had been commenced by an attorney for the minor. That is not the case before the court. The consent of the minor himself, in submitting to the jurisdiction of the court, and applying to it for relief, does not seem to us to have been of no effect whatever, or, in other words, absolutely void; for the acts of minors are in general voidable merely, and are absolutely void only in certain cases. If this be so, then the court had jurisdiction of the person and of the subject-matter; and hence its action, however erroneous, was not void.

In the passage above quoted, Tidd makes a distinction between infant plaintiffs and infant defendants. It would seem that this distinction was made by St. 21 Jac. I. c. 13, § 2, which provided that, after verdict for the plaintiff, judgment shall not be stayed or reversed by reason that the plaintiff in ejectment, or other personal action or suit, being an infant under 21 years, did appear by attorney therein. See *Drago v. Moso*, 1 Speer, 212; *Smith v. Van Houten*, 9 N. J. Law, 382. This difference between action taken by the infant himself, and action taken in hostility to him, may be founded in reason. It was acted on in *Tremper v. Barton*, 18 Ohio, 425. It is unnecessary in this case, however, to say what would be the law with reference to infant defendants appearing and defending without a guardian *ad litem*. With reference to plaintiffs, it has been frequently held in this country that the want of a next friend or guardian *ad litem* does not go to the jurisdiction, but is a mere irregularity.

Thus in *Fellows v. Niver*, 18 Wend. 563, where a *prochein ami* was appointed after the commencement of the suit, a motion to set aside the proceedings was denied, the court saying: "The only difference between the former statutes and the present is this: Formerly the *prochein ami* was appointed after the issuing of the process, but before a declaration; now, it should be done before process; but now, as formerly, it is a question of *regularity* merely, not, as the defendant's counsel supposes, a question of *jurisdiction*. It is a question of practice, and the irregularity may be waived under the present statutes as well as under the old statutes."

So in *Bartlett v. Batts*, 14 Ga. 541, where a next friend was appointed for an infant plaintiff after the commencement of the action, the court refused to set aside the verdict, saying: "It seems very safe to say that a suit commenced and prosecuted by an infant alone is not absolutely void; and, although defective in wanting a next friend, the defect is one which before verdict is amendable, and after verdict is cured."

So in *Hafern v. Davis*, 10 Wis. 502, where the plaintiff signed her complaint in her own name, and proceeded without the appointment of a next friend, the court, per DIXON, C. J., said: "All objections not going to the merits of the action or defense seem to be swept out of existence. Section 40 of chapter 125 provides: 'The court shall in every stage of an action disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of any such error or defect.' This is evidently an error or defect which does not affect the substantial rights of the plaintiff in error." The foregoing cannot be said to be a decision, for the case was reversed on another ground. The *dictum*, however, was approved and followed in *Sabine v. Fisher*, 37 Wis. 376. In that case there was no guardian *ad litem* or next friend appointed for the plaintiff. On the trial the defendant moved to dis-

miss on this ground, but the court thereupon appointed a guardian *ad litem*, and denied the motion to dismiss. On appeal the judgment was affirmed, the court, per RYAN, C. J., saying: "There is no error in the leave given to respondent to amend, so as to prosecute the suit by her next friend. Had she proceeded without leave, the judgment could not be reversed on that ground: *Hafern v. Davis*, 10 Wis. 501." And the foregoing cases were approved and followed in *Hepp v. Huefner*, 61 Wis. 150, 20 N. W. Rep. 923. And to the same effect are other cases: *Young v. Young*, 3 N. H. 345; *Blood v. Harrington*, 8 Pick. 554; *Schemerhorn v. Jenkins*, 7 Johns. 373; *Kidd v. Mitchell*, 1 Nott & M. 334; *Smart v. Haring*, 14 Hun, 276; *Sims v. New York College*, 35 Hun, 344. And compare *Brooke v. Clark*, 57 Tex. 112.

We do not regard the case of *Townsend v. Tallant*, 33 Cal. 52, as inconsistent with this conclusion. That was a case with reference to a sale of real estate under the direction of the probate court. It may very well be that a special proceeding by an administrator to divest the heir of title to real property is to be differently regarded. Nor do we think that section 1307 of the Code of Civil Procedure affects the question.

3. It is suggested that the court may have set aside the verdict upon its own motion, under section 662 of the Code of Civil Procedure, on the ground that the jury acted "under a misapprehension of the instructions, or under the influence of passion or prejudice." But it is sufficient to say that it appears from the bill of exceptions that the order setting aside the verdict was not made at the time of its rendition, nor was it made upon the court's own motion, but on the formal written application of the proponent. And, furthermore, the opinion of the court shows the grounds on which it acted. It is true that this opinion is not a part of the record. But, when counsel prints a document in his brief, he must not be surprised if, so far as he is concerned, it is treated as properly before the court. *Mott v. Reyes*, 45 Cal. 386.

It may be added, although the point is not distinctly made, that the case cannot be treated as one of a motion for new trial granted, or sustainable on the ground of insufficiency of the evidence to support the verdict. The notice of motion states that it was to be made on the minutes of the court, but contains no specification of the insufficiency of the evidence. In such case the statute expressly provides that the motion shall be denied. Code Civil Proc. § 659, subd. 4. This being so, the contestant was not required to insert any evidence in the bill of exceptions settled after the order.

We therefore advise that the order be reversed, and the cause remanded, with directions to the court below to enter judgment upon the verdict in favor of the contestant.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion, order reversed, and cause remanded, with direction to the court below to enter judgment upon the verdict in favor of contestant.

(73 Cal. 632)

Ex parte McNALLY, on *Habeas Corpus*. (No. 20,336.)

(Supreme Court of California. October 29, 1887.)

MUNICIPAL CORPORATION—ORDINANCE IMPOSING LICENSE FOR SALE OF LIQUOR—CONSTITUTIONALITY.

Const. Cal. § 11, art. 11, provides that "any . . . city . . . may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with the general laws." Petitioner was convicted of misdemeanor for violating a city ordinance, in refusing to pay a license fee of \$200 per year for carrying on his business as saloon keeper. Held, that the ordinance was not in violation of that section of the constitution.

Commissioners' decision. In bank
On *habeas corpus*. Superior court, Nevada county; J. M. WALLING, Judge.
Horace L. Smith, for petitioner. Geo. A. Johnson, Atty. Gen., for the People.

FOOTE, C. The petitioner is a person carrying on the business of selling spirituous, malt, or fermented liquors or wines within the corporate limits of the city of Eureka, in this state. He was convicted by a jury of a misdemeanor, for violating an ordinance of said city, in refusing to pay a license to carry on his business, was fined by the court, and is in the custody of the sheriff, according to the sentence of that tribunal for non-payment of his fine, and has sued out a writ of *habeas corpus* to obtain his liberty.

It is claimed on his behalf that the ordinance which imposed the license in question was in violation of some of the provisions of the state constitution, but with this contention we cannot agree. In section 11, art. 11, of that instrument it is provided that "any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." There is no general law which conflicts with the ordinance. There is nothing in it which goes to show that in enacting and enforcing it the city authorities of Eureka exceeded their powers granted by that section of the constitution. The mere fact that the defendant was required to pay a license tax of \$50 per quarter, or \$200 per year, does not demonstrate it. It does not otherwise appear but what that amount was necessary in order properly to regulate the business of liquor selling, by confining it, perchance, to fewer and more responsible persons, or in some other way tending to the preservation and enforcement of good order, and the general welfare of the inhabitants of that city. Nor is there anything in the ordinance which is oppressive, or unreasonable towards or prohibitory of the business of retailing spirituous liquors. *Ex parte Wolters*, 65 Cal. 270, 3 Pac. Rep. 894; *In re Guerrero*, 69 Cal. 88-95, 10 Pac. Rep. 261, and cases cited.

The writ should be dismissed, and the petitioner remanded to the custody of the sheriff.

We concur: BELCHER, C. C.; HAYNE, C.

By THE COURT. For the reasons given in the foregoing opinion the writ is dismissed, and petitioner remanded to the custody of the sheriff.

(74 Cal. 46)

NEWELL and others v. DESMOND. (No. 9,589.)

(Supreme Court of California. November 3, 1887.)

1. EXECUTION—BONA FIDE PURCHASERS FROM DEBTOR—CHANGE OF POSSESSION.

In an action of replevin brought by a claimant of property which had been levied upon as the property of one Cadman, under a judgment against him in favor of one Sutton, the court charged the jury that if they "should find that the property levied on in the action of *Sutton v. Cadman* was not in existence at the time of the alleged transfer by Cadman to the plaintiff, then there could not have been a change of possession as to that property, and the provisions of the Civil Code, § 3440, in reference to a change of possession, would not apply, and the transfer would be valid, even as against creditors, without reference to the question of change of possession." *Held* correct.

2. SAME—CLAIM BY THIRD PARTY—BURDEN OF PROOF.

Where a sheriff levied upon goods in a book store, as the property of one Cadman, and claimant brought an action of replevin against the sheriff, and it appeared that there had previously been a sale of the store by Cadman to claimant, but that Cadman still worked in the store as before, and defendant claimed that

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there had been no such change of possession as would give the claimant title against a levying creditor, *held*, that the burden of proof rested upon defendant to show that the goods levied upon had belonged to the judgment debtor.

3. DEPOSITIONS—DEPONENT PRESENT IN COURT.

A deposition taken under Code Civil Proc. Cal. § 2021, subd. 1, may be read although the deponent is present in court; as section 2032 expressly provides "if the deposition be taken under subdivisions 2, 3, and 4 of section 2021, proof must be made at the trial that the witness continues absent or infirm, or is dead." And the only reason for enumerating these subdivisions is to permit the depositions taken under subdivision 1 to be read though the deponent be in court.

In bank. Appeal from superior court, city and county of San Francisco; JAS. G. MAGUIRE, Judge.

This was an action of replevin against a sheriff, to recover goods seized upon execution. One Sutton had obtained a judgment against one Cadman, who had been the owner and manager of a book store, but who, some time previous to this judgment, had sold, in good faith, to one of the plaintiffs, an interest therein. The firm then became Cadman & Fay, Cadman continuing to act in his usual capacity. Shortly after, plaintiff Newell succeeded Cadman, but the new firm continued to employ the latter, and he apparently occupied his usual place in the business. All of the books which were levied upon, except about \$40 worth, according to Cadman's uncontradicted testimony, were new stock, placed in the store after Cadman sold out, and after the stock bought from him had been sold. Defendant claimed that there had been no such open and apparent change of possession as would make the sale by Cadman valid against his creditors. The court below instructed the jury that if they "should find that the property levied on in the action of *Sutton v. Cadman* was not in existence at the time of the alleged transfer by Cadman to Fay and to Mrs. Newell, then there could not have been a change of possession as to that property, and the provisions of the Civil Code, § 3440, in reference to change of possession, would not apply, and the transfer would be valid, even as against creditors, without reference to the question of change of possession."

Henry E. Highton, Calhoun Benham, and T. W. Carter, for appellant.
W. B. Tyler, for respondent.

TEMPLE, J. We think the court did not err in overruling the objections to the deposition of plaintiff Fay, on the ground that Fay was present in the court when the deposition was read. The deposition was taken at the instance of defendant, under section 2021, Code Civil Proc., subd. 1. It is expressly provided in section 2032, Code Civil Proc.: "If the deposition be taken under subdivisions 2, 3, and 4 of section 2021, proof must be made at the trial that the witness continues absent or infirm, or is dead." Subdivision 5 relates to cases where the oral examination is not required. Subdivision 6 expressly provides that the deposition authorized to be taken by it shall not be used if the presence of the witness can be had. The sole purpose of enumerating the subdivisions at all, in section 2032, was to provide that the deposition authorized by subdivision 1 could be read without showing the absence of the witness.

The verdict of the jury establishes the fact that the sales made by Cadman were *bona fide*. As to the necessity of delivery and a continued change of possession under the circumstances, the law is correctly stated in the instructions given by the court.

There was no evidence on the part of defendant that any of the books levied upon ever belonged to Cadman & Fay. Cadman testified for plaintiff that none of the books taken were on hand when the transfer was made, except one set of the value of \$40. The burden of proof on this point was on the defendant. The verdict cannot be disturbed on this ground.

There was evidence which tended strongly to prove actual fraud in both

transfers made by Cadman, but this was left to the jury under proper instructions, and their verdict was for plaintiff.

Order affirmed.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; PATERSON, J.; McFARLAND, J.; MCKINSTY, J.; THORNTON, J.

(74 Cal. 60)

AUZERAIS v. NAGLEE. (No. 8,798.)

(Supreme Court of California: November 5, 1887.)

1. ACCOUNT STATED—ACTION ON—BILL OF PARTICULARS.

In an action upon an account stated, defendants demanded a copy of the account mentioned as sued upon, and in reply plaintiff furnished an account in which defendant was charged with a gross amount as a stated account, and interest thereon, and was credited with some payments, but no bill of particulars accompanied the account. Defendant's motion for a further account of the items sued for was refused. *Held*, that this ruling was correct, as the action was upon account stated, and no bill of particulars was necessary.

2. SAME—REFUSAL TO FURNISH BILL OF ITEMS NOT PREJUDICIAL.

Where it appeared that, previous to a demand for a bill of items of the amounts claimed by plaintiff from defendant, plaintiff had furnished such a bill as an original statement of his account against defendant, and defendant, at the time of the demand, had such original accounts in court, he was not prejudiced by a ruling refusing the order to furnish a bill of items.

3. SAME—EVIDENCE TO EXPLAIN LETTER.

A letter written to defendant by plaintiff, who claimed an account stated was introduced by defendant to show that the account was not stated, and read as follows: "We would call your attention to your unsettled account. The balance due is \$2,326.35. Please call and settle same, and oblige * * *" *Held*, that it was not error to allow the writer to explain that he used the word "unsettled" in the sense of "unpaid," and not as opposed to an account stated or agreed upon.

4. SAME—INTEREST.

In California, when it is shown to be the custom of a merchant to charge interest after 30 days upon monthly balances due upon open account, and where such account showing the interest charged regularly is received and understood by the debtor, and the account becomes stated, the debtor is bound to pay the balance due as in the account stated, with interest.

5. LIMITATION OF ACTIONS—ACCOUNT STATED—WHEN STATUTE BEGINS TO RUN.

Where the statute of limitations has not run upon the items in an account at the time of the statement thereof, the statement creates a new cause of action, and the statute only runs thereon from the time of the account stated.

6. SAME—ACKNOWLEDGMENT IN WRITING.

Under Code Civil Proc. Cal. § 360, providing that no acknowledgment of an indebtedness is sufficient to remove the bar of the statute of limitations, unless the acknowledgment be in writing, and signed by the person making it, an acknowledgment in the handwriting of the debtor in the form of a receipt, as follows: "Received December 8, 1880, of Henry M. Naglee, \$1,000, on account of the within," and signed by the creditor,—is sufficient to remove the bar as to the debtor, Naglee, named therein.¹ TEMPLE and THORNTON, JJ., dissenting.

In bank. Appeal from superior court, Santa Clara county; DAVID BELDEN, Judge.

Wm. Matthews, for appellant. D. M. Delmas, for respondent.

SEARLS, C. J. The complaint in this cause contains three counts or causes of action,—one upon an account stated, as of January, 1880, and the others for goods, wares, and merchandise sold and delivered to defendant subsequent to said last mentioned date. The action was brought July 29, 1881. Defendant, in addition to the denials contained in his answer, interposed a plea of the statute of limitations to the first count, claiming the cause of action to be barred by the provision of section 339, Code Civil Proc., (two years.) Plain-

¹As to what is a sufficient acknowledgment of an indebtedness to remove the bar of the statute, see *Jordan v. Jordan*, (Tenn.) 3 S. W. Rep. 893, and note.

tiff had a verdict and judgment for \$1,531.82, from which, and from an order denying a new trial, defendant appeals.

After service of summons and complaint, the defendant demanded in writing a copy of the account mentioned as sued upon in the first count of the complaint, and, in reply to such demand, plaintiff furnished to defendant an account in which defendant was charged with amount due on stated account, January 1, 1880, \$2,674.90, to which interest was added, and from which sundry payments were deducted, etc., but without giving in detail the items of the original account going to make up the amount. Defendant moved the court for a further account, which was refused, upon the ground that in an action on an account stated, no account need be furnished under the law. To this ruling the defendant excepted, and the action of the court is assigned as error.

The first count or cause of action set out in the complaint, and upon which a copy of the account was demanded, is upon an account stated. A stated account is an agreement between both parties that all the items are true; but this agreement may be implied from circumstances, as where merchants reside in different places, and one sends an account to the other, who makes no objection to it within a reasonable time. *Stebbins v. Niles*, 25 Miss. 267; 1 Waite, Act. & Def. 191-198. In such cases the action is based upon the agreement, which has all the force of a contract. The original account becomes the consideration for the agreement, and it is not necessary to prove the items of such account, nor can they be inquired into or surcharged except for some fraud, error, or mistake, and such grounds must be according to the weight of authority set forth in the pleadings. *Kronenberger v. Binz*, 56 Mo. 121; *Threlked v. Dobbins*, 45 Ga. 144; *Sutphen v. Cushman*, 35 Ill. 186; *Horan v. Long*, 11 Tex. 230; *Philips v. Belden*, 2 Edw. Ch. 1; *Hawkins v. Long*, 74 N. C. 781; *Kock v. Bonitz*, 4 Daily, N. Y. 117; *Slee v. Bloom*, 20 Johns. 669.

The balance found due upon a stated account is principal; it cannot be re-examined (except for fraud or mistake) to ascertain the items or their character. *McClelland v. West*, 70 Pa. St. 183. The object of a bill of particulars is to apprise a party of the specific demand of his adversary. *People v. Monroe*, 4 Wend. 200; *Matthews v. Hubbard*, 47 N. Y. 428. This being true, it is difficult to discern how, upon principle, a defendant is entitled, under section 454, Code Civil Proc., to a copy of the original account upon which the contract in an action on a stated account is based. The term "stated account" is but an expression to convey the idea of a contract, having an account for its consideration, and is no more an account than is a promissory note or other contract having a like consideration for its support.

The Code of Civil Procedure (section 454) by its terms makes it unnecessary for a party declaring upon an account to set forth the items in his pleading, but requires him, on demand, to furnish a copy of the account thus pleaded, under penalty of being precluded from giving evidence thereof, in case of refusal. In an action on an account stated, it is not necessary to prove the account, or any of its items, but the proof in such a case is directed to the fact that the parties have accounted together, and agreed upon the balance due, (*insimul computassent*,) and, in an action on the original account, it has been held that a plea of an account stated, if supported, will bar a recovery. *Driggs v. Garretson*, 25 N. J. Eq. 178.

In the language of Waite, in his work on Actions and Defenses, (volume 6, p. 430,) an accounting "when accomplished, does not necessarily exclude all inquiry into the rectitude of the account. The parties may still impeach it for fraud or mistake, but, so long as it is not impeached, the agreed statement serves in place of the original account as the foundation of an action. It becomes an original demand, and amounts to an express promise to pay the actual sum stated. The creditor becomes entitled to recover the agreed bal-

ance in an action based upon the fact of its acknowledgment by the debtor upon an adjustment of their respective claims."

The penalty for refusing to furnish an account is that the party refusing to so furnish it shall be precluded from proving it, but it can have no application to a case where, as in an action on an account stated, he is not required to prove the account. We are therefore of opinion the court below did not err in denying defendant's motion for a further account.

Again, as before stated, the object in requiring an account is to enable the opposite party to make a defense to the cause of action based on such account. The defendant in this cause, as appears by the record, was in possession of the original accounts rendered him by the plaintiff, and, on notice of the latter, produced them in court. If, therefore, we concede the court to have been wrong in its ruling, the defendant was not injured thereby, and the judgment should not for that cause be reversed.

It is next urged that the court erred in permitting the witness Pomeroy to explain "what was the meaning of the word 'unsettled,' as used by him in his letter of July 26, 1880." Defendant, on cross-examination of this witness, had presented him with Exhibit Q, being a letter from plaintiff and his grantor to defendant, as follows:

"*Gen. H. M. Naglee:* We would call your attention to your unsettled account, the balance due us being \$2,326.35. Please call and settle same, and oblige
Yours, very truly, AUZERAIS & POMEROY."

"The firm of Auzerai & Pomeroy having been dissolved, we are anxious to have all our accounts settled, and we will be greatly obliged if you give us above.
E. AUZERAIS, Liq. P."

The testimony was further directed to showing that the unsettled account referred to in the letter was the very account which plaintiff had claimed and testified was settled. On redirect examination the witness was permitted to explain that he used the term "unsettled" in the sense of "unpaid," and the term "settle" in the sense of "pay." Bouvier defines the word "settle," "to adjust or ascertain; to pay. Two contracting parties are said to settle an account when they ascertain what is justly due by one to the other. When one pays the balance or debt due by him he is said to settle such debt or balance;" citing *Houston v. Stanton*, 11 Ala. (N. S.) 419.

We think there can be little doubt but that the term "settle" has a double meaning, and is used alike to denote an adjustment of a demand and a payment. This being so, it was proper for the author of the letter containing the declaration to explain in which of the two senses he used the expression. In other words, there was an ambiguity upon the face of the instrument which it was competent not to contradict, but to explain. *Chicago v. Sheldon*, 9 Wall. 50; *Railroad Co. v. Bank*, 19 Wall. 548; *Jenny Lind Co. v. Bower*, 11 Cal. 194; *Harnickell v. Brown*, 45 N. Y. Sup. Ct. 350; 2 Whart. Ev. §§ 954, 955. There is in this view nothing in conflict with the provisions of sections 1858, 1859, 1861, Code Civil Proc.

It is further urged that the court erred in holding that the cause of action accrued at the date the account was stated between the parties, (if in fact stated,) and that, therefore, the statute did not apply to any item after January 31, 1878, two years before the alleged statement; and that the court also erred in holding that by silence or acquiescence, or concurrence by unwritten words in the correction of the account, the defendant could become liable to pay larger interest than 7 per cent. per annum. An open account already barred by the statute of limitations cannot be relieved from the bar of such statute by an oral statement of such account, for the reason that, under our Code, (Code Civil Proc. § 360,) no acknowledgment or promise is sufficient evidence of a new or continuing contract by which to take the case out of the operation of the statute, unless the same is contained in some writing signed by the party to be charged thereby. Where, however, the demand is not

barred at the date of the account stated, although the statement is verbal, the statute begins to run upon the new cause of action thus brought into existence from the date of the settlement, and new promise arising thereunder, and, if verbal, an action may, under subdivision 1, § 339, Code Civil Proc., be brought within two years after such settlement.

In the language of Angell, (Ang. Lim. § 150:) "For the moment it becomes a *stated* account, it is at an end; and the balance, which is ascertained and admitted to be due, from one party to the other, is immediately subjected to the operation of the statute, as an original and separate demand. * * * When the parties have stated, liquidated, and adjusted their accounts, and thus ascertained the balance, it ceases to be an account, and has lost the peculiar attributes of an account. What was before an implied promise to pay what was reasonable, by such liquidation and stating of account, at once becomes an express promise to pay a sum certain." *McLellan v. Crofton*, 6 Greenl. 337. The statute begins to run, in cases of adjustment, when the adjustment is made. *Ex parte Storer*, 2 Ware, 294; *Higgs v. Warner*, 14 Ark. 192; *Brackenridge v. Baltzell*, 1 Cart. (Ind.) 333. So, too, the balance of an old account, when found and assented to, may become the first item in a new account. It was said by Chief Justice NORTH in *Farrington v. Lee*, 1 Mod. 270: "If, after an account stated, upon the balance of it a sum appear due to either of the parties, which sum is not paid, but is afterwards thrown into a new account, it is now *slipped out* of the statute again." *Bank v. Knapp*, 3 Pick. 96; Ang. Lim. § 151; *Clarke v. Jenkins*, 3 Rich. Eq. 314.

There was also evidence showing that on the eighth day of December, 1880, the defendant paid to plaintiff, upon the account rendered him, the sum of \$1,000, which is evidenced by a receipt on the back of the account, in the handwriting of defendant, (except the signature thereto,) as follows:

"Received December 8, 1880, of Henry M. Naglee, \$1,000 on account of the within.
E. AUZERAIS, Liquidating Partner."

Respondent contends that this part payment, evidenced by a writing, in which the name of Naglee appears under his own hand, is a sufficient signing, under the statute, (section 360, Code Civil Proc.,) to suspend its operation; and in support of his contention cites *Barron v. Kennedy*, 17 Cal. 514; *Pena v. Vance*, 21 Cal. 142; *Fairbanks v. Dawson*, 9 Cal. 89; *Rowe v. Thompson*, 15 Abb. Pr. 377; *Holmes v. Mackrell*, 3 C. B. (N. S.) 789; *Johnson v. Dodgson*, 2 Mees. & W. 653.

The part payment was evidenced by a writing. It was in the handwriting of defendant. His signature was contained therein. The statute does not require the party to *subscribe* his name, and it is sufficient if it be evident from any part of the instrument of acknowledgment that the debtor named in it has given to it his assent; and, as was said in *Rowe v. Thompson*, *supra*: "As the legal definition of the word 'signed' is the act whereby a person gives or declares assent by name, sign, or mark, it follows that it is enough, if it appears in the body or upon the margin or elsewhere of the instrument, that such assent has been given. If the attestation appears anywhere upon the face of the writing it is sufficient, and the party thus attesting is bound as effectually as if he had subscribed his name at the foot."

Johnson v. Dodgson, *supra*, was a case under the statute of frauds, in which the latter, it appeared, had made out a memorandum in his own handwriting, and required it to be signed by the vendor as follows:

"LEEDS, nineteenth October, 1836.

"Sold John Dodgson: 27 pockets Playsted, (hops,) 1836, Sussex, at 103s.,"
etc.

Signed for JOHNSTON, JOHNSTON & Co.

"D. MOORE."

This was held sufficient to charge Dodgson, as the body of it was in his handwriting and contained his name.

Upon the same principle, we may say here, the body of the instrument showing a part payment is in the handwriting of defendant, who is the party charged, and contains his name. We think the evidence was sufficient to bind defendant.

Next, could the defendant become liable, under the evidence, upon a stated account for a rate of interest in excess of legal interest? It appears from the record that interest at the rate of 1 per cent. per month was charged, and is included in the stated account. There was also a question as to a further sum charged as compound interest, but which was deducted by plaintiff upon protest of defendant, and that question is not necessarily involved.

In *Marye v. Strouse*, 6 Sawy. 205, a case in most respects similar to this, HILLYER, J., held that where a statute like our own, which does no more than prohibit a recovery of interest beyond the legal rate, when the contract is not in writing, but does not otherwise make the rate of interest unlawful, interest in excess of that rate may be included in an account stated and recovered. The case proceeds upon the theory that the interest as charged, being known and assented to by the debtor, and not being in violation of any positive law, affords a sufficient consideration for the new promise involved in an account stated.

The custom of merchants in Pittsburgh and Philadelphia to charge interest on their accounts after six months is judicially noticed in the Pennsylvania courts. *Koons v. Miller*, 3 Watts & S. 271; *Watt v. Hoch*, 25 Pa. St. 411; *Adams v. Palmer*, 30 Pa. St. 346. And evidence of usage has rendered charges for interest under such circumstances recoverable at law. *Glass Factory v. Reid*, 5 Cow. 611; *Knox v. Jones*, 2 Dall. 193.

In *Raymond v. Isham*, 8 Vt. 263, it was said: "From the practice which has generally obtained in this state, (Vermont,) from the known usage and custom of Mr. Raymond, (the creditor,) as well as other merchants, to cast interest on their accounts after six months, we think there was an implied contract on the part of Dr. Isham to pay interest after the usual time of credit."

In *McAllister v. Reab*, 4 Wend. 483, the court said: "We do not think the charge of interest on any part of the account objectionable. The plaintiff proved that the defendant was one of his customers, and that he always charged interest on his accounts after ninety days."

The uniform custom of a merchant or manufacturer is presumed to be known to those who are in the habit of dealing with him, and in their dealings are supposed to act with reference to that custom. *Meech v. Smith*, 7 Wend. 315; *Reab v. McAllister*, 8 Wend. 109; *Backus v. Minor*, 3 Cal. 231.

Where a banker and his customer have carried on their business for a series of years in a particular way, it will be assumed there is an agreement to that effect, and the principle involved will be held binding in any subsequent disagreement between them. *Mosse v. Salt*, 32 Beav. 269; *Clancarty v. La-touche*, 1 Ball & B. 420.

These were cases in which only legal interest was charged, but it was allowed upon unliquidated demands where, but for the custom or pursuant to an agreement, no interest could have been recovered. The deduction is that, there being no positive law to the contrary, the payment of interest may be the subject of contract, express or implied, in cases where, but for such contract, no interest could be recovered. In this state we are of opinion that when, as in the present case, it is shown to be the universal custom of a merchant to charge interest after 30 days upon monthly balances due upon open account, and where such account showing the interest charged up regularly is received by the debtor and fully understood by him, and where such account becomes stated, either by the prolonged failure of the debtor to object thereto, or by a settlement and adjustment thereof between the parties, a new contract arises between such parties, and the debtor is bound to pay the

balance found due, and no inquiry is permissible as to the items beyond the defense of the statute of limitations, and that of fraud, error, or mistake. There is no plea of fraud, error, or mistake, and no showing in support of such plea had it been interposed. It follows from these views that the instructions given were correct.

The testimony upon the question of an accounting was conflicting, and the verdict of the jury is conclusive in this court.

We are of opinion the judgment and order appealed from should be affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

PATERSON, J. I concur. If it be conceded that it was error to permit the witness Pomeroy to explain the meaning of the word "unsettled," still it was harmless. The letter itself shows clearly that the word was used in the sense stated by the witness. The item of interest, like any other item included in the account as stated, could be attacked only upon an allegation showing fraud, error, or mistake.

TEMPLE, J. I dissent. Under our statute a custom which would prove an agreement to pay more than legal interest is against law. I also think that assent to an account stated does not take the account from the operation of the statute of limitations. The cases which hold that the account stated is a new promise, and the statute begins to run from that time, have no force here, where the acknowledgment must be in writing.

THORNTON, J. I dissent. The motion of the defendant for a further and more particular copy of the account sued on was denied by the court below "on the ground that in an action on an account stated no account need be furnished under the law." The statute on this subject is section 454, Code Civil Proc.: "It is not necessary for a party to set forth in a pleading the items of an account therein alleged, but he must deliver to the adverse party, within five days after a demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof. The court or judge thereof may order a further account when the one delivered is too general, or is defective in any particular." The bill of items or particulars furnished on the action was of the most general character, and the defendant followed the usual practice in moving for one more particular. *Providence T. Co. v. Prader*, 32 Cal. 638. The account furnished was not a copy of the account sued on as an account stated, but something entirely different. The question to be determined is whether, in an action on an account stated, a defendant is entitled to a bill of particulars, or, as it is sometimes styled, a bill of items. Certainly the demand of defendant comes within the statute, for an account is alleged in the first count of the complaint. I cannot see that it makes any difference as to the right to make the demand that the pleader counts on an account stated, unless it is held that an *account stated* is not an *account*, and I cannot perceive that it can be so held.

In New York, where the statute is the same as regards this point as that of this state, (Code Proc. N. Y. § 158,) it was held by the superior court of New York that the account alleged in a pleading, the refusal to deliver a copy of which by the party alleging it precludes him from giving evidence of it under the Code of Procedure, (section 158,) is some written instrument existing before the commencement of the action, evidence of the existence and contents of which is material to the party alleging it; in other words, an account claimed to have been rendered and acquiesced in; that is, an *account stated*. *Johnson v. Mallory*, 2 Rob. (N. Y.) 681, in which cause the point is directly decided. See, also, *Barkley v. Railroad Co.*, 27 Hun, 516. In the last case

cited the court said: "In ordinary language, the word 'account' is applied to almost any claim or contract which consists of several items. And there is no necessity for giving any limited meaning to the word as it is used in section 531, Code Civil Proc." For section 531, see Bliss, Ann. Code, N. Y. 396. Section 531 seems to have been enacted in place of section 158, above mentioned, of the New York Code.

In *Brown v. Calvert*, 4 Dana, 220, which was an action of *assumpsit*, the declaration containing only the general counts, (of which it may be said a count upon an account stated is one,) the court said: "Whenever the form of the declaration is so general as not to apprise the defendant of the nature, character, and extent of the claim set up against him, he may demand a *bill of particulars*. Such a bill is not only proper, by way of limiting the plaintiff in his proof to the specific demands claimed by him, but is essential to enable the defendant to prepare fully for his defense, and to guard him against surprise. The right is not only sanctioned by authority, but by reason and propriety."

In *Johnson v. Mallory*, *supra*, it is said that the provision of the statute above referred to "can only be construed to be intended to point out the mode of pleading an account, as well as to ascertain what account was intended." 2 Rob. (N. Y.) 683.

In *Smith v. Hicks*, 5 Wend. 51, it is held that a bill of particulars is sufficiently definite if it apprise the other side of the evidence that is to be offered, so that he cannot mistake as to his preparation to resist the claim. The office of a bill of particulars is to apprise a party of the specific demands of the adverse party when the pleadings are general, and leave uncertain what is particularly demanded, either in the complaint or answer. *People v. Monroe*, 4 Wend. 200; *Drake v. Thayer*, 5 Rob. (N. Y.) 694. The bill of particulars is considered and construed as an amplification of the pleading to which it relates, and in that sense forming a part of it. *Bowman v. Earle*, 3 Duer, 691; *Chrysler v. James*, 1 Hill, 214; *Brown v. Williams*, 4 Wend. 360, 368; *Starkweather v. Kittle*, 17 Wend. 20; *Gay v. Cary*, 9 Cow. 44; *Ryckman v. Haight*, 15 Johns. 222.

The above cases show that the defendant is entitled to a bill of particulars, when the complaint is general, to enable him to prepare to resist the claim on which he is sued. It should be furnished to enable the defendant to prepare his defense; and if defendant must by his answer attack the items of the account, or any of them, for fraud, error, or mistake, in order to be heard in regard to them, (and such seems to be the law in this state when the pleadings are verified; see *Terry v. Sickles*, 13 Cal. 427,) then certainly he ought to have a bill delivered to him to enable him to prepare his answer assailing the items on the grounds mentioned. As to the generality of the complaint, I cannot conceive a count more general than one setting up an account stated.

As to alleging an account in a complaint, the count on an account stated is the only one of the common counts, whether in *debt* or *assumpsit*, in which an account is mentioned. See for the common counts referred to, 2 Chit. Pl. 37-114, 385-387. I have examined the forms of these counts as given by Chitty, and do not find any other count than one on the account stated, in which an account is ever alleged. In the *regula generales* of Trinity term (1831) it is provided that a bill of particulars shall be delivered by the plaintiff with every declaration containing counts in *indebitatus assumpsit* or *debt* on simple contract. See appendix to 1 Chit. Pl. 726, 727. It is highly probable that the sections (158 and 531) of the New York Code of Procedure and section 454 of the Code of Civil Procedure in this state were framed in view of this rule of Trinity term, following what had always been the practice.

The above authorities establish, in my judgment, the true construction of the statute (Code Civil Proc. 454) in force in this state. They show that, when

the complaint counts on an account stated, the defendant is entitled as a matter of right on demand to have furnished him a copy of the account or bill of items or particulars. They show that he is so entitled to enable him—*First*, to ascertain the account, on which he is sued, *Johnson v. Mallory*, 2 Rob. 683; *second*, to prepare his defense to the claim on which the action is brought against him; *third*, to frame his answer so as to attack the items of it which he desires to assail for fraud, error, or mistake, and thus be enabled to offer evidence in regard to such items. The statute was framed to promote justice between and to secure a full and fair hearing to litigants, and in construing it the rule established by the Code should be followed and regarded. This rule will be found in section 4 of the Code of Civil Procedure, and is in these words: "The Code establishes the law of this state respecting all the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice."

The construction of section 454 adopted in the prevailing opinion, in my judgment, is narrow and illiberal, defeats the object of the Code provision, and must result in failure to promote justice. This is said with the highest respect for the judgment of the justices who concur in it. I think the motion of the defendant for another and further copy of the account sued on, and alleged in the first count of the complaint, should have been granted, and the court erred in denying it.

In the prevailing opinion an account stated seems to be regarded as a contract, and therefore a defendant is not entitled to a copy of it when an action is brought on it. We know of no rule of law which holds that an account stated is a contract. It is only evidence of a contract,—a contract, too, implied by law. Independent of an express promise to pay the balance, ascertained by it, it can be nothing more than evidence of a contract which the law implies from circumstances.

It is also said in the prevailing opinion that "the penalty for refusing to furnish an account is that the party refusing to so furnish it shall be precluded from proving it; but it can have no application to a case where, as in an action on an account stated, he is not required to prove the account." The plaintiff is required to prove any account on which he sues when the answer of defendant puts its existence in issue. This is true of an account stated as well as any other. And in this case the defendant denied that any account was ever stated, and the plaintiff, in opening his cause, was very careful to prove it. The account furnished is not the account to be proved. The account alleged in the pleading is the one of which proof must be made. And section 454 precludes a party failing to deliver a copy of the account, not from proving the account which he is to deliver, but from giving evidence of the account alleged in the pleadings. As here, an account stated is alleged, and it is that account he is precluded by conduct "*from giving evidence thereof*." He is not allowed to give any evidence showing that the account counted on was ever stated, or even had an existence. In other words, as regards such account, he must go out of court,—be nonsuited.

But it is said that there should be no reversal because the defendant suffered no injury from the denial of his motion, as he had in his possession and produced on the trial the accounts which had been rendered to him. But this production occurred some time after his motion was denied. The court, when it denied the motion, had no knowledge that any account had been rendered. The defendant was then told that, as the complaint was on an account stated, the law gave him no right to have a copy of any account furnished to him. The court below seems to have taken it for granted that the mere allegation in the complaint that an account had been stated between the parties must be taken as true, and that, under such circumstances, the defendant had no right to the relief asked for, whether an account had been rendered or stated or not. The record shows that defendant's motion was

denied on the thirtieth of September, 1881, and the accounts referred to were produced on a trial which commenced on the nineteenth of December following, 80 days after the denial of the motion. If the defendant had lost or mislaid the account which seems to have been rendered more than a year before suit brought, and he had to assail particular items of the account in his answer, it would have been a hard case upon him to have to plead without having the account to show to his counsel, that he might by answer attack any items objected to. But in fact, as shown above, the defendant had a right to ascertain on what account he was sued, so as to make preparation by pleading and procuring his proof to resist the claim in suit. He had a right to have the account, even if he had it in his possession when making the demand under the statute, identified as the account which he had to meet, so that he might not be put to conjecture what account he had to answer to and furnish evidence against. If the plaintiff had, in reply to his demand, stated in writing that the account alleged in the complaint referred to the account rendered him at such a date, (specifying it,) I think it would have been sufficient unless the defendant had destroyed or lost or mislaid the account rendered. In such case of destruction or loss or mislaying, the defendant ought, on motion, to have had allowed him a copy of the account sued on. But the record furnishes conclusive evidence that the defendant was injured by this ruling.

The defendant offered evidence to impeach the correctness of certain items claimed to be in the account sued on as an account stated. The items mentioned were items of interest, and an account of Naglee & Mills charged to defendant against his objection. The same evidence was also offered to show that certain items sued for were barred by the statute of limitations. To this offer plaintiff objected upon the ground that the defendant had only denied that the account had been stated, and had not attacked the statement for fraud or mistake, and that the testimony was not admissible under the pleadings. The court admitted the evidence as to the defense of the statute of limitations only, and excluded it for all other purposes, thus sustaining the objection of plaintiff with the exception above stated. That the defendant suffered injury we think is clear. He was deprived of the means which the law afforded him of ascertaining what account he was sued on, so that he might in his answer have assailed the items he intended to impeach, and when afterwards he comes to offer his impeaching evidence he is told that his answer is defective in not attacking such items, and his evidence must therefore be excluded. We have no doubt that the court erred to the injury of defendant in denying his motion for the account. And, further, that, having denied this motion, when the defendant offered evidence to impeach items of the account for error or mistake, the court erred in excluding the evidence. No principle of law authorizes a court to deny to a defendant the means of properly setting forth his defense in his answer, and, when he afterwards endeavors to make such defense, to deprive him of it and reject it because he has not properly set it forth.

I concur with what is said by Justice TEMPLE, that, under our statute, a custom which would prove an agreement to pay more than legal interest is against law. I also agree with him that an assent to an account stated does not, under the statute of limitations of this state, take the account from the operation of the statute. The very point, in my opinion, has been adjudged in *Weatherwax v. Consummes V. M. Co.*, 17 Cal. 345. See Wood, Lim. § 280. Nor do I think that the writing relied on, viz.: "Received December 8, 1880, of Henry M. Naglee, one thousand dollars on account of the within,"—was an acknowledgment signed by the defendant, as required by the statute. It could not be held to be signed by defendant for the reason that he did not intend to sign anything. Where in an olographic will, commencing with the pronoun "I" and followed by the testator's name, such name has been held a signing of the will, it was so held, because the court was satisfied that it was so intended by

the writer. If anything appears on the face of the writing showing that the testator did not intend his name so written to be his signature, it would not be so held. Here there is nothing showing that the defendant intended his name to be a signature to anything. He never could have supposed that he was signing an acknowledgment of a debt. In fact, in writing the above words, he was doing what he had a right to demand the party to whom he paid the money should do, viz., to furnish him with a written receipt for the money.

For the foregoing reasons I am of opinion that the judgment and order should be reversed.

(74 Cal. 113)

CITY AND COUNTY OF SAN FRANCISCO v. LIVERPOOL, L. & G. INS. CO.
(No. 11,945.)

(Supreme Court of California. November 10, 1887.)

1. TAXATION—POWER OF LEGISLATURE TO TAX FOR LOCAL PURPOSES—TAX ON INSURANCE PREMIUMS—FOREIGN COMPANY.

Const. Cal. art. 11, § 12, provides that "the legislature shall have no power to impose taxes upon counties, cities, or towns, or upon the inhabitants or property thereof, for county, city, town, or municipal purposes; but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes." Pol. Code Cal. § 616, subd. 1, provides that every agent of a foreign insurance company shall at certain times pay to the treasurer of a county or city a percentage of the premiums received on property insured by him within the county or city, the money to constitute a fireman's relief fund, to be expended by the governing body of the fire department of the city or county. Plaintiff sued the defendant, a foreign insurance corporation, to recover \$414.36 under the provisions of this act. *Held*, that the fact that defendant was a foreign corporation did not authorize the legislature to exercise a power denied to it by the constitution, and that a law passed in violation of it would be *ultra vires*, and as void when it operated upon a foreign corporation as on a citizen.

2. SAME—MUNICIPAL PURPOSE—FIREMEN'S RELIEF FUND.

Held, also, that the object of the fund, if a public one at all, was a municipal purpose.

3. SAME—FOREIGN CORPORATIONS—TAX ON PREMIUMS IN ADDITION TO LICENSE.

Pol. Code Cal. §§ 622-624, provides certain prescribed conditions under which foreign insurance companies can do business in California. These statutes were in force at the time of the passage of the act (Pol. Code Cal. § 616, subd. 1) imposing a tax on premiums collected, and have not been amended or repealed. *Held*, that when a business is first licensed, and then by a subsequent law subjected to a license in the form of a tax, the last law not intimating that the previous license is withdrawn unless the imposition is paid, the presumption is strong that the exaction is for revenue, and was not intended as a condition.

4. SAME—TAX FOR REVENUE—FOR PURPOSES OF REGULATION.

When a tax is partly for revenue, and partly imposed under the police power of the state, it must conform to the limitations under the taxing power, except so far as a departure is necessary to make it regulative or prohibitory.

5. SAME—IMPLIED ASSENT TO UNCONSTITUTIONAL ACT.

When a foreign corporation continues to do business after the passage of an act in relation to it, which is unconstitutional, no implied assent on the part of the corporation can be claimed to the illegal condition imposed by such act.

In bank. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

Stanley, Stoney & Hayes, John Lord Love, and John Garber, for plaintiff and respondent. A. L. Hart and E. W. McGraw, for appellants. Alexander and Isaac Joseph, amici curiæ.

TEMPLE, J. This action is brought to recover \$441.36, with interest, under an act of the legislature entitled "An act to require the payment of certain premiums to counties, and cities and counties, by fire insurance companies not organized under the laws of California, but doing business therein, and providing for the disposition of such premiums." An answer was filed

to the complaint, and thereupon on motion judgment was rendered for the plaintiff on the pleadings, from which defendant appeals.

The act requires every agent of the insurance companies designated, to pay into the hands of the treasurer of any county, or city and county, in the state a sum equal to 1 per centum upon the amount of all premiums which, during the year, or part of the year, ending on the first Monday of September, shall have been received by such agent, or which shall have been agreed to have been paid for any insurance effected, or agreed to be effected, within the limits of such county, or city and county; the money when so paid to constitute a fund known as the "Firemen's Relief Fund," of the county, or city and county, in which the property insured is situated, and to be under the exclusive control of the fire commissioners, or other governing body of the fire departments of such county, or city and county, under such general regulations as the board of supervisors thereof may prescribe. The answer does not deny any of the material allegations of the complaint, and to be under the claims that the exaction is illegal, and that the statute imposing it is unconstitutional and void; that it is violative of various provisions of the constitution, and among them is section 12, art. 11, which reads as follows: "The legislature shall have no power to impose taxes upon counties, cities, towns, or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes." If this exaction is a tax, and the purpose to which the proceeds are devoted is a county, city, town, or other municipal purpose, it is plain that it is prohibited by this section. Both propositions are denied by respondent. It is claimed that the object of the act is to prescribe a condition upon the performance of which foreign corporations shall be permitted to do business in this state; that the state may discriminate against such corporations in favor of her own citizens or domestic corporations; that as *such* foreign corporations have no rights under the state constitution except such as are expressly guarantied to them *eo nomine as foreign corporations*, that the power of the state to impose conditions is not limited by general provisions of the state constitution, and is absolute unless specifically limited, either in the federal or state constitution; and, in the absence of such limitations, foreign corporations, as such, have no rights which the state cannot touch. This claim is certainly very broad, and is derived from the proposition that corporations have no absolute right to recognition in other states, but do business in such states merely by grace, depending for the enforcement of their contracts upon the assent of those states, which may be given on such terms as they please.

It is of some interest to note here that the power of the legislature to impose conditions is as absolute over domestic as over foreign corporations. There is no natural right in our own citizens to do business in a corporate name. These home corporations act as such purely by grace, and not by right, depending absolutely upon the consent of the state for the enforcement of their contracts, and that assent may be withheld or permitted on such terms as the state shall choose. It may exclude domestic corporations entirely from the state, and, in the absence of express constitutional limitation, permit foreign corporations alone within its borders, or may impose a license tax upon domestic corporations which is not imposed upon foreign corporations. It may amend or repeal its charters at any time, or impose such new terms and conditions to the right to do business as it may see fit. This absolute power over domestic corporations was never denied or questioned, except as to the right to alter or amend the charters, and that right is clear under our constitution. The whole force and effect of the decisions cited from the federal courts is that foreign corporations are not protected by section 2, art. 10, of the federal constitution, and therefore the state may deal with corporations organized in

other states as absolutely as with domestic corporations. When the courts of the United States speak of the power of the state to impose conditions upon foreign corporations, they of course have reference to federal limitations. There is no intimation that such corporations are not, when permitted to do business within a state, entitled to the protection of its laws as fully as citizens. That is not a federal question, but those courts have held that a statute of Iowa which provided that any foreign corporation which should remove a cause from a state court to a federal court should forfeit its right to do business as a corporation within the state was void. *Barron v. Burnside*, 121 U. S. 186, 7 Sup. Ct. Rep. 931. In that case the statute made it a misdemeanor for any one to act as agent for any company which had forfeited its right to do business in the state under this act. Barron was convicted under the statute, and his conviction was declared illegal by the supreme court, on the ground that no such condition could be imposed. The effect of this decision is that the permit was valid, but the condition void. Following the logic of this case, the result would seem inevitable that a condition in violation of the state constitution is simply void. Indeed, this would seem too obvious to require much discussion. The fact that the party against whom a suit is brought to collect a tax may be a foreign corporation, may be very material in determining whether the tax is prohibited by the constitution; but it could not authorize the legislature to exercise a power clearly denied to it in the constitution. Such laws are *ultra vires*, and as clearly void when they operate upon a foreign corporation as upon a citizen.

We come now to the inquiry, is the exaction here in question a tax? The statute itself denominates it a tax, and it must be confessed that it has all the characteristics of a tax. It is a charge imposed by the legislature for the purpose of revenue. It is not founded upon contract, and does not establish the relation of debtor and creditor. It is an enforced proportional contribution, levied by authority of the state, and, as respondent claims, for public needs. That it has all the attributes of a tax is practically admitted by the respondent, but it is sought by a very subtle process of reasoning to show that, in this particular case, it must not be regarded as a tax. However deftly it is stated, the point in all this specious logic is that, unless it be held something else than a tax, it may be unconstitutional. Laws are not to be declared unconstitutional unless clearly so, and, if two constructions are possible, and according to one the law must be held unconstitutional, and under the other construction it can be sustained, that construction must be adopted which will sustain the law. This principle is not disputed, and it is often of great value, but it must not be pressed so far as to amount to an abdication of its functions on the part of the court, nor a denial of justice to suitors. If we can clearly see that a law is beyond the power of the legislature, we must so declare. It is claimed that this is a sum paid by the corporation for the privilege of acting as such in this state, and therefore not a tax. The plausibility of the claim consists in apparently identifying this case with cases in which it is clear the exaction is a condition, and from which this is made to differ only in degree. If the condition had been that the corporation should pay a fixed sum for the privilege before it was allowed to do business at all, it would, no doubt, be held a condition, and not a tax; so, perhaps, if the license were required to be renewed at stated periods; and it has been held that, when the corporation is required to pay a percentage upon its receipts, and the payment is required to be secured by a bond before the corporation is allowed to do business in the state, this special requirement distinguishes it from ordinary taxation, and stamps its character. *Trustees, etc., v. Roome*, 93 N. Y. 325. So the two classes of cases, one of which is plainly taxation, and the other a sum paid for a permit, may be approximated until it is difficult or impossible to say to which class a given case may belong. These difficulties to discriminate the principles underlying different cases constantly included in different

classes, and to which the same rule of decision cannot be applied, constitute the perpetual debating grounds of the law, and occasion much of the confusion in the decisions. But, as was remarked by Judge MARSHALL, because we cannot easily draw the line does not prove that there is no difference in principle. No one fails to note the contrast between the light of day and the darkness of night, but no one is able to draw the line between daylight and darkness, or note the precise instant when one ends and the other begins. I have said that the act on its face denominates the exaction a tax, and that it is imposed according to the methods of taxation. It is also manifest from the act that the chief reason of the tax is to raise money. No one can read the law without being so impressed. The purpose was to create a fund, and counsel have labored here to show that this fund was for a public, and a highly meritorious and useful, purpose.

We find in the next place that, when the statute was passed, the conditions on which foreign corporations could do business were prescribed, and very full provision had been made on the subject. Sections 622-624. Pol. Code. See, also, St. 1871-72, 826. In the act in question these statutes are not alluded to, and they have never been amended or repealed. There is nothing in the law we are considering to indicate that it was intended as a condition, except when viewed in the light of the rule requiring us to so construe it rather than to declare it void. Now, a business may be licensed, and still be subject to be taxed. A license proper is a permit to do business which could not be done without the license. It is a mere permit. It may be thus licensed, and then subject to a license tax. These licenses may not differ in form, but one is a license proper, and the other is a license tax, imposed for the purpose of revenue. This business being first licensed and then in a subsequent law subjected to a license in the form of a tax, the last law in no way intimating that the previous license is withdrawn unless the imposition is paid, the presumption is very strong that the exaction is for revenue purposes, and was not intended as a condition. It is claimed, however,—*First*, if the exaction be a tax, it is imposed under the police power for the purposes of regulation, and therefore not liable to the objection; and, *second*, if it be such a tax it is a condition, and, even if unconstitutional, the corporation could waive the objection, and did so when, after the passage of the act, it continued to do business in the state.

When the police power is appealed to to justify legislation, there seems to be an impression that all claim of constitutional limitation is at an end; but let us inquire into the matter a little. With reference to the power of taxation, the principle is about this: The framers of the organic law, when they formulated limitations upon this power, had in view the burdens of taxation. They were providing for equality and uniformity only with reference to fair and just distribution of these burdens. It is not to be presumed, however, that they intended to deprive the state of the power of self-preservation, or of accomplishing those acknowledged ends of all government,—the safety and welfare of the people. The requirement of equality applies mainly, if not entirely, to taxes upon property laid upon the *ad valorem* principle. As to taxes upon occupation or business, the requirement is only of uniform operation, and this requirement is satisfied when it is uniform as to the class to which the law applies. Necessarily, to impose this tax, the population must be classified as to occupations, and it is not required that all occupations shall be taxed to justify a tax upon some. Perhaps it would be impossible to accomplish the end the government has in view in imposing a tax purely regulative or prohibitory, if the legislature is bound by the requirement of uniformity. These limitations are applicable only to the power of taxation, and are, therefore, held not to limit other functions of the government where entirely different ends are in view, although it is sought to reach them by a regulation having the form of a tax. I think this tax is purely one for revenue.

but, admitting that the purpose is a mixed one, still it must conform to the limitations upon the taxing power, except in so far as a departure is necessary to make it regulative or prohibitory. It could be made just as effectual as a police regulation without violating the provision of our state constitution under consideration.

As to the proposition that the corporation waived the constitutional objection by continuing to do business after the passage of the act, it is enough, in my opinion, to say that it is a mere *petitio principii*. If the condition be void no implied assent can be claimed.

It remains to inquire whether the tax was imposed upon the counties, cities and counties, towns, or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purpose. It was quite unnecessary to call attention to the fact that the tax is not upon a county or city as a corporation, and, unless the point had been distinctly made, it would have been thought quite unnecessary to say that it was not the purpose of the section to prohibit such impositions. The constitutional convention cannot be supposed to have thought it necessary to prohibit the legislature from imposing a tax upon a municipal corporation as such, for the use of the municipality. It may also be admitted that the defendant is not an inhabitant of the municipality, within the meaning of this provision, although this is by no means a clear proposition. It is not necessary for the case to decide it. The same may be said of the claim that the imposition is not a tax upon property. In my opinion, the purpose of the section is to relegate to the local boards the whole subject of county and municipal taxes for local purposes, and that the legislature has no power to impose any tax whatever, within those territories, for local purposes. If the purpose of the fund created by the tax is a public purpose at all, it is clearly a municipal purpose. The management and control of the fire departments have always been left to local authorities. The fact that the state at large has an interest in the efficiency of the departments does not render the end any less a municipal one. The people of the state have such an interest in all the police powers granted to these municipalities. And even if the state may exercise a concurrent supervision over a subject, still, so far as actually controlled by the local board, it is a matter of municipal concern. It is claimed by the appellant that the law is in conflict with many other provisions of our constitution, and also that, no provision being made for a suit to collect the tax, this action is without authority. Taking the view I have of the objections here discussed, it is not necessary to pass upon other objections.

I think the judgment should be reversed; and it is so ordered.

We concur: SHARPSTEIN, J.; PATERSON, J.

McKINSTRY, J. I concur with Justice TEMPLE. I am of opinion also that the statute in question violates sections 31 and 32 of article 4, and section 6 of article 11, of the constitution; further, that the statute did not authorize, nor does it purport to authorize, the commencement and prosecution of the present action, and that the action is not authorized by any other law.

We dissent: SEARLS, C. J.; McFARLAND, J.

(74 Cal. 94)

PEOPLE v. SCOTT. (No. 20,342.)

(Supreme Court of California. November 7, 1887.)

BURGLARY—CARRYING PROPERTY INTO ANOTHER COUNTY—PLACE OF TRIAL—INFORMATION.

Although under Penal Code Cal. § 786, providing that "when property taken in one county by burglary, robbery, larceny, or embezzlement, has been brought into

another, the jurisdiction of the offense is in either county," a criminal may be tried wherever he carries goods obtained by burglary, yet an information charging the offense of burglary to have been committed in San Bernardino county, where the burglar was found with his goods, cannot be supported by evidence of breaking and entering a house in San Diego county, whence the goods were brought to the former jurisdiction.

In bank. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

John J. Stephens, for defendant. *Geo. A. Johnson*, Atty. Gen., for respondent.

SEARLS, C. J. The defendant was accused by information in the county of San Bernardino of the crime of burglary, alleged to have been committed in said county. He interposed a plea of not guilty. Upon the trial there was evidence tending to prove the defendant guilty of a burglary committed at Indio, in the county of San Diego, and that the property (a coat and pistol) feloniously taken from a house burglariously entered, was taken by defendant to the county of San Bernardino, where he was arrested, informed against, tried, and convicted. At the trial objections were made by defendant to testimony under the information going to show a burglary committed in the county of San Diego, which objections were overruled by the court, and exceptions taken. These rulings are assigned as error. A motion in arrest of judgment and for a new trial in behalf of defendant was overruled.

Section 786 of the Penal Code provides as follows: "When property taken in one county by burglary, robbery, larceny, or embezzlement, has been brought into another, the jurisdiction of the offense is in either county," etc. No question is made that the defendant might have been proceeded against in either county. The real question, however, is one of pleading: Under an indictment or information charging a burglary to have been committed in the county of San Bernardino, could evidence be received of an offense committed in the county of San Diego? In other words, should the information in the case as stated have charged, according to the facts, that the burglary was committed in the county of San Diego, and that the property was brought into the county of San Bernardino? At common law, crimes were considered as altogether local, cognizable and punishable exclusively in the jurisdiction where committed. Story, Conf. Law, § 620, and cases cited. It was said in *Warrender v. Warrender*, 9 Bligh, 119: The "*lex loci* must needs govern all criminal jurisdiction, from the nature of the thing, and the purpose of that jurisdiction." At common law it was held that a person indicted in England for robbing a house in Guernsey, and bringing the property to England, could not be convicted either of larceny or of receiving. *Reg. v. Debruiel*, 11 Cox, Crim. Cas. 207. In many of the United States it is provided by statutes, and in some where no such statutes exist it has been held, that where property has been feloniously taken in one state, and brought into another, the thief may be punished in the latter. These considerations go to the jurisdiction of the court, and not to the form of charging the facts constituting the offense, and are referred to only for the purpose of showing that, except as provided by statute, crime is regarded as local. This court has repeatedly held that, in cases of larceny, where property has been stolen in one county and taken into another, it is proper to charge the thief with having committed the offense in the latter county; and, where the venue is laid in that county, the facts showing the property to have been taken in the other county need not be averred, but evidence showing that the property was so taken may be admitted. *People v. Mellon*, 40 Cal. 654; *People v. Murphy*, 51 Cal. 376. These cases are in accord with many which might be cited from other states, in which it is held that, inasmuch as the owner has not parted with his property or right to possession of the thing stolen, the thief who takes it into another county is to be deemed in law to have taken it in such last-mentioned county, and, when

he is charged with the felony in such last county, the facts stated warrant the legal conclusion. This reasoning and the cases cited would be conclusive in favor of the sufficiency of the information here were it for larceny, but it is not larceny, but burglary, with which the defendant is charged. It is true the court of San Bernardino may try a defendant for a burglary committed in San Diego, provided the fruits of the crime have been brought into the former county; yet it cannot be said, in fact or in contemplation of law, that the offense of burglary, essentially a local crime, and which consists in entering a house, room, etc., with intent to commit larceny, was committed in any other county than that in which the house, room, etc., are situated. We think the reasoning of DENIO, C. J., in *Haskins v. People*, 16 N. Y. 344, and the distinction there made, indicates the true rule. It is as follows: "The difference between the two cases is this: burglars may be tried out of their proper counties in certain special cases, that is, where the goods burglariously taken are carried into another county by the offenders; but this is by positive law, and not because the burglary was actually committed in the county where the indictment is found, or in judgment of law is considered to have been committed there. The fact must therefore be set out which brings the case within the statute; but in the case of an indictment for a simple larceny found in a county into which the thief has carried the property stolen in another county, the law adjudges that the offense was in truth committed there, and, hence, there is no occasion for a statement in the pleading of what occurred in the other county."

We are of opinion that the information in this case should have charged the facts as they existed, viz., that the burglary was committed in the county of San Diego, and that the property taken was carried into the county of San Bernardino, and, that having failed to do so, the proffered evidence was inadmissible. The judgment should have been arrested, whereupon the court was authorized, if it deemed proper, to recommit the defendant, or admit him to bail to answer a new information or indictment, as provided by sections 1187 and 1188 of the Penal Code.

The judgment and orders appealed from are reversed, and the cause remanded for further proceedings.

We concur: TEMPLE, J.; PATERSON, J.; MCKINSTRY, J.; SHARPSTEIN, J.; THORNTON, J.

(15 Or. 98)

STATE *ex rel.* REED v. SMITH and others.

(*Supreme Court of Oregon. June 14, 1887.*)

1. **CORPORATIONS—PLEGDED STOCK—WHO MAY VOTE ON.**
Where shares of stock are pledged as collateral, the pledgee reserving the right to sell in case of default, and the pledgee causes a transfer to himself to be recorded on the books of the corporation, until the pledgor's rights shall have been foreclosed by a sale, etc., he, and not the pledgee, is entitled to vote on the stock, in the absence of a statute providing otherwise.
2. **SAME—MEETING—ELECTION—PRESIDING OFFICER.**
Where, at a stockholders' meeting for the election of directors of the corporation, certain persons receive the requisite number of votes, the fact that the presiding officer insists on counting certain votes cast, otherwise than as they should be counted, announces the result of the election to be otherwise than as it really is, issues certificates of election to those not entitled to them, and declares the meeting adjourned, although a majority votes against adjournment, in no way affects the rights as directors of those in fact elected.
3. **SAME—IRREGULAR MEETING AFTER ADJOURNMENT.**
Nor are their rights, as directors, affected by an irregular and unofficial meeting, reorganized by those remaining after the adjournment, at which meeting they are declared elected, their rights being derived from the election alone.

4. SAME—DIRECTORS—ORGANIZATION OF BOARD.

But where, immediately afterwards, on the same day, the directors thus elected proceed, at a special meeting, without notice to the former president, who also has been elected a member of the new board, to organize a board, choosing one of their number president, his title to the office will not be recognized by the courts, the proceeding exhibiting undue haste and irregularity.

5. SAME—NON-RESIDENT DIRECTORS.

The Oregon statute, permitting a minority of the directors of corporations constructing railroads or canals to reside out of the state, applies to a corporation whose railroad, running from its furnace to its mine, is only three miles long, and whose short canal is not navigable.

6. SAME—ELIGIBILITY.

Where the statute declares that no person shall be eligible to the office of director of a corporation unless he is a stockholder therein, and where the by-laws of a corporation provide that transfers of stock shall be made only on the corporate books, and that the transfer book shall be closed for 10 days previous to the day of the annual meeting of the stockholders, although the purchaser of stock, who has not caused his transfer to be recorded, might be refused permission to vote or to receive dividends, yet he might be elected a director by the vote of a majority of the stockholders.

On petition for rehearing. For original opinion in this case, see 14 Pac. Rep. 814. For dissenting opinion of LORD, C. J., see *ante*, 137.

THAYER, J. I have examined with some care the ably prepared petition for rehearing filed herein by the counsel for the respondent, and have endeavored to give it that consideration which the importance of the questions involved therein demands. The counsel inquire with considerable earnestness whether any one can imagine any reason for the giving of the written power of attorney by Seeley to Reed, at the time the stock was transferred by the former to the latter, excepting that it was understood and intended that Reed should transfer the stock as provided for in the power of attorney. Another inquiry might be made that would be as difficult to answer, and that is, why Seeley executed to Reed an absolute transfer and assignment of the stock when it was understood and intended by them that no title to the stock was to pass from the former to the latter, beyond a right to sell it in case of a default in the payment of the \$50,000, and an application of the proceeds to such payment. The assignment and delivery of the 361 shares of stock, and execution of the power of attorney by Seeley to Reed, no more expresses their intention in the transaction than an absolute deed to real property from the former to the latter would, where a defeasance was given back. The deed, by itself, would constitute a complete conveyance of the property, but, in connection with the defeasance, would be no conveyance at all; would be no more than a charge or lien upon the property. So the assignment and power of attorney, considered by themselves, would constitute a sale of the stock, with an immediate right upon the part of the purchaser to have a transfer made, from the vendor to himself, on the books of the company; but, considered in connection with the agreement made and entered into, by and between the parties at the same time, might have an entirely different character.

It is certain that the assignment was not intended to have any effect except as a pledge of the stock, coupled with a right to sell it in case the note was not paid at its maturity; and I concluded, when the case was heard, that the power of attorney could have no operation until such sale were made; that it was only executed for the purpose of enforcing the security in case Reed was compelled to resort to it in order to obtain payment of the note; and I therefore characterized Reed's act in having the transfer made to himself upon the books of the company, by surrendering up the stock, and having new certificates issued to himself before the note became payable, as a wrong. Whether that conclusion was correct or not, must be determined by an ascertainment of the intention of the parties to the transaction, and that must be gathered from the assignment and transfer of the stock, the power of attorney,

and agreement entered into between them at the time. The said agreement contains a recital that Reed was about to advance to the "Oregon Iron & Steel Company" an amount of money, so that the total amount of his advances would aggregate \$150,000; that Seeley was willing to take an interest of \$50,000 in the total advances made by Reed, and had given his note, of even date with the agreement, to Reed for said sum, payable two years from date, with interest, etc., and had delivered as collateral security, for said note and interest, 361 shares of the capital stock, full paid, of said company. Therefore Reed undertook that, upon the full payment of the note and interest, to redeliver to Seeley said shares of stock, together with one third of such bonds, etc., as he should receive from said company, in consideration of his said advances; and Seeley, in consideration thereof, authorized and empowered Reed, upon default of the payment of said note, at the maturity thereof, together with the accumulated interest thereon, to sell or dispose of, at public or private sale, and in such manner and on such terms as to the said Reed should seem best, the said 361 shares of stock. Any one having any knowledge whatever of business affairs would know at once that this agreement was the substratum of the transaction between the parties, and that the assignment and transfer of the stock, and execution of the power of attorney, which it appears was signed in blank, were for the sole purpose of carrying out the provisions of the agreement; and it seems to me that to term this assignment and transfer of the stock anything other or different than a pledge would be a misnomer.

It is well understood that such character of property is capable of being pledged as well as sold, and that the general law relating to that subject applies to such a pledge. Reed's duty in the matter, under the law and under the agreement, was, upon full payment of the note and interest, to redeliver to Seeley the 361 shares of stock. No authority was given him in the agreement to surrender them to the company, and receive other certificates in his own name. He could not become the owner of the stock by a transfer to himself, and no more, in my opinion, had he the right to clothe himself with the apparent ownership of it. He had authority to sell it, in case the note and interest were not paid when due, and make a transfer to the purchaser upon the books of the company. The power to make such transfer, it seems to me, was only to complete the sale, in case the event transpired authorizing him to make the sale.

Counsel, however, claim that it was necessary in order to protect his security that the transfer upon the books be made to him at once; that otherwise Seeley's creditors might come forward and attach the stock, and cut off the security. They do not explain how Seeley was to be protected against Reed's creditors, in case the stock is registered in the latter's name. I do not see how Seeley, especially under the view of counsel that the registry of the stock passes the legal title, could have any protection. Reed would have the title, and his creditors, if he had any, could sequester it with impunity. It would not be necessary for them to prove that they trusted him upon the faith that he was the owner of the stock, as he would be owner in fact. But I do not think that, "unless Reed had the right to transfer the stock to himself upon the books of the company under said power of attorney, his collateral security would be of no more value to him than a chattel mortgage unrecorded and concealed in his pocket;" or that, "prior to the time when the transfer was made upon the books of the company, any creditor of Seeley might have attached the stock, or have seized it upon execution, or Seeley might have sold it to a *bona fide* purchaser."

There have been, I confess, a number of decisions to that effect; but the weight of authority is the other way. Mr. Cook, of the New York bar, in a late work on the law of stock and stockholders, says, (section 487:) "The decided weight of authority holds that he who purchases, for a valuable con-

sideration, a certificate of stock, is protected in his ownership of the stock, and is not affected by a subsequent attachment or execution levied on such stock, for the debts of the registered stockholder, even though such purchaser has neglected to have his transfer registered on the corporate books, thereby allowing his transferrer to appear to be the owner of the stock upon which the attachment or execution is levied." And this author cites a large number of authorities in support of that rule.

The decisions upon the question in the different states, and in many of the states themselves, have not been in harmony. The language of Chief Justice SHAW in *Fisher v. Bank*, 5 Gray, 373, quoted in the counsel's petition, "that shares in a bank whose charter provides that they shall be transferable only at its banking house, and on its books, cannot be effectually transferred, as against a creditor of the vendor who attaches them without notice of the transfer, by a delivery of the certificates, together with an assignment and blank power of attorney from the vendor to the vendee, even if notice of the transfer be given to the bank before the attachment," instead of being authority in favor of the counsel's position upon the point, is considered, in the light of the other decisions in that state, directly against it.

In *Sibley v. Bank*, 133 Mass. 515, it is shown that Judge SHAW's decision in *Fisher v. Bank* was controlled by the statutes of that state expressly applicable to bank shares. Judge ALLEN, who delivered the opinion of the court in *Sibley v. Bank*, 521, says: "In *Fisher v. Bank* the question was, what was the intention of the legislature of this state in using similar words, [referring to the provision in the federal banking act, that the stock shall be transferable on the books of the bank in such a manner as may be prescribed by its by-laws,] and the court found in the general spirit and scope of the legislation of this commonwealth, as to the attachment of shares in corporations, and in the particular legislation as to the attachment of bank shares, evidence that the legislature intended by the words, 'the stock of said bank shall be transferable only at its banking house and on its books,' to enact that an assignment not so recorded should not be valid against attaching creditors of the assignor. * * * Those statutes not only made the shares of any stockholder liable to attachment, but made it the duty of the officers of any corporation keeping its records to give a certificate of the shares or interest of any stockholder, on request of any officer having a writ of attachment or execution against such stockholder. But he says: "The statute under consideration for construction is a statute of the United States, in whose legislation no such policy existed, and whose legislative acts contained no provisions such as were referred to from the legislation of Massachusetts."

And in *Music Hall v. Cory*, 129 Mass. 436, 437, Judge COLT, in delivering the opinion of the court, says: "In the next place, it is strenuously urged that, by force of the various statutes of this commonwealth relating to the ownership and transfer of stock in corporations, authorizing the attachment of shares, requiring returns to the secretary of the commonwealth, and imposing a personal liability on stockholders for the debts of the corporation, there can be no transfer of stock, valid against the claims of an attaching creditor, unless such transfer be recorded in the books of the corporation;" citing the statutes. "The intention of the legislature, it is said, must have been to provide for the owners of stock a convenient and uniform method of transferring title on the books of the corporation, which should be the only valid transfer as to creditors and others interested; and, although the statutes have not provided in express terms that, as to creditors, transfers shall not be valid till they are so recorded, yet such, it is contended, is the necessary implication, for otherwise the design of the statutes, requiring registration and making the shares liable to be taken for debts, would be defeated. But the consideration is not sufficient to control the law, as long since settled by the decisions of this court. It requires clear provisions of the charter itself, or of

some statute, to take from the owner of such property the right to transfer it in accordance with known rules of the common law. And by those rules the delivery of a stock certificate, with a written transfer of the same, to a *bona fide* purchaser, is a sufficient delivery to transfer the title as against a subsequent attaching creditor;" citing several cases, including *Fisher v. Essex Bank*. The learned judge further adds that "it would not be in accordance with sound rules of construction to infer from the provisions of several different statutes, passed for the purpose of obtaining information needed to secure the taxation of such property, or for the purpose of subjecting stockholders to a liability for the debts of a corporation, or for protecting the corporation itself in its dealings with its own stockholders, that the legislature intended thereby to take from the stockholder his power to transfer his stock in any recognized and lawful mode. If a change in the mode of transfer be desirable for the protection of creditors, or for any other reason, it is for the legislature to make it by clear provisions enacted for that purpose."

It is evident from these cases that Judge SHAW, in the absence of the peculiar provision of the Massachusetts statutes referred to, would have held the direct opposite of the holding set out in the petition; that under the statutes of this state upon the subject it may reasonably be supposed he would have decided the same way the court did in *Music Hall v. Cory*, *supra*. Such has been the current of decisions of the federal courts. And I am of the opinion that in the best considered cases the same result has been reached. In support of that opinion I cite with great confidence, *Smith v. Crescent City, etc., Co.*, 30 La. Ann. 1378, and *Cornick v. Richards*, 3 Lea, 1. Judge DAVIS, in *Bank v. Lanier*, 11 Wall, 377, 378, stated explicitly what kind of security Reed had when Seeley deposited said certificates of stock with him, when he said that "although neither in form nor character negotiable paper, they approximate to it as nearly as practicable. If we assume that the certificates in question are not different from those in general use by corporations, and the assumption is a safe one, it is easy to see why investments of this character are sought after and relied upon. No better form could be adopted to assure the purchaser that he can buy with safety. He is told, under the seal of the corporation, that the shareholder is entitled to so much stock, which can be transferred on the books of the corporation, in person or by attorney, when the certificates are surrendered, but not otherwise. This is a notification to all persons interested to know that whoever in good faith buys the stock, and produces to the corporation the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred to him. And the notification goes further, for it assures the holder that the corporation will not transfer the stock to any one not in possession of the certificates. In this state of the case Lanier and Handy made their purchase of Culver. They bought for value, without knowledge of any adverse claim, in full faith that the bank would observe its engagements, and pursued in all respects the directions given in the certificates. They were not told to give notice to the bank of their purchase, nor was there any necessity for notice, because, by the rules of the bank, Culver could not transfer the stock in the absence of the certificates, and these they had in their possession." Reed being a pledgee instead of a purchaser of the stock, did not render it more necessary that it should be registered in his name in order that his rights in the transaction should be protected. Holding the certificate without such registry would be more consistent, and less liable to the imputation of fraud, in the case of a pledge than of a sale. But I am satisfied that in neither case could his rights be affected by any act done or suffered by Seeley subsequent to the delivery over to him of the stock, although no transfer were made upon the books of the company. Reed can not, therefore, claim that it was necessary to his protection against the creditors of Seeley, or against the acts of Seeley himself in selling the stock to a purchaser without notice, that such transfer be made. The former

had a right to have a transfer made upon the books of the company, but it seems to me that it was only a conditional right; that the parties did not intend that it should be exercised except in event of the non-payment of the note. They seem to have acted in accordance with such intention. Reed did not have the transfer made for more than a year and a half after the execution of the assignment, and in the mean time Seeley voted the stock. The transfer upon the books would put it out of the power of the latter to receive the dividends that might accrue thereon, and at the same time he had obligated himself to pay the interest upon the note semi-annually, at the rate of 7 per cent. per annum.

I can see no justice in the right which Mr. Reed sets up. Counsel have cited a number of authorities to show that he had a right, as pledgee of the stock, to fill the blank in the assignment and have it transferred to himself. I have examined the most of these authorities, and do not think them decisive of the question under consideration, or as having much to do with it.

Day v. Holmes, 103 Mass. 310, one of the cases cited, was an action for the wrongful conversion of certain mining stock, delivered by the defendant to the plaintiffs as collateral security for his indebtedness to them, with an assignment in blank which the plaintiffs filled by inserting their own names, and obtained new certificates to be issued to themselves. This, the court said, was in no sense a sale of the stock to themselves; that the delivery of the assignment in blank necessarily implied the right to insert their own names, and the doing so, and taking out new certificates, was in accordance with the implied contract of the parties, and a lawful and reasonable measure to protect their security, and could, upon no principle, be deemed an unlawful conversion. The gist of the decision is that the plaintiffs were not chargeable with a wrongful conversion of the stock in consequence of the filling the blank assignment, and having the new certificates issued to themselves; that it was in accordance with the implied contract of the parties. It will be observed that the court also said in that case "that it was obviously not the intention of the plaintiffs to exercise any dominion over the stock inconsistent with the rights of the defendant;" that "his rights were not in fact violated or injuriously affected." If it had appeared to the court that the plaintiffs were largely interested in the corporation that issued said stock; that their apparent object and purpose in filling the blank assignments with their own names, and having the new certificates issued to themselves, was to enable them to represent the stock at stockholders' meetings, vote it in opposition to the wishes of the defendant, and in order to secure the election of themselves and friends to the directorship of the corporations, and thereby control the management of their affairs,—it would not certainly have commended the act, nor, in my opinion, have determined that they could rightfully use the defendant's stock to further any such design.

McNeil v. Bank, 46 N. Y. 330, another of the cases cited by counsel, was an action to compel the surrender of 134 shares of stock in the First National Bank of St. Johnsville. The plaintiff owned the stock, and delivered it to, and left it with, Goodyear Bros. & Durant, stockbrokers, as collateral security for any balances that might be found due them on account of other stock they had purchased, and were carrying for him. A blank assignment and power of attorney to transfer the 134 shares was indorsed thereon, and signed by the plaintiff at the time of its delivery. Afterwards the defendant, at the request of Goodyear Bros. & Durant, paid to Fred. Butterfield, Jacobs & Co. the sum of \$45,135, and received from the former certain securities, including the 134 shares of stock as security, for the advances. Goodyear Bros. & Durant, at the time of the advances to Fred. Butterfield, Jacobs & Co., were insolvent, and indebted to the defendant. In pledging the plaintiff's shares of stock, they acted without actual authority from him, and without his knowledge. He was indebted to them in the sum of \$3,000, but the account had not been ren-

dered, or any demand made. The defendant, at the time of receiving the shares, had no knowledge of the plaintiff's interest therein. The defendant filled in the blank in the assignment and power with the name "I. H. Stout," its cashier, and attempted to have the shares transferred to his name on the books of the said First National Bank of St. Johnsville, but was prevented by injunction in the action. The balance of the advances, made thereon by the defendant, less the proceeds of the other securities received therewith, was \$15,219.81, and the question for the court to determine was whether defendant was entitled to hold the 134 shares for the payment of this balance. The court of appeals held that it was; that the plaintiff, by executing the blank assignment and power, was, as against the defendant, estopped from asserting his ownership to the stock, where the latter had made advances under the circumstances mentioned; that the signing of the blank assignment and power, and delivering the stock, was the common practice of passing the title of stock, and that it conferred upon Goddard Bros. & Durant the apparent title thereto. The question was not as to the rights of the immediate parties to the assignment and power of attorney, but as to the rights of third persons who had advanced money upon the faith of them.

If Reed had sold the 361 shares in controversy to an innocent purchaser, there is no doubt but that such purchaser would have acquired a valid title to them. But a pledgee of the stock, as between him and the pledgor, would have no such right.

Chancellor WALWORTH, in *Bank v. Kortright*, 22 Wend. 349, used the following language: "The stock was not sold to Barton, but was merely pledged for the security of \$10,000. He therefore had no legal right to fill up the blank with an absolute sale to himself, and a power to transfer it on the books of the bank absolutely. If the debt was not paid, he had a right to sell the pledge to a third person, after due notice thereof to the banker, and then have been authorized to fill up the blank with an absolute sale to such purchaser, and a power to transfer the stock to such purchaser on the corporation books, as that would be according to the agreement inferred from the pledge of the certificate with such blank indorsement."

In that case the rights of a *bona fide* transferee were involved, who had sued the bank for refusing to permit a transfer of the stock upon its books, and the decision was placed on similar grounds to that in *McNeil v. Bank*, *supra*; but the view enunciated by the chancellor upon the point referred to was not questioned as a logical sequence; and there is nothing, as I can see, in the way of its application to the case under consideration. The question here is between pledgor and pledgee. The obligations of each are fully set out in a written agreement. The object of the formal assignment and power of attorney relating to the shares of stock was evidently to effectuate and carry out the purposes of the agreement; and the evident and unmistakable aim of the relator was to gain control and dominion over the shares of stock pledged, in order to enable him to retain the management of the affairs of the company, and without regard to the maintenance and protection of his security. That he had a right to have the shares transferred upon the books of the corporation, for the better protection of his security, except as before suggested, is very questionable to my mind; but that he had such right, for the purposes of advancing his general interest, I do not believe. I cannot think that the transaction between him and Seeley, in view of all the facts, indicates any such intention on the part of the parties, and I must still adhere to my former bluntly expressed opinion upon that point.

I do not mean to be understood as holding that a pledgee of capital stock in a corporation has not a right to have it transferred to him upon the books of the corporation. Many authorities, in referring to the matter in a general way, accord the right unqualifiedly, and I have met with others that deny it.

In *Smith v. Crescent City, etc., Co.*, 30 La. Ann., *supra*, the court, at page

1383, in referring to the convenience and value of such stock as a basis of credit, says: "The holder who does not wish to sell may pledge his certificates for loans and discounts to an amount approximating their market value, with reasonable margin for possible depreciation. The pledgee does not desire to become the owner of the stock; and he would not think it necessary, *nor would he have the right, to surrender the pledged certificates, and have the stock transferred to him on the books of the corporation.*" The court here evidently meant that such right did not arise out of the mere act of pledging, and I think that would be correct, except where the transfer was necessary to the completion of the pledge. A pledgee cannot be the purchaser of the thing pledged, when sold to satisfy the debt, (*Bryan v. Baldwin*, 52 N. Y. 232;) and he could certainly have no right to have a transfer made to himself upon the books of the corporation, unless specially granted by the pledgor. Pledging the shares of stock would not of itself confer the right.

McHenry v. Jewett, 90 N. Y. 58, is decisive of that point. In that case shares of the capital stock of the Cleveland, Columbus, Cincinnati & Indianapolis Railway Company were pledged by the plaintiff, their owner, to the Erie Railway Company, to secure a loan of money, and, by means of certain foreclosure proceeding against that company, they were transferred, subject to the plaintiff's right of redemption, to the New York, Lake Erie & Western Railroad Company. The sale under this foreclosure was made in 1878, and since that time the defendant had held the shares nominally as trustee for the last-named company. By what authority they were registered in his name as trustee had not been made to appear. It was not shown to have been done under the authority of the plaintiff in the action. "For that reason," the court said, "the defendant must be regarded as holding the shares solely under the authority created by the pledge; and having no greater right to make use of or act upon them than the relation of a mere pledge would confer. As between himself and the plaintiff in the action, that continued to be the sole measure of his rights. * * * As the defendant had the shares simply by way of pledge or security for the repayment of money which had been loaned upon them, he could hold them only for that purpose. As long as the rights of the plaintiff to redeem them by the payment of the debt was not extinguished by a lawful sale, (*Lawrence v. Maxwell*, 53 N. Y. 19,) they are articles of property which, under such an arrangement, could not be otherwise lawfully used, and under the authorities, the defendant had no legal right to vote upon them without the express or implied assent of the plaintiff, the pledgor. This point was considered in *Scholfeld v. Bank*, 2 Cranch, C. C. 115; *Vowell v. Thompson*, 3 Cranch, C. C. 428; *Ex parte Willcocks*, 7 Cow. 402. In the last case it was held that, until the pledge was enforced, and the title made absolute in the pledgee, and the name was changed on the books, the pledgor should be received to vote; that it was a question between him and the pledgee with which the corporation had nothing to do. *Id.* 411. These cases are direct and decided authorities against the right of the defendant to vote upon the shares, and the principle sustained by them has in no respect been impaired by *In re Barker*, 6 Wend. 509, or *In re Railroad Co.*, 19 Wend. 135; for the disputes which were there made the subject of adjudication did not arise between parties sustaining the relation existing between the plaintiff and the defendant to this action. It was simply made a question between a person offering to vote, who was registered as trustee of the shares in the first case, and described as cashier in the second, and the corporation, whether such registry of stock authorized the person, in whose name it had been made, to vote upon it. No point was made in behalf of the party beneficially interested in the shares, and for that reason the cases are inapplicable to the present controversy; for here it has been shown that the defendant, in whose name the shares had been registered, as trustee, has no greater or other right than that of a pledgee, which, under the authorities

determining the effect of that relation, will not permit him to vote upon them against the objection of the plaintiff, who is still, to that extent, entitled to dictate and direct the use which may be made of them."

The opinion of the court in the case from which this rather extensive quotation is made, was delivered by Judge DANIELS, who, for nearly 25 years past, has been upon the bench of the supreme court and court of appeals of New York, and whose knowledge of the various decisions of the courts of that state, and ability to discriminate between analogous ones, are not excelled by any jurist. Said opinion was concurred in by Judges DAVIS and BRADY, the former of whom delivered the opinion in *Railroad Co. v. Schuyler*, 34 N. Y. 41, to which the counsel have referred in their petition apparently with great confidence.

A distinction is made in *McHenry v. Jewett*, which, in the examination of the question under consideration, is liable to be overlooked; and that is the difference in principle between a case where parties claim a right to represent stock, and it is challenged by the corporation, and one where the contention is between parties, beneficially interested in stock, as to which is entitled to represent it. The corporation might not have any right to refuse to allow a party to be registered as a stockholder in the company, and to participate in the affairs of its business, while another party might very properly object to it as the exercise of unwarranted authority, and a fraud upon his legal rights. A corporation is no such sacred sanctuary as is able to shield those gaining admission to it from the responsibility imposed by law. Getting shares of stock transferred to a person upon the books of the corporation does not preclude the courts from inquiring, when the matter is properly before them, by what right the transfer was made, and what immunities it confers. The records of corporation proceedings are not absolute verity, or conclusive of the right of parties under the law. They may show that a person is a stockholder in the company, and entitled to vote shares of stock when the courts upon an investigation of the facts would adjudge the contrary. The question as to who has the right to vote shares of stock must ultimately be determined by law, and, as between pledgor and pledgee, it has been long since established that the right belongs to the former, unless accorded by him to the latter. A stipulation to that effect upon the part of the latter, or from which it would necessarily be implied, would doubtless confer the right; but, as said in *McHenry v. Jewett*, it is a question between the two parties with which the corporation has nothing to do.

Qualification of Director. Upon the question whether an assignee of a share of stock is a stockholder in the company, so as to be eligible to the office of director before a transfer of the stock is made upon the books of the company, I can see no reason to change my former view. The language of RAPALLO, J., in *McNeil v. Bank*, quoted by the learned counsel for the petitioner, "that, as between the parties, the delivery of the certificate, with assignment and power indorsed, passes the entire title, legal and equitable, in shares, etc., and that the transferee acquires the entire right to the stock, subject to only such liens or claims as the corporation may have upon it, and excepting the right to vote at elections," etc., is more in favor of that view than against it. If it were a case where the legislature had provided that the stock should be transferable only on the books of the company, the position contended for by the counsel might be tenable; but where that is only required as a compliance with the by-laws of the company, to facilitate the management of its affairs, I cannot think it is. It seems to me that a sale of a share of stock to a party, evidenced by a written transfer and delivery of the certificate, constitutes him, under the laws of this state, a stockholder, within the meaning of the statute, providing that no person is eligible to the office of director unless he is a stockholder in the corporation. Who could be the stockholder in such case except the purchaser of the share? Certainly not the seller, after having

sold it, received the purchase price therefor, delivered over the certificate with a written assignment indorsed thereon, and done every act in his power to render the sale complete, although his name still remained upon the books of the company as owner. It might, with full as much reason, be claimed that the grantor of real property continued the owner of the fee until the grantee recorded his deed from the former. The grantor, in fact, has power over real property after executing the deed in such a case which the vendor of stock does not possess over a share so transferred. The former, by again selling the real property to an innocent purchaser, might cut off the right conveyed to his first grantee, while the vendor of the stock, after delivering over the certificate with the assignment indorsed, would be wholly powerless to affect his first vendee by a second sale. The books of the corporation are evidence as to who are the holders of the stock; but not conclusive evidence upon that point. The law must ultimately determine the question from all the facts in the case. It would be carrying the doctrine of nicety to an absurd extent to hold that a party, although he had sold out his entire stock in a corporation, or where it had been sold out upon a lawful execution against him, would still have the right, if the transfer had not been made upon the books of the company, to manage its most important affairs in defiance of the real substantial owner of the stock. Yet it seems to me that the rule contended for by the counsel, if carried out to its logical sequence, would necessarily, under certain conditions that might arise, lead to such result.

(15 Or. 644)

SOVERN, Adm'r, etc., v. YORAN.

*(Supreme Court of Oregon. January 31, 1887.)***1. TROVER AND CONVERSION—FINDING SECRETED MONEY—EVIDENCE—NONSUIT.**

In an action by an administrator to recover the sum of \$1,926.85, alleged to have belonged to deceased, and to have been converted by defendant, the evidence tended to show that the same amount had been found in two purses, one containing \$926.85, the other \$1,000, under a barn floor, on premises which defendant occupied, by persons who delivered it to him; that, at the time of her death, deceased occupied the premises, had that amount of money, and only \$2.50 was found in her immediate possession; that, while dying, deceased tried to tell a by-stander something about secreted money, but failed to speak intelligently; and that the purses found in the barn were in separate cans, and had evidently been put there for safe-keeping. *Held*, that these facts tended to show that the money in the purses belonged to deceased, and that defendant had reason to believe so, and a judgment of nonsuit was erroneous.

2. SAME—DUTY OF FINDER TO MAKE INQUIRY.

When money is found under circumstances charging the finder with notice that it belongs to a particular person, the finder must, before taking action under a statute providing a method for disposing of lost money, make suitable inquiry as to the ownership.

Appeal from circuit court, Lane county.

THAYER, J. The appellant, as such administrator, commenced an action in said circuit court, against the respondent, to recover \$1,926.85, alleged in his complaint as belonging to the said estate, which had gone into the possession of the respondent, and been converted by him. The respondent denied the material allegations of the complaint, and set up, as a further defense, the following: "That on the twenty-second day of March, 1884, upon the premises owned and occupied by defendant, one Hugh Gray found one purse of money amounting to the sum of \$926.85, and one Darwin E. Yoran found one purse of money amounting to the sum of \$1,000. That the said Hugh Gray and Darwin E. Yoran delivered the said two packages of money to this defendant to be disposed of according to law, and subject to their claim as such finders. That this defendant, as such holder of said money, in compliance with title 2 of chapter 18 of the General Laws of Oregon, did, on the

twenty-fourth day of March, 1884, give notice in writing to the clerk of Lane county, Oregon, of such finding; did also on said day cause a similar notice to be posted up in two public places in said county, as follows: one at the court-house, and one at the post-office in Eugene city, Oregon; did also publish a notice of such, printed in the Oregon State Journal, a newspaper published weekly in said county, for ——— weeks in succession, the first insertion thereof being on the ——— day of March, 1884. That no owner appeared within one year from the date of such notice, and claimed said sums of money. That on the twenty-fifth day of March, 1885, and before any notice was given to the said defendant of any claim to said money, and before the commencement of this action, defendant did, in compliance with the aforesaid statute of Oregon, deliver to B. H. James, county treasurer of said Lane county, Oregon, the sum of \$961.85, being one-half the value of the aforesaid \$1,926.85, less the sum of \$2, paid for publishing said notice. That said defendant did, at the same time deliver to the said Hugh Gray, aforesaid, the sum of \$462.90, and did deliver to the said Darwin E. Yoran the sum of \$499 50. That the said sums of money were delivered to this defendant as bailee by said finders, and the same, or that portion to which each was entitled under the aforesaid law, was delivered to the aforesaid finders, and paid over to said treasurer of Lane county, Oregon, before demand was made, or this action commenced."

The appellant filed a motion to strike out the further defense, which the court denied, and he thereupon filed a demurrer thereto, and the court overruled that. He then filed a reply denying it, and in which he alleged that the decedent in her life-time placed said two purses of money, mentioned in the answer, on the premises therein mentioned for safe-keeping, and that she owned said purses at said time, or was lawfully in possession thereof, and that said purses were never at any time lost.

Upon the trial by jury, the appellant gave evidence that the decedent, at the time of her death, occupied the premises upon which the money was found; that she had money corresponding in amount with the money found; that she was accustomed to secrete her money about the premises; that at the time of her death no money was found upon her, or within her immediate possession, except about \$2.50; that while dying she attempted to tell her daughter, Mrs. Ralston, something about money, and indicated that it was secreted, but was too weak to state intelligently regarding it; that the money was found under the floor of the barn upon the premises; that a piece of plank constituting a part of the floor in the corner of the barn was lifted up, and the money was found there in purses that were in two separate cans, and which evidently had been placed there for safe-keeping by some one. Upon submission of the appellant's testimony, the court, upon motion of the respondent's counsel, granted a nonsuit, and entered the judgment appealed from.

This ruling is claimed by the appellant's counsel to have been erroneous, and in my opinion it was. The testimony and circumstances tended to prove that the money belonged to the deceased at the time of her death, and that the respondent had reason to believe that such was the fact. She had been in the occupation of the premises where it was discovered, and it had unquestionably been left at the place where it was found, intentionally. It was certainly his duty to make suitable inquiry before claiming that it was lost money. The evidence should have been submitted to the jury, and if they had found a verdict thereon, it would have been upheld.

The judgment should be reversed, and the case remanded for a new trial.

STRAHAN, J., having been of counsel in the above cause, took no part in the consideration of the same in the supreme court.

(20 Nev. 70)

STATE v. ONE-ARM JIM. (No. 1,265.)

(*Supreme Court of Nevada.* October 15, 1887.)

APPEAL—FOR DELAY—AFFIRMANCE.

On appeal, when there is no assignment of errors and no appearance by either party, and it is evident that the appeal was taken merely for delay, the judgment of the lower court will be affirmed.

Appeal from district court, Humboldt county; R. R. BIGELOW, Judge.

HAWLEY, J. Appellant was convicted of murder in the first degree. It does not appear from the transcript on appeal that any exceptions were taken during the trial of the cause. No counsel have appeared in this court for either party, and it is evident that the appeal is without merit. It presents no question for our consideration, and must have been taken simply for delay. In a letter presented to the board of pardons, the attorney who defended appellant in the district court said: "I appealed the case, and got stay of execution, simply to give time to apply for commutation. If commuted, will dismiss appeal, as there are no errors."

The judgment appealed from is affirmed, and the district court is directed to designate a day for carrying its sentence into execution.

(10 Colo. 297)

DALLAS v. REDMAN.

(*Supreme Court of Colorado.* October 18, 1887.)

CONSTITUTIONAL LAW—TITLES OF ACTS—AMENDMENT OF CODE.

Const. Colo. art 5, § 21, provides that "no bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed." An act (Sess. Laws Colo. 1883, p. 112) entitled "An act to amend an act entitled 'An act providing a system of procedure in civil actions in the courts of justice of the state of Colorado,' approved March 17, 1877, and to further amend a certain amended section, and to revive and amend a certain repealed section thereof," provides (section 1) for an amendment to section 53, Civil Proc. Act; section 2 provides for the re-enacting and amending section 99 of said act, before repealed, and for the establishment of procedure by intervention in attachment, and section 3 provides for the amendment of Code Civil Proc. § 159. *Held*, that the act referred to contains but one subject, clearly expressed in its title, and is constitutional.

Commissioners' decision. Error to district court, Saguache county.

This was an action brought by Mrs. Dallas against G. A. Gibbs, upon a promissory note, for balance due thereon of about \$1,500. A writ of attachment was duly issued in the case, and certain real estate and personal property seized thereunder; whereupon Mrs. Redman, the defendant in error, claiming to be the owner of said real and personal property, came and filed her plea of intervention in the case, setting forth that she was the owner and lawfully seized and possessed of said property, which had been seized under the writ; to which pleading the plaintiff filed a motion to strike from the files, as follows: "(1) Because there is no law of this state authorizing any such paper to be filed in such case. (2) Because the pretended law under which such paper purported to have been filed is in conflict with the constitution of this state."

The court denied the motion, and ruled the plaintiff to plead to the petition of the intervenor; whereupon the plaintiff answered the same, denying the allegations thereof, together with some affirmative allegations, to which there was a replication; so that the issues between the plaintiff and the intervenor were made up, and the same were tried to a jury. The verdict was for the intervenor, the defendant in error here, that she was the owner of the said

property and entitled thereto. Plaintiff filed a motion for a new trial upon the same grounds set forth in said motion to strike, together with other reasons, referring to the admission and rejection of evidence on the trial; which other reasons were not presented to this court on assignment of error, as the evidence at the trial was not made a part of the record. The court denied the motion for a new trial, and gave judgment upon the verdict. A final judgment was given for plaintiff against defendant Gibbs for amount of demand, and plaintiff brings the case here on error assigned against the intervenor, defendant in error.

Assignment of errors, as follows: (1) The court below erred in overruling the plaintiff in error's motion to strike the pretended petition of intervention of the defendant in error, filed July 13, 1883, from the files of the court, and of this cause. (2) The court below erred in overruling plaintiff's motion for a new trial. (3) The court erred in not sustaining the motion to strike the pretended petition of intervention from the files, upon the grounds set forth in said motion. (4) The court erred in not sustaining the motion for a new trial for the first ground in said motion set forth. (5) The district court erred in dissolving the attachment as to the property described in the pretended petition of intervention.

George Puhl, for plaintiff in error. *C. A. Allen*, for defendant in error.

STALLCUP, C. By the assignment of errors and argument of counsel, we have one question presented for consideration, and that is to the constitutionality of the act of 1883, providing the remedy by intervention where the property attached in an action is claimed by a person not party to the action. It is insisted on the part of the appellant that the act is unconstitutional and void, for the reason that the title thereto does not sufficiently express the subject-matter thereof, as required by section 21 of article 5 of our constitution. The title of said act is as follows: "An act to amend an act entitled 'An act providing a system of procedure in civil actions in the courts of justice of the state of Colorado,' approved March 17, 1877, and to further amend a certain amended section, and to revive and amend a certain repealed section thereof." The said act may be found on page 112 of Session Laws of 1883. It contains three sections beside the "emergency clause" section. The first section thereof amends section 53 of the act providing a system of procedure in civil actions. The second section is as follows:

"Sec. 2. Section ninety-nine of said act, having been heretofore repealed, is hereby revived, re-enacted, and amended so as to read as follows: Sec. 99. In all cases of attachment, any person other than the defendant, claiming any of the property attached, or any lien thereon or interest therein may intervene without giving bail, but the property attached shall not thereby be replevied or released. Such intervention shall be by verified petition stating the right or interest which the intervenor claims in or to such property; and the same may be filed in said cause at any time before the trial of the cause upon its merits; and as soon as notice of the intervention shall be given to the interested parties to the action, or their attorneys, with reasonable opportunity to them to defend against the same, the same shall be tried as follows: If the intervenor claim the absolute title or ownership to the property, either party shall be entitled to trial by jury; but if the claim be by mortgage, or some interest less than full title or ownership, the trial shall be by court, unless the court shall direct an issue to a jury. In case the verdict or finding shall be for the intervenor, the damages which he has suffered by reason of the attachment of the property may be assessed in such verdict or findings, and the intervenor shall recover the same, together with his costs, of the plaintiff in the attachment, and the court shall render such judgment in reference to the attached property as will secure the right of the intervenor thereto or therein, according to such verdict or finding; and in case the verdict or finding shall

be for the plaintiff, he shall recover costs against such intervenor; and the court may require the intervenor to give security for costs for like causes and in like manner as the plaintiff may be required to give security for costs in civil actions."

The third section amends section 159 of the act providing a system of procedure in civil actions.

Section 21 of article 5 of our constitution is as follows:

"Sec. 21. No bill except general appropriation bills shall be passed containing more than one subject, which shall be clearly expressed in its title; but, if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed."

The act referred to contains but one subject, and the same is clearly expressed in the title. In the case of *Clare v. People*, 9 Colo. 122, 10 Pac. Rep. 799, where this same constitutional provision was considered by this court, with reference to an act entitled "An act to facilitate the recovery of ore taken by theft or trespass, to regulate the sale and disposition of the same, and for the better protection of mine owners," this court held that, there being but one general subject expressed, the fact that the legislature saw fit to incumber the title with two specifications, under that subject, does not render it obnoxious to this constitutional provision; also that the purpose of this constitutional provision was to prevent imposition upon the legislature and the people, through the practice of dealing in bills with subjects of which the titles give no intimation; that this constitutional inhibition must receive a reasonable interpretation, and, whenever a matter contained in the statute may fairly be considered germane to the subject expressed by the title, it is sufficient.

The judgment should be affirmed.

BY THE COURT. For the reasons assigned in the foregoing opinion the judgment of the district court is affirmed.

(10 Colo. 223)

BROPHY v. HYATT.

(*Supreme Court of Colorado*. October 18, 1887.)

1. MUNICIPAL CORPORATIONS—ORDINANCES—POWER TO IMPOUND AND SELL STOCK RUNNING AT LARGE.

Gen. St. Colo. 958, § 14, par. 45, gives the town authorities power "to declare what shall be a nuisance, and to abate the same, and to impose fines upon parties who may create, continue, or suffer a nuisance to exist." Paragraph 50 gives them power "to regulate, restrain, and prohibit the running at large of horses, cattle, swine, sheep, goats, geese, and dogs, and to impose a license fee upon dogs." The amendatory act of 1879 (Gen. St. 999) gives them power to "authorize the impounding and summary sale of horses, cattle, sheep, goats, swine, and geese, found running at large within such city or town contrary to any ordinance thereof." *Held*, that an ordinance requiring the village marshal to take up, impound, and sell stock found running at large within the corporate limits of the town, was within the power given to the town authorities.

2. SAME—CONSTITUTIONALITY—NOTICE OF SALE—DUE PROCESS OF LAW.

An ordinance requiring notice of the sale of an impounded animal to be given, and, if his property has been wrongfully seized, allowing the owner an ample remedy in an action to recover his property, or its value, is not in conflict with Const. Colo. art. 2, § 25, which provides that "no person shall be deprived of property without due process of law."

3. SAME—FORFEITURE OF IMPOUNDED ANIMALS.

An ordinance authorizing the sale of impounded animals provided that "if any animal shall be sold for more than sufficient to pay the officer's fees and expenses aforesaid, such excess shall be, by the officer making the sale, deposited in the town treasury, to be paid upon the order of the board of trustees to the owner or owners of such animals, upon claim and proper proofs before said board." *Held*, that this ordinance did not work a forfeiture of the impounded animals.

4. SAME—ADOPTION OF ORDINANCE—RECORD OF YEAS AND NAYS.

A record of a meeting of a board of trustees which recited, respecting the adoption of an ordinance, that, "Upon the ballot being spread for its approval and adoption, the votes stood as follows: Ayes, W. R. Neal, C. W. Givens, L. Conley, George H. Shone, D. R. Smith, and William Sabine. Noes, none,"—showed a sufficient compliance with Gen. St. Colo. § 3324, which provides that, "on the passage of or adoption of a by-law or ordinance * * * by any council or board of trustees of the municipal corporation, the yeas and nays shall be called and recorded."

5. SAME—APPOINTMENT OF MARSHAL—RECORD—INTERLINEATION.

The record of the appointment of a village marshal was read and approved by the board of trustees, as being in accordance with the facts. The validity of his appointment was questioned because the record was interlined. *Held*, that the interlineation was immaterial.

Error to district court, Conejos county.

This is a suit brought by the plaintiff in error against the defendant in error, for trespass, for unlawfully taking, conveying away, detaining, and selling a milch cow, the property of the plaintiff in error, to his damage in the sum of \$100. Defendant in error admits the taking, conveying away, detaining, and selling the cow, but justifies as marshal of the town of Alamosa, and that he took said cow while running at large in the said town, in violation of an ordinance requiring the taking up, impounding, and sale of stock found running at large within the corporate limits of said town. All material allegations of the answer are denied by the replication. Judgment for the defendant, and writ of error to the supreme court. Sections of ordinance considered:

"Sec. 16. It is hereby made the duty of the marshal to take up and confine in a secure pen, or place provided for the purpose, every hog, shoat, pig, goat, mule, horse, mare, gelding, stallion, jack, ass, jenny, sheep, ram, or goose, or any cow, ox, calf, steer, or bull, found running at large within the corporate limits of the town; and no such animal taken up and confined as aforesaid, shall be released until the owner or owners, or some person for him or them, shall pay to such officer having such animal in charge the sum of one dollar, as his fee for taking up, or receiving and discharging, each and every such animal taken up and confined as aforesaid, and the sum of fifty cents for the suitable and proper sustenance of each and every such animal, for every twenty-four hours the same shall be kept.

"Sec. 17. The marshal is hereby authorized and empowered to sell at public vendue, any animals taken up and confined as aforesaid, five days' notice at least of place and time of sale having been given, by posting at least three notices in the most conspicuous places in said town. But if said animals, or any of them, are redeemed, or an offer is made to redeem them by paying the officer's fees, together with the expenses for sustenance, and advertising as aforesaid, at any time before they are actually sold, the same shall not be sold, but shall be released by the officer having the same in keeping. The marshal shall render to the board of trustees, at least once each quarter, a true statement of all fees and money received by him for the animals sold, and the disposition made by him of such money.

"Sec. 18. If any animal shall be sold for more than sufficient to pay the officer's fees and expenses aforesaid, such excess shall be, by the officer making the sale, deposited in the town treasury, to be paid upon the order of the board of trustees to the owner or owners of such animals, upon claim and proper proofs before said board."

C. C. Holbrook, for plaintiff in error. *Wells, Smith & Macon*, for defendant in error.

ELBERT, J. It appears that the town of Alamosa was duly incorporated under the general statute concerning towns and cities. Gen. St. 958. By virtue of section 14, paragraph 45 of this act, the town authorities had power "to declare what shall be a nuisance, and to abate the same, and to impose

lines upon parties who may create, continue, or suffer a nuisance to exist." And under paragraph 50, power "to regulate, restrain, and prohibit the running at large of horses, cattle, swine, sheep, goats, geese, and dogs, and to impose a license fee upon dogs." Under the amendatory act of 1879 (Gen. St. 999) they have power "to authorize the impounding and summary sale of horses, cattle, sheep, goats, swine, and geese, found running at large within such city or town contrary to any ordinance thereof." Under these provisions, the power of the town authorities to pass the ordinance in question appears to have been ample. The record offered in evidence sufficiently showed the adoption of the ordinance in accordance with the requirements of law.

Section 3324 of the General Statutes provides that, "on the passage or adoption of a by-law or ordinance * * * by any council or board of trustees of the municipal corporation, the yeas and nays shall be called and recorded." In the case of *Tracey v. People*, 6 Colo. 151, this provision was held mandatory, and the case is cited in support of the objection that in the adoption of the ordinance we are considering, there was no compliance by the town authorities with this mandatory statute. The object of the requirement that "the yeas and nays shall be called and recorded," is to fix the individual responsibility for municipal legislation, of each and every member of the council or board of trustees present and voting, by a sure, permanent, and public record, showing how he voted upon each and every by-law or ordinance adopted. *Steckert v. City of East Saginaw*, 22 Mich. 109. In the case of *Tracey v. People*, *supra*, the minutes of the meeting of the board at which the ordinance in question was adopted, recited only that the several articles of the ordinance were "adopted as read." This was clearly insufficient to show a compliance with the law. In the case at bar, the record of the meeting of the board of trustees recites, respecting the adoption of the ordinance we are considering, that "upon the ballot being spread for its approval and adoption, the votes stood as follows: Ayes, W. R. Neal, C. W. Givens, L. Conley, George H. Shone, D. R. Smith, and William Sabine. Noes, none." We think this sufficient. The yeas and nays were ascertained and recorded. This satisfied the essential requirements of the statute. While the usual parliamentary mode of taking such a vote is by a call of the roll, and was doubtless contemplated by the law-maker, still it is not to be regarded as essential. Any mode by which the vote of each member is clearly and definitely ascertained for the purposes of the record is sufficient.

In respect to the constitutional objections urged by counsel it may be said:

1. The ordinance does not, strictly speaking, declare or work a forfeiture of impounded animals, since it provides for the payment of the proceeds of the sale to the owner, after deducting the costs of the proceeding.

2. Notice of the sale is required to be given, and the owner, if his property has been wrongfully seized, has an ample remedy in an action to recover the property, or its value. Such an ordinance is not in conflict with section 25, art. 2, of the constitution, which provides that "no person shall be deprived of life, liberty, or property, without due process of law." This has been frequently held with respect to similar ordinances and constitutional provisions. 1 Dill. Mun. Corp. §§ 150, 348, and cases cited; *Gosselink v. Campbell*, 4 Iowa, 296; *Roberts v. Ogle*, 30 Ill. 460; *Hart v. Mayor, etc.*, 9 Wend. 589; *Grover v. Huckins*, 26 Mich. 476; *Mayor, etc., v. Lanham*, 67 Ga. 753; *Mayor, etc., v. King*, 7 Lea, 442; *Campau v. Langley*, 39 Mich. 451; *Campbell v. Evans*, 45 N. Y. 356.

The objections taken to the validity of the defendant's appointment as marshal were not well taken. *First*. The election of Johnston, his predecessor, was only for one month, and his term of office having expired, it was competent for the board to elect a successor. *Second*. The record showed his election by ballot, if, as contended, this mode of appointment is contemplated by statute. That the record was interlined was not material, so long as it was

read and approved by the board, as being in accordance with the facts. There is some contention that the prescribed notices were not posted for the length of time required by the ordinance, but an examination of the evidence leaves no doubt that the ordinance was complied with in this important particular.

The judgment of the court below must be affirmed.

(10 Colo. 270)

KINNEY v. WOOD.

(*Supreme Court of Colorado.* October 18, 1887.)

1. ASSIGNMENT—EVIDENCE OF.

In an action on an account, defendant claimed that plaintiff had assigned the account before suit. The only evidence offered was that of a witness who testified that in November, 1882, she presented an order of plaintiff on defendant to him, and he said he would try to pay her a part of the account that evening; that she presented the order at another time, and defendant made no objection to it, but told her he would pay it all; that she never presented the order after Thanksgiving of that year. Plaintiff testified that defendant owed him the account, and plaintiff and his witness testified that plaintiff demanded payment of such account in December, 1882, and that defendant then promised to pay him. *Held*, that the evidence failed to show that the account had been assigned, and sufficiently showed that plaintiff was the owner at the time of suit.

2. APPEAL—REVIEW OF EVIDENCE—TRIAL BY COURT.

The rule that where the evidence is conflicting, and the verdict is not manifestly against the weight of evidence, the verdict will not be disturbed on appeal, applies equally where a jury is waived and the issues of fact are tried by the court.

Commissioners' decision.

Error to San Miguel county court.

E. Miles, for plaintiff in error. *R. D. Thompson* and *W. H. Gabbert*, for defendant in error.

RISING, C. The defendant in error brought an action in justice's court against the plaintiff in error to recover the sum of \$10 for money loaned, \$10 due for board, and \$2 for interest on said sums. Case taken to county court by appeal. Upon the trial in the county court, defendant introduced evidence to prove an indebtedness of the plaintiff to him in the sum of \$38. The case was tried to the court, and the court rendered judgment for the plaintiff for the full amount of his claim and interest.

There are many errors assigned, but counsel for plaintiff in error in his argument relies solely upon the insufficiency of the evidence to sustain the judgment, and bases his argument upon the following propositions: That the evidence shows that the plaintiff had no cause of action against defendant at the time the suit was brought; and that if plaintiff had a cause of action, the preponderance of the evidence clearly establishes a set-off, greater in amount than the claim of plaintiff. Upon an examination of the evidence, we think it clearly shows that the plaintiff was the owner of the claims sued on at the time suit was brought. The only evidence there is, tending to sustain the position of plaintiff in error, upon this point, is the testimony of Mrs. Wood, that, in November, 1882, she presented an order of M. A. Wood on the defendant, and the defendant said he would try to pay her a part of the account that evening; that she presented the order at another time, and defendant made no objection to it, but told her he would pay it all; that she left town about Thanksgiving, and never presented the order after that time. This evidence is wholly insufficient to show that the claims sued on were ever assigned to Mrs. Wood by the plaintiff. Aside from this, the plaintiff testified on the trial that the defendant was indebted to him on the claims sued on, and the plaintiff and Allen Wood, a witness, each testified that the plaintiff demanded payment of these claims of the defendant in December, 1882, and that defendant then promised to pay them to him.

The evidence upon the question of set-off is very conflicting, and the rule that when the evidence is conflicting, and the verdict is not manifestly against the weight of evidence, the verdict will not be disturbed, must be applied in this case. In the application of this rule, in *Green v. Taney*, 7 Colo. 278, 282, 8 Pac. Rep. 423, it was held "that this court will only interfere where, upon the whole record, it appears that the jury acted so unreasonably in weighing testimony as to suggest a strong presumption that their minds were swayed by passion or prejudice, or that they were governed by some motive other than that of awarding impartial justice to the contending parties." A careful examination of this case fails to disclose any facts which bring it within the limitations to the application of the rule so clearly laid down by Judge HELM. Where a jury is waived, and the issues of fact are submitted to the court, upon a review of the findings of fact by this court, the same rule must be applied as would be applied if the issues of fact had been determined by a jury. *Murphy v. Cunningham*, 1 Colo. 467, 471.

The judgment should be affirmed.

We concur: MACON, C.; STALLCUP, C.

BY THE COURT. For the reasons assigned in the foregoing opinion the judgment of the county court is affirmed.

(10 Colo. 284)

BRASHER and others v. CHRISTOPHE.

(*Supreme Court of Colorado.* October 18, 1887.)

CHATTEL MORTGAGES—RESERVATION BY MORTGAGOR OF RIGHT TO SELL CHATTELS—MORTGAGE VOID AB INITIO.

B. and L. purchased the furniture in a hotel of the plaintiff, and gave him a mortgage on the property to secure the unpaid purchase money, reserving to themselves the right to sell the furniture for the purpose of buying better. They sold some of it and bought other fittings, and gave four chattel mortgages on the old and new furniture, which were foreclosed, and the property sold. Plaintiff sued the other mortgagees in trover. *Held*, that reservation to the mortgagors of the right to sell the mortgaged property rendered it void *ab initio* as to creditors and incumbancers.¹

Commissioners' decision. Error to district court, Arapahoe county.

H. C. Dillon, for plaintiff in error. *Browne & Putnam*, for defendant in error.

MACON, C. The facts of this case are: In February, 1880, Christophe was keeping a boarding-house or tavern called the "Balcom House," in Denver, holding a lease on the premises from Hallack Bros., and on the nineteenth of that month assigned said lease, and sold the furniture in the house to James Bell and Alexander Lewis, for \$2,500, \$1,500 of which was paid down, and the notes of Bell and Lewis for \$1,000 were given, to secure which, the latter executed to Christophe a chattel mortgage upon the same furniture they had bought of him, in which they reserved the power to sell and dispose

¹In *Iowa*, a chattel mortgage under which the mortgagor is permitted to sell the property in the ordinary course of trade, is held not to be fraudulent in law, but that the question of fraud is one of fact, to be determined from all the circumstances. *Lyon v. Bank*, 29 Fed. Rep. 666; *Maish v. Bird*, 22 Fed. Rep. 576; *Crooks v. Stuart*, 7 Fed. Rep. 800; *Meyer v. Evans*, 23 N. W. Rep. 386; *Meyer v. Gage*, 22 N. W. Rep. 892; *Jaffray v. Greenbaum*, 20 N. W. Rep. 775; *Sperry v. Ethridge*, 19 N. W. Rep. 657; *Clark v. Hyman*, 7 N. W. Rep. 386. See, also, in *Michigan*, *Hills v. Furniture Co.*, 23 Fed. Rep. 432; *Morse v. Riblet*, 22 Fed. Rep. 501.

As to the law in other states in regard to such mortgages, see *Fisher v. Syfers*, (Ind.) 10 N. E. Rep. 308; *Wilson v. Voight*, (Colo.) 13 Pac. Rep. 726; *Byrd v. Forbes*, (Wash. T.) Id. 715; *Howard v. Wulfekuhler*, (Kan.) Id. 566; *Loth v. Carty*, (Ky.) 4 S. W. Rep. 314; *Hubbell v. Allen*, (Mo.) 3 S. W. Rep. 22; *Hisey v. Goodwin*, (Mo.) 2 S. W. Rep. 566, and note; *Davis v. Scott*, (Neb.) 34 N. W. Rep. 353.

of the mortgaged property in this form: "It is expressly understood and agreed by the party of the second part that the parties of the first part shall have the privilege of disposing of such furniture and chattels conveyed by this chattel mortgage as they shall see fit, for the purpose of purchasing other and better furniture and fittings to put in the aforesaid premises." Afterwards, and before the maturity of any of the notes given to Christophe, Bell and Lewis executed four other chattel mortgages, the first to Brasher Bros., the second to Richmond Bros. & Farnsworth, the third to Richmond & Farnsworth, and the fourth to Fishel, Kohn & Wise, to secure an indebtedness in the aggregate to these several firms of about \$3,600. Soon after the nineteenth of February, and before any of the last four mentioned mortgages were executed, Bell and Lewis had sold a large part of the furniture bought of Christophe and included in his mortgage, and replaced it with other articles of furniture, but how much in value, and what particular articles of the old furniture remained in the house when the last four mortgages, or any of them, were executed, is not shown with any degree of certainty; though the jury on the trial found as a fact that on the fifth of May, 1881, there remained in the house of such old furniture about \$1,000 in value. On the fifth of May, 1881, the mortgagees, in the last four mortgages, foreclosed them by seizing and selling the property described therein, leaving nothing for Christophe. For this Christophe brought an action of trover against Brasher Bros., and Bell and Lewis. In this complaint is set out the mortgage in its legal effect, and also the property described therein; the fact of taking and conversion by the defendants, and the value of the property. The record shows that to the original complaint, Bell and Lewis filed a demurrer, and that afterwards an amended complaint was filed, after which Bell and Lewis made no further defense, and the case went against them by default. Brasher Bros. filed their answer, denying the validity of the alleged mortgage to Christophe; denied the identity of the goods described in the complaint with those mortgaged in the last four mortgages; and admitted the seizure and conversion of all the property, furniture, and fittings in the said Balcom House, then called and known as "The Turf Exchange."

The pleadings present two issues: *First*, the validity of the alleged mortgage to Christophe; and, *second*, the identity of the chattels described in the alleged mortgage to Christophe with those taken and converted by Brasher Bros. The case was tried to a jury, who rendered a verdict for plaintiffs in the sum of \$1,334. Defendants moved for a new trial on the ground of error in law in the trial; that the verdict was contrary to the law and evidence; because the damages awarded by the jury were excessive; because of newly discovered evidence since the trial, and for that the court erred in entering judgment on the verdict, pending notice of a motion for a new trial. This motion was overruled, to which defendants excepted, and prayed an appeal, which was denied by the court, and to which an exception was reserved. Defendants are in this court on a writ of error, and have assigned twelve errors as ground for reversal of the judgment below, but abandoned the twelfth assignment. In the trial, Christophe introduced his mortgage in evidence over the objection of defendants, and defendants offered the last four mortgages which the court admitted, but limited their effect as evidence, and required defendants to show that they were executed to secure money due for better furniture and fittings for this Turf Exchange, holding that for any other purpose the mortgages should be deferred to that of the plaintiff. On the conclusion of the evidence, the court instructed the jury as follows:

"*Gentlemen of the Jury*: The first, and substantial, and material issue in this case for you to determine from the evidence, is whether the defendants, commonly spoken of as Brasher Bros., being B. P. Brasher and L. B. Brasher, wrongfully took and converted to their own use certain property mentioned in the plaintiff's amended complaint, and which is referred to in this chattel

mortgage, and contained in this schedule, and if you shall find that they did, then to find the value of such goods and chattels which you shall find they wrongfully converted. The case, to a certain extent, so far as the documentary portion here and the legality of these documents is concerned, is contradicted. On the nineteenth of February, 1881, it appears in evidence, without contradiction, that the plaintiff made a sale of certain goods and chattels in the Balcom House, in this city, to Bell and Lewis, for a certain sum in cash, and took a mortgage back for the sum of \$1,000, three notes amounting in the aggregate to \$1,000, and the mortgage upon the goods and chattels in said Balcom House to secure the payment of those notes. In that chattel mortgage is contained this clause: 'It is expressly understood and agreed by the party of the second part' (that is the plaintiff, Seraphin Christophe) 'that the parties of the first part' (this is Bell and Lewis) 'shall have the privilege of disposing of such furniture and chattels, conveyed by this chattel mortgage, as they shall see fit, for the purpose of purchasing other and better furniture and fittings to put in the aforesaid premises.' It further appears that subsequently, and before the maturity of any of these notes, Bell and Lewis gave four other certain chattel mortgages to secure claims held against them by Brasher Bros., by Richmond & Farnsworth, by Richmond Bros. & Farnsworth, and by Fishel, Kohn & Wise, and gave a mortgage on certain other property of the defendants, Bell and Lewis, said property in those four other certain mortgages being described as being in the same house; and it is for you to say, from the evidence, whether the property described in those four other certain mortgages, given by Bell and Lewis, is the same identical property as the property described in the plaintiff's mortgage from Bell and Lewis. As to that you must depend on the evidence for your guidance, and not necessarily upon the fact that the property may be described in the same language, or the same general terms. As to the identity, then, of the property described in the first mortgage, and in these four other certain mortgages, you are to determine from the evidence whether it is the same property. If you shall find that it is the same property, or that any portion of it is the same property, then the court charges you, as a matter of law under this case, under the evidence in this case, that the security of these four parties, or four partnerships, by their four chattel mortgages, is not good against the first mortgage, unless these four mortgages, or some one or more of them, was given for the purpose of purchasing other and better furniture and fittings, to put in the aforesaid premises. The plaintiff gave to the defendants, Bell and Lewis, the privilege of disposing of the property as they should see fit; and the court holds that they might mortgage it, if the purpose of their mortgaging it was to secure other and better furniture and fixtures to put in the same hotel; but it could not be mortgaged for any other purpose; that is, the same property described in the plaintiff's mortgage could not be mortgaged for any other purpose than for the express purpose specified here, and be a good mortgage to defeat the first mortgage; but, if mortgaged for the purpose of getting other furniture and fittings for that hotel, for that express purpose in good faith, then the second mortgagee's security would prevail over the first mortgagee's security, if you shall find that fact from the evidence.

"Now, it further appears from the evidence, without contradiction, that some time about the first of May, 1881, the defendants the Brasher Bros., acting in concert with the other mortgagees under these subsequent mortgages, went and took possession of certain property in the Balcom House, which has been since known as 'The Turf Exchange,' as appears from the evidence under their several mortgages, and sold and disposed of the property which they took possession of. But it is for you to say from the evidence whether in taking possession of certain property in the Balcom House, or Turf Exchange, whether or not they took possession of any of the property which the plaintiff had a mortgage upon; the plaintiff in this respect must sat-

isfy you by a preponderance of the evidence that these defendants, in concert with others who had mortgages, did take the property mentioned in the plaintiff's chattel mortgage, or some portion of it before the plaintiff is entitled to recover; and then, if you shall find that the defendants did take possession, and caused to be sold and converted to their own use, any property described and mentioned in the plaintiff's chattel mortgage, then the defendants are liable for the value of so much as they took, unless the defendants shall have satisfied you by a preponderance of the evidence that their mortgage was given for that property, because it was taken in order to enable Bell and Lewis to purchase other and better fittings for the hotel; and if the defendants shall have satisfied you that notwithstanding you may believe from the evidence that they took certain property that was in the plaintiff's mortgage, —if they shall have satisfied you by a preponderance of the evidence that these mortgages were taken in good faith for the purpose of enabling Bell and Lewis to better furnish and fix up the Balcom House, then the defendants are not liable. So the liability of the defendants depends upon two substantive propositions, and you must find upon those two in order to warrant you in finding a verdict for the plaintiff. *First*, you must find by a preponderance of the evidence that they took property which the plaintiff had a valid mortgage upon, and converted it to their own use; and, *second*, that in so taking it they took it under mortgages which were not valid, because they were not taken under the power which the plaintiff gave Bell and Lewis to dispose of the property to secure other and better furniture and fittings for fitting up the hotel. Upon the first proposition that they took property secured by the chattel mortgage, the burden of proof is upon the plaintiff, but in respect to the second proposition, that these mortgages were executed for the purpose of enabling Bell and Lewis to purchase other and better fittings, the burden of proof is upon the defendants. Now, there was no objection to Brasher Bros. and these subsequent mortgagees acting in concert by one agent if their mortgages were *bona fide* and valid, and they had a right, each of them, to foreclose their mortgages at one and the same time, and by one and the same agent, and nothing is to be adjudged against them on that account. Their liability, if there be any liability at all, depends upon the ground that they have wrongfully taken certain property that the plaintiff had a chattel mortgage upon and converted it to their own use, without having brought themselves within the provisions of this mortgage, that is, of getting chattel mortgages which would supersede the plaintiff's chattel mortgage for the purpose of enabling Bell and Lewis to purchase other and better fixtures and furniture for the said hotel. You must identify this property for the one purpose or the other, as indicated by my charge, and as indicated by the evidence, as best you can to determine the controversy.

"The measure of the plaintiff's recovery must in no event exceed the sum of \$1,000, with interest thereon, from February 19, 1881; but, even though the plaintiff should recover, he is not necessarily entitled to recover that amount, unless the value of the property, which the defendants shall be held or found to have wrongfully converted, would amount to that sum. You are the judges of the weight of the evidence and of the credibility of the several witnesses, and from all the testimony and facts and circumstances of the case, appearing at the trial, fairly considered and weighed, you are to arrive at the truth of this matter, and found your verdict upon it under the rule of law given to you by the court. The court instructs the jury that the plaintiff having averred a demand in his complaint and the defendant having denied it, to entitle the plaintiff to recover you must find that the plaintiff demanded the return of those goods from the Brasher Bros. If you find for plaintiff against the defendants B. P. and L. B. Brasher, the form of your verdict should be as follows, viz.: We, the jury, find the issues here joined between the plaintiff and defendants B. P. and L. B. Brasher for the plaintiff,

and we assess the plaintiff's damages by occasion of the premises in his complaint specified against said defendants at the sum of ____."

The defendants prayed the following instructions:

"The jury are instructed that the plaintiff in this case claims damages against the defendants Brasher Bros., because he says that they seized, took into their possession, and sold certain goods and chattels upon which he claims to have had a lien as a chattel mortgage. If you believe from the evidence that the defendants Brasher Bros. did not convert to their own use, or sell any of the goods and chattels covered by the plaintiff's chattel mortgage, your verdict will, of course, be for the defendants. If, however, you should believe from the evidence that the said Brasher Bros., acting in conjunction with Richmond Bros. & Farnsworth, Richmond & Farnsworth, and Fishel, Kohn & Wise, did seize, take into their possession, and sell some of the goods and chattels described in plaintiff's chattel mortgage, and that the value of the goods and chattels so taken and sold did not exceed the amount of the indebtedness then due and owing from the defendants Bell and Lewis, to the said Richmond & Farnsworth, Richmond Bros. & Farnsworth, Fishel, Kohn & Wise, and Brasher Bros., you should in like manner find in favor of the said Brasher Bros.

"The court instructs the jury that a chattel mortgage of personal property where the mortgagor, as in this case, is allowed to continue in possession of the property, and sell and dispose of the same, is in law fraudulent and void as against the creditors of the mortgagor, as well as against subsequent purchasers and incumbrancers of the same. Inasmuch, therefore, as the plaintiff's said chattel mortgage permitted the said Bell and Lewis to remain in possession of the mortgaged chattels, and to sell and dispose of the same, the plaintiff is not entitled to recover anything from the said Brasher Bros. as for a wrongful conversion of any such goods and chattels, even though they should believe from the evidence that the said Bell and Lewis did sell, mortgage, or otherwise dispose of some of the said goods and chattels to the said Brasher Bros., or any other person or persons whatsoever.

"The jury are further instructed that the burden of proof in this case is upon the plaintiff, and it is for him to prove his case by a preponderance of the evidence. If the jury, therefore, find that the evidence in this case preponderates in favor of the defendants, then the plaintiff cannot recover, and the jury should find for the defendants.

"The jury are further instructed that the defendants cannot be held liable for a conversion of any of the goods and chattels in controversy in this case, without a definite demand by the mortgagee, and a definite refusal to surrender them. If, therefore, you believe from the evidence that the plaintiff did not make a definite demand upon the said Brasher Bros. for a return of the said goods and chattels, or that they did not make a definite refusal to surrender them, your verdict should be in their favor."

This the court refused to give, but indorsed thereon, "Given in substance."

Of the eleven assignments of error relied on by plaintiffs in error, it is unnecessary to notice more than one,—the second, which attacks the validity of the Christophe mortgage, as against Brasher Bros.; for upon the correctness of the construction of that mortgage, by the district court, the validity of this judgment depends. In fact, all the other assignments, except the first and fourth, are but different statements of the point made in the second. If the Christophe mortgage was valid against plaintiffs in error, there is no error in the judgment and proceedings of the court below; if not, then the judgment in this case must be reversed. It cannot be denied that the rulings of the courts of the several states as to the validity of a mortgage, reserving the right to the mortgagor to sell and dispose of the property mortgaged for his own use, have been various and conflicting. But it seems that in this state the ruling upon that question has been uniform, and that the doctrine is settled here. In *Bunk*

v. *Goodrich*, 3 Colo. 141, the mortgage covered a stock of clothing, and by its terms the mortgagor was permitted to retain, use, and enjoy the property. The only use to which such property could be put was to sell it, which he did, with the knowledge of the mortgagee; and the court, in a unanimous opinion, held the mortgage void as against the creditors of the mortgagor. In *Wilcox v. Jackson*, 7 Colo. 521, 4 Pac. Rep. 966, it does not appear whether the mortgage provided for a retention and use of the property mortgaged, but as a matter of fact, the mortgagors did retain the possession, and sold the goods for their own benefit with the knowledge and consent of the mortgagee. In that case, it was held that the leaving of the goods in the possession of the mortgagors and permitting them to sell the same for their own benefit, was fatal to the validity of the mortgage. Still later, in the case of *Wilson v. Voight*, 9 Colo. 614, 13 Pac. Rep. 726, where the mortgage provided that the mortgagor, Voight, should retain, use, and enjoy the mortgaged property, this court held the mortgage void. HELM, J., in speaking for the court, used the following language: "The instrument contained a provision authorizing the mortgagor, until default, to retain the possession, use, and enjoyment of the property mortgaged. It is difficult to understand how the mortgagor could use and enjoy a stock of merchandise without selling or disposing of the same. But we shall assume that the instrument contains no language affecting its validity. The testimony of the mortgagee himself establishes the following facts, viz.: That after the mortgage was executed and delivered, the mortgagor continued to sell and dispose of goods from the stock included, in the ordinary and regular course of trade; that he applied none of the proceeds from such sales to the payment of the notes secured by the mortgage, but retained the same for his own use and benefit; and that these things were done with the full knowledge and consent of the mortgagee. This sale of goods and disposition of the proceeds with the mortgagee's consent were acts wholly at variance with the idea of *security*, fundamental to such transaction,—acts which were inconsistent with the purposes of chattel mortgage statutes, and stamped upon the entire transaction a brand of bad faith, difficult of satisfactory explanation. * * * Predicated upon these considerations is the view sustained, as we think, by the larger number, and better reasoned cases, viz.: That the *existence* of the facts mentioned, whether shown by the mortgage or by evidence *aliunde*, wholly invalidates the transaction as to creditors. The position that the motive of the mortgagor and mortgagee should, under such circumstances as those before us, remain a question of fact to be determined by the jury upon all the evidence, is taken in able and ingenious opinions; but when carefully analyzed, it will be found that these opinions are based more upon considerations of probable hardship and inconvenience in individual cases, than upon solid principles of law, or broad and intelligent grounds of public policy."

Here the mortgage permits the mortgaged chattels to be converted into money, for the sole use and benefit of the mortgagors, nor is the effect of the mortgage in any way altered or changed by the fact that the mortgagors are required to reinvest the funds arising from the sale of the chattels in other furniture to be put in the house. Had the mortgage contained an express provision declaring that the newly-acquired property should be covered thereby, it is doubtful if the legal effect would have been changed. But we do not pass upon this question; it is enough to say that if such intention existed it is not sufficiently expressed. Upon the newly-acquired property the mortgagee had no lien or security; it became the absolute property of the mortgagors, liable to seizure upon attachment, or execution by other general creditors, or to be incumbered to such creditors by chattel mortgage. The district court seems to have supposed that because the mortgagors were bound by the terms of the instrument to reinvest the proceeds of the old furniture in new, so long as the old remained unsold, Christophe had a lien upon it. This view is plau-

sible, but not sound. The very question came up for adjudication in *Wilson v. Voight, supra*, and was decided adversely to the view assumed by the district court. It is there said: "The fact that other property besides merchandise was included in the mortgage, does not affect the result. There are cases which hold that such an instrument may be void in part, and in part valid. * * * But we are inclined to accept and apply the doctrine elsewhere announced that if the mortgage be void as to a portion of the property mentioned therein, it is void altogether. It is the *agreement to sell*, retaining the proceeds, or the act of selling with the mortgagee's consent, and retention of the proceeds that invalidates the transaction. Whether this agreement or this act relate to one part of the property mortgaged or another it is a matter of little significance. In a case like the one at bar, where there is no express agreement, why should the mortgage be held good as to fixtures, but void as to the goods remaining unsold? It may be that no more goods would have been disposed of. And it may be that had things remained *in statu quo*, and Voight returned, he would have proceeded to sell the fixtures. If under a contract, providing for the sale of merchandise, the mortgage may remain valid as to fixtures and other property, it should follow that when the contract related to a particular line of goods, or a particular part of the stock, the mortgage would remain unassailable as to the rest of the wares or commodities. The welfare of all parties interested will, we think, be best subserved by holding the mortgagee to a strict degree of care in seeing to it that the transaction is not tainted with this objectionable feature. There will, in our judgment, be less confusion, and in the end less real injustice, by adhering to the rule that if the mortgage is upon this ground void in part, it is wholly void."

The agreement to sell invalidates the mortgage as to creditors and incumbrancers, and this effect takes place at the moment of the delivery of the instrument. It is not necessary to this effect that any of the property be sold under the power. The transaction is vitiated *ab initio* as to all the property upon which it is attempted to create a lien, by the reservation of such right, and not by the exercise of it. Every objection which can be conceived against a chattel mortgage, like those in the cases cited, will apply to this one. The provision that the chattels may be sold for a designated purpose only, does not help the mortgagee, when if the purpose is executed he is bereft of all security. In this case, the more speedily Bell and Lewis executed this power to sell according to its terms, the more completely was Christophe deprived of his security. The transaction has every feature and element of an incumbrance made for the purpose of defrauding creditors. If the construction adopted by the district court were correct, then Bell and Lewis could have held this property until one day before the maturity of their debt to Christophe, protected from execution or attachment at the suit of other creditors, and then have sold it, applied the proceeds to their own use, and if such other creditors should have been fortunate enough to find other property upon which to levy attachments, they might have been compelled to prorate with Christophe. Whatever the motives of the parties to such a transaction may be, viewed as a moral question in the business of every-day life, its effects are injurious, and in law and equity such agreements are fraudulent *per se* as against creditors and subsequent incumbrancers.

It follows, therefore, that the judgment must be reversed, and the case remanded, with directions to proceed according to the views expressed in this opinion.

We concur: STALLCUP, C.; RISING, C.

BY THE COURT. For the reasons assigned in the foregoing opinion the judgment of the district court is reversed, and the cause remanded for a new trial.

(10 Colo. 278)

HAYT v. HUNT.

(Supreme Court of Colorado. October 18, 1887.)

1. SPECIFIC PERFORMANCE—VERBAL CONTRACT—PART PERFORMANCE—PLEADING.

Gen. St. Colo. § 1519, provides that "nothing contained in chapter 43 of 'Frauds and Perjuries' shall be construed to abridge the power of courts of equity in cases of part performance to compel specific performance." Defendant made a verbal contract to convey a tract of land to plaintiff's grantor, on condition that she would make certain improvements thereon. A complaint for the specific performance of this agreement contained averments showing an acceptance of, and compliance with, the terms of the proposition made by defendant. *Held*, that the averments of the complaint showed a proper case for specific performance.

2. SAME—COMPLAINT NOT SHOWING CONTRACT IN WRITING—DEMURRER DOES NOT LIE.

It did not appear on the face of a complaint for specific performance that the proposition from defendant, specifying the conditions on which he would convey, was not in writing. *Held*, that the question whether defendant's proposition was in writing could not be raised by demurrer; if raised at all, it must be by answer.¹

3. SAME—ASSIGNEE MAY MAINTAIN ACTION.

Defendant offered to deed a parcel of land to plaintiff's grantor if she would make certain improvements on it. She took possession, made permanent and valuable improvements on the land, and performed all the conditions required of her by defendant's proposition. *Held*, that such performance of a parol agreement constituted her the equitable owner of the premises, and enabled her assignee to maintain an action for specific performance.

4. SAME—ASSIGNMENT BY QUITCLAIM DEED.

Held, also, that a quitclaim deed was sufficient, such being the intention of the parties, to pass her equitable title under the contract.

5. SAME—PLEADING—DEFINITENESS.

Defendant demurred to a complaint for specific performance on the ground that the complaint was ambiguous, unintelligible, and uncertain. *Held*, that while the complaint was not so formal as would be required by common-law practice, yet it stated definitely the object of the action, and the result desired, and was sufficient; following *Gilpin Co. v. Drake*, (Colo.) 9 Pac. Rep. 787.

6. LIMITATION OF ACTIONS—OBJECTION CANNOT BE RAISED UNDER GENERAL DEMURRER.

Defendant demurred to a complaint for specific performance on the ground that it did not state facts sufficient to constitute a cause of action. At the hearing he sought to raise the objection that the complaint showed that the action was barred by the statute of limitations. *Held*, that such a defense must be pleaded specially, whether by demurrer or answer.²

7. COSTS—ON OVERRULING DEMURRER.

In an action for specific performance the defendant demurred to the complaint. The demurrer was overruled, and \$5 costs were imposed on the defendant. *Held*, that this was warranted by section 57 of the Colorado Code, which provides that, upon the determination of any demurrer in any cause originally brought in the district court, the unsuccessful party shall be adjudged to pay not less than \$5 nor more than \$10 into court for the use of the successful party; following *Chivington v. Colorado Springs Co.*, (Colo.) 14 Pac. Rep. 212.

Commissioners' decision.

Appeal from district court, Huerfano county.

The complaint alleges that on or about July 9, 1878, the defendant was the owner of a body of unimproved and unoccupied land near to and adjoining the town of Alamosa, in Conejos county; that he was anxious to make said

¹When a pleading alleges an agreement which would be within the statute of frauds unless in writing, it will be presumed to be a written contract. *Swetland v. Barret*, (Mont.) 1 Pac. Rep. 745.

On the contrary, it is held in *Smith v. Theobald*, (Ky.) 5 S. W. Rep. 394, that a petition based upon a contract required to be in writing, and signed by the defendant, is demurrable if it does not set out the fact of the writing and signature.

²In *Ohio*, it is held that, where the declaration shows upon its face that the cause of action sued upon is barred by limitation, a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action is sufficient to let in the defense of the statute. *Seymour v. Railway Co.*, 4 N. E. Rep. 236. So in *Nebraska*. *Merriam v. Miller*, 34 N. W. Rep. 625. As to how the bar of the statute may be made available, see note to *Id.* 629.

land valuable, and bring it into market for speedy sales, and to that end proposed to one A. C. Rupe that if he would cause to be built a good house and other surrounding improvements on a certain definitely described portion and parcel of said land, he would deed the said portion and parcel of said land to Wilhelmine F. Rupe, the wife of said A. C. Rupe; that said A. C. Rupe and Wilhelmine F. Rupe, relying upon the promises of the defendant, caused to be built upon said described premises a large and comfortable dwelling-house, a stable, and suitable outhouses, and expended in the improvements of said premises the sum of \$6,500; that defendant on the ninth day of July, 1878, made, executed, and delivered to said Wilhelmine F. Rupe a warranty deed to certain definitely described premises; that at the time said deed was so made, executed, and delivered, the defendant and the said A. C. Rupe, and the said Wilhelmine F. Rupe, each supposed that it fully and perfectly described the premises upon which said improvements had been made, and that it conveyed the title to the premises so improved; that said premises were occupied and possessed by said A. C. Rupe, his wife and family, from July, 1878, until the same were delivered by them to the plaintiff; that in August, 1882, it was discovered by said A. C. Rupe and his wife that said deed made by defendant to said Wilhelmine F. Rupe did not describe and include all of the said premises upon which the said improvements were placed, and they demanded of said defendant a deed for all the ground so occupied and improved by them, which deed the defendant refused to make; that thereupon the said A. C. Rupe and the said Wilhelmine F. Rupe threatened to move their said houses and all their said improvements off said premises, and that defendant fearing that they would do so, and believing that if said house and improvements were taken away, it would injure the sale of the balance of his said property, went to one Charles D. Hayt, the husband of the plaintiff, who was acting as the agent and attorney of the said Wilhelmine F. Rupe, and said to him that he would not make a deed of the premises to the said A. C. Rupe or to Wilhelmine F. Rupe; that he did not want the house removed away, for it would injure the balance of his land, and if the said Hayt or any of his friends would buy Rupe out, he would make a good title to the premises to the purchaser; that plaintiff, relying upon the said promises of the defendant, on September 1, 1882, through her said husband, Charles D. Hayt, acting as her agent, purchased said premises of the said Wilhelmine F. Rupe, and entered into the immediate possession and occupancy thereof; that plaintiff paid for said premises the sum of \$2,000, and has spent in improving the same the sum of \$700, and that plaintiff and her family have occupied said premises from the said September 1, 1882, and are still occupying the same; that on the eleventh day of April, 1883, the plaintiff received a quitclaim deed from said A. C. Rupe and Wilhelmine F. Rupe for all their interest in said premises; that plaintiff and her grantors have paid all the taxes and assessments assessed against said premises for the years 1879, 1880, 1881, 1882, and 1883; that plaintiff has requested defendant to make her a deed to said premises, and perfect her title thereto, and that he has refused and still refuses so to do.

Prays judgment: (1) That the absolute title to the said premises be adjudged and decreed to be in plaintiff. (2) That defendant be decreed to make to the plaintiff a good and sufficient deed to said premises by a short day to be fixed by the court. (3) For general relief.

Defendant demurred to the complaint upon the following grounds: (1) That said complaint does not state facts sufficient to constitute a cause of action. (2) That said complaint is ambiguous, unintelligible, and uncertain. Demurrer overruled, and five dollars costs taxed against defendant on account of said demurrer. Defendant elected to stand upon his demurrer.

Upon a hearing of the cause, decree entered that plaintiff is entitled to have a title from defendant for the said premises, and that defendant, within 60 days from the date of said decree, convey by a sufficient deed of conveyance

all his right, title, and interest in and to the premises first definitely described, and set out in said complaint. Defendant duly excepted to all the rulings of the court, and to the entry of the decree.

L. B. France, for appellant. *Blackburn & Dale*, for appellee.

RISING, C. The errors assigned are based upon the ruling of the court on the demurrer, and upon the action of the court in imposing costs upon the defendant upon overruling his demurrer.

The argument of counsel for appellant, upon the first ground of the demurrer, is that the statement of facts in the complaint shows the alleged contract to be within the statute of frauds, and that the action was not brought within the time limited by statute, and that each of these objections is fatal on demurrer, upon the ground that the complaint does not state facts sufficient to constitute a cause of action. The objection that the action is barred by the statute is not raised by the demurrer. This defense is in the nature of a special privilege, and must be pleaded specially, whether the pleading be by demurrer or answer. *Heater v. Clifford*, 5 Colo. 168-173.

It does not appear upon the face of the complaint that the proposition made by Hunt to Rupe was not in writing, and, therefore, as to the allegations relating to the transactions between Hunt and A. C. Rupe and Wilhelmine F. Rupe, the complaint is sufficient. The question should have been raised by answer, if raised at all. *Tucker v. Edwards*, 7 Colo. 209, 3 Pac. Rep. 233; Bliss, Code Pl. 312, and cases cited. But, even if it appeared upon the face of the complaint that the proposition was not in writing, then the averments of the complaint relating to the transaction between Hunt and Wilhelmine F. Rupe, showing an acceptance of and compliance with the terms of the proposition made by Hunt to her, are sufficient to bring the case within the provisions of section 1519 of the General Statutes, which provides that "nothing contained in chapter 43 of 'Frauds and Perjuries' shall be construed to abridge the powers of courts of equity to compel the specific performance of agreements, in cases of part performance of such agreements." The complaint alleges, not only a part performance, but a full and complete performance, by Wilhelmine F. Rupe, of all the conditions the performance of which was required of her by the proposition made by Hunt, to entitle her to a deed to the premises so improved by her, and also shows an attempted performance of said agreement on the part of said Hunt. Such performance of a parol agreement for the conveyance of land is sufficient to authorize courts of equity to compel specific performance of the agreement.

The most important acts which constitute a sufficient part performance to authorize courts of equity to decree specific performance, are actual possession, and the making of permanent and valuable improvements. Pom. Eq. Jur. § 1409; Story, Eq. Jur. § 761; *Davenport v. Mason*, 15 Mass. 92; *Freeman v. Freeman*, 43 N. Y. 34; *Laird v. Allen*, 82 Ill. 43; *Jamison v. Dimock*, 95 Pa. St. 52; *Lamb v. Hinman*, 46 Mich. 112, 6 N. W. Rep. 675, and 8 N. W. Rep. 709; *Littlefield v. Littlefield*, 51 Wis. 25, 7 N. W. Rep. 773. By virtue of the possession taken of the premises, and the improvements placed thereon by Wilhelmine F. Rupe under the proposition made by Hunt, and in performance of the conditions contained in said proposition, Mrs. Rupe became the equitable owner of said premises. Pom. Eq. Jur. § 368.

Such equitable interest may be assigned by the vendee or party who stands in the position analogous to that of the vendee, and the assignee may maintain an action to compel a specific performance of the contract. Pom. Spec. Perf. § 487; Wat. Spec. Perf. § 68; *House v. Dexter*, 9 Mich. 246. The quitclaim deed from Mrs. Rupe to the plaintiff conveyed by assignment the equitable right of Mrs. Rupe in the premises, and all her rights under the contract with Hunt. *Miller v. Whittier*, 32 Me. 203; *Currier v. Howard*, 14 Gray, 511; *Bradbury v. Davis*, 5 Colo. 265, 269; *Fitzhugh v. Smith*, 62 Ill. 486.

In the case last cited it is held that the effect of a deed is made to depend rather upon the intention of the parties than upon the form of the deed.

It must be assumed upon this appeal that the allegations of the complaint necessary to authorize the decree entered, were sustained by proofs upon the hearing. The complaint alleges an agreement by Hunt to convey to Wilhelmine F. Rupe certain definitely described premises, upon condition that she make certain improvements on said premises; alleges the full and complete performance of such condition by Mrs. Rupe; alleges that Mrs. Rupe conveyed all her interest in said premises to the plaintiff before the bringing of this action; alleges that defendant has not conveyed said premises to Mrs. Rupe, nor to the plaintiff, although requested so to do by Mrs. Rupe before her conveyance to the plaintiff, and by the plaintiff since such conveyance to her. These allegations constitute a cause of action against the defendant, and are sufficient to sustain the decree entered.

From a careful examination of the complaint, we come to the conclusion that the second ground of demurrer is not well taken. *Gilpin Co. v. Drake*, 8 Colo. 586, 591, 9 Pac. Rep. 787.

The objection to the action of the court in imposing five dollars costs against defendant upon overruling his demurrer is not well taken. The payment of this sum by defendant was adjudged under the provisions of section 57 of the Code. The validity of the statute authorizing this action of the court is questioned by counsel for appellant. The validity of the statute was sustained in *Chivington v. Colorado Springs Co.*, 14 Pac. Rep. 212.

The judgment should be affirmed.

We concur: MACON, C.; STALLCUP, C.

BY THE COURT. For the reasons assigned in the foregoing opinion the judgment of the district court is affirmed.

(10 Colo. 309)

MCCAIG and another v. BRYAN.

(*Supreme Court of Colorado.* October 18, 1887.)

1. MINES AND MINING—CONTEST—INSTRUCTIONS.

In an action to try title to a mining claim, the court charged the jury that the plaintiff, in order to recover, must prove that he located his claim "by sinking a shaft at least ten feet from the lowest part of the rim at the surface, showing a well-defined crevice; posting at the discovery shaft the usual notice; placing upon the corners and center of the side lines, stakes, six in all, marked in the usual manner; and record of the claim;" and that if the jury found that the plaintiff proved this, then defendant, in order to make his claim valid, must prove a prior location in like manner. The instruction did not state the requirements of the law as to what the locator of a mining claim must do to make a location, nor did it state the law in regard to marking of the location stakes, or what must be recorded, or when the record must be made, or where; but left the jury to determine the law as well as the fact. *Held*, that the instruction was erroneous.

2. SAME—IMPROVEMENTS—BUILDING—INTENTION OF CLAIMANT.

In an action between claimants of a mining claim, there was evidence to show that the ore-house built on the claim by defendant was placed there for the use and benefit of another claim, and the court submitted to the jury the question of good faith and intention of defendant to make an improvement upon the claim. *Held*, not error. To make a building erected upon a mining claim an improvement, under the law requiring annual labor, it must have been placed there for the purpose of benefiting the claim, and for its improvement.

3. SAME—CREVICE—MINERAL-BEARING ROCK IN PLACE.

The court instructed the jury that plaintiff must prove "that the Apex lode was located by sinking a shaft at least ten feet from the lowest rim at the surface, showing a well-defined crevice." *Held*, that the instruction was erroneous, because it did not submit to the jury the question of fact as to whether the crevice contained mineral-bearing rock in place.

4. SAME—COMPLIANCE WITH MINING LAWS—PROVINCE OF JURY.

Under act of congress of March 3, 1881, authorizing the jury to find that the title to the ground in controversy has not been established by either party, a party claiming the right of possession of any part of the public domain, in an adverse suit, by virtue of a mining location, must establish such right by evidence of a compliance with the state and federal statutes relating to the location and holding of mining claims. And it was proper for the court to submit to the jury to find as a question of fact, from the evidence, whether the defendant had complied with such requirements of the statute.

Commissioners' decision. Appeal from district court, Clear Creek county. *H. W. Hobson* and *Luke Palmer*, for appellant. *Morrison & Fillius* for appellees.

RISING, C. Appellant, as owner of the No. 4 lode mining claim, applied for a patent therefor, and appellees, as owners of the Apex lode mining claim, filed their adverse claim, under the provisions of the statutes of the United States, to that portion of said No. 4 claim which was in conflict with said Apex claim; and within the time required by law, appellees brought this action in support of such adverse claim. The plaintiffs predicate their right to the possession of the premises in controversy upon a full compliance by them with all the requirements of the laws of the United States, and of the state of Colorado, relating to the location of lode mining claims, in the location by them of the Apex lode, and in their complaint allege such compliance, and allege the wrongful entry of defendant upon the premises in controversy, and the wrongful withholding of the same from plaintiffs. The defendant predicates his right to the possession of the premises in controversy upon a full compliance by him with all of the requirements of said laws, in the location and holding of the No. 4 lode by his grantor, prior to the said location of the Apex lode, and by himself as purchaser of said lode, and in his answer to the complaint alleges such compliance. All the material allegations of the answer are put in issue by plaintiffs' reply thereto. There is no denial in defendant's answer of any of the allegations of the complaint relating to the compliance by plaintiffs with all the requirements of the law in the location of the Apex lode.

Upon the trial plaintiffs produced evidence in support of the allegations of their complaint, tending to show a performance of all the necessary acts to make a location of the Apex lode mining claim, and showing the discovery of the lode on the fourteenth day of June, 1882, and the recording of a certificate of location on the twenty-first day of June, 1882. Defendant did not offer any evidence to rebut the evidence of plaintiffs' location of the Apex lode, but produced evidence in support of the allegations of his answer, tending to show a performance of all the necessary acts, except the posting of the proper notice at the point of discovery, to make a location of the No. 4 lode mining claim, and showing the survey of the lode on the eighth day of April, 1880, and the recording of a certificate of location on the twelfth day of April, 1880. Defendant also introduced evidence for the purpose of showing the performance by him, as the purchaser of the No. 4 lode, of the annual labor required by law for the year 1882, and prior to the discovery of the Apex lode by the plaintiffs. The plaintiffs introduced evidence in rebuttal, tending to show that defendant's grantor, in attempting to locate the No. 4 lode, failed to sink the discovery shaft upon the lode to the depth of at least 10 feet from the lowest part of the rim thereof at the surface.

For the determination of this case, it is only necessary to consider the first and third assignments of error.

The first assignment is that the court erred in giving the following instruction to the jury: "The court instructs the jury that the plaintiff, to recover in this cause, is bound to prove—*First*, that the Apex lode was located by sinking a shaft at least ten feet from the lowest part of the rim at the surface, showing a well-defined crevice; posting at the discovery shaft the usual

notice; placing upon the corners and center of the side lines, stakes, six in all, marked in the usual manner; and record of the claim. And if you find that plaintiffs prove this, it then devolves upon the defendant to prove an older location in the same manner; so that the oldest valid claim should hold the ground. This the defendant seeks to do by means of the No. 4 lode; but if you believe—*First*, that the discovery shaft of the No. 4 lode was not ten feet deep from the lowest point of the rim at the surface at the time of the discovery of the Apex lode in June, 1882, then the No. 4 location is invalid and void; and, *second*, if said No. 4 did not at that time show a well-defined crevice, it is void." This instruction is clearly erroneous in several particulars. The statute requires the locator of a mining claim to post at the point of discovery a sign, or notice, containing the name of the lode, the name of the locator, and the date of discovery. The instruction undertakes to tell the jury what the locator is required to do to make a location; and fails to state the requirements of the law correctly. What has been said in relation to the notice is applicable to the instruction as to the marking of the stakes.

That portion of the instruction treating of the record of the claim is too indefinite to mean anything, except that some kind of a record is required. What must be recorded, and when the record must be made, and where, are questions upon which the jury should have been instructed; but upon these questions the jury is left to determine the law as well as the fact. The jury are also instructed that the plaintiffs must prove "that the Apex lode was located by sinking a shaft at least ten feet from the lowest part of the rim at the surface, showing a well-defined crevice." This part of the instruction, which states the law correctly, so far as it goes, is incomplete in not stating what the crevice must contain. Under the instruction as given, the crevice shown by sinking the shaft might be absolutely barren of mineral of any kind, and yet the plaintiffs would have complied with the law as given to the jury; but such compliance would not confer any right upon plaintiffs to the possession of the premises, without the further showing that such crevice contained mineral-bearing rock in place. *Van Zandt v. Argentine M. Co.*, 8 Fed. Rep. 725. It is also barely possible that the instruction might be misleading to the jury, and be by them taken to mean that the locator must not only sink the discovery shaft 10 feet deep from the lowest part of the rim at the surface, as the law requires, but that such shaft must be kept open to that depth. The court erred in giving this instruction.

The court gave the following instruction to the jury at plaintiffs' request: "The court instructs the jury that if you believe, from the evidence, that the building of the ore-house on the surface ground of the No. 4 lode was for the sole use and convenience of the Little Mattie mine, and not intended for the No. 4 lode, then, and in that case, you will not consider such ore-house as improvements on the No. 4 lode, unless you further find, from the evidence, that the ore-house was built in good faith, to make a permanent improvement on the No. 4 lode." The third assignment of error is based upon this instruction.

The only objections urged against the instruction by counsel in their argument which call for any discussion are—*First*, that the plaintiffs having failed to plead specially the non-performance of annual labor on the No. 4 lode, that question cannot properly be brought into the case; and, *secondly*, that it was error to submit to the jury the question of intention and good faith of the owner in building the ore-house.

We do not think these objections well founded. The defense set up in the answer is that defendant has the better right to the possession of the premises by virtue of a valid location thereof, antedating the location of the Apex lode by the plaintiffs, and by virtue of a full compliance by the defendant and his grantor with the requirements of the statute necessary to continue the right to the possession of the premises so located. The replication puts

in issue all the allegations of the answer upon which the defense is based. To establish his defense, it was incumbent upon the defendant to show not only a valid location of the premises, antedating the location by the plaintiffs, but to also show that the right to the possession had been kept good by a compliance with the statutes relating thereto. On the trial the defendant undertook to show such compliance, by the introduction of evidence relating to the building of an ore-house on the No. 4 lode. The act of congress of March 3, 1881, authorizing the jury to find that title to the ground in controversy has not been established by either party, makes it absolutely necessary that a party claiming the right to the possession of any portion of the public domain in an adverse suit by virtue of a mining location, must establish such right by evidence of a compliance with the state and federal statutes relating to the location and holding of mining claims. *Becker v. Pugh*, 9 Colo. 589, 13 Pac. Rep. 906. The pleadings required proof to be made of a compliance with the requirements of the statute; the policy of the law, without regard to the pleadings, requires such proof to be made. Evidence was introduced tending to show such compliance, and it was proper for the court to submit to the jury to find as a question of fact, from the evidence, whether defendant had complied with such requirements of the statute.

This brings us to the second objection made to the instruction. The jury were instructed that if they believed from the evidence that the ore-house was built for the sole use of the Little Mattie mine, and was not intended for the No. 4 lode, then they should not consider such ore-house as improvements on the No. 4 lode in their estimate of annual labor, unless they should further find from the evidence that the ore-house was built in good faith to make a permanent improvement on the No. 4 lode. We do not think the court erred in so instructing the jury. The argument of counsel is that if an improvement is put upon a claim by the owner, it does not matter what his intentions were in so doing; that the improvement is what the law requires, and that when the improvement is made the government is satisfied without inquiring into the intentions of the owner in making such improvements. The argument rests upon the assumption that the ore-house was an improvement, and that the jury were only required to determine with what intention it was put on the claim.

The question submitted to the jury for determination was whether an improvement had been put on the claim, and they were told that, in determining whether an ore-house built on the claim was an improvement under the law relating to annual labor, they might consider the good faith and intention of the owner in having it built. To make a building erected on a mining claim an improvement, under the law requiring annual labor, it must have been placed there for the purpose of benefiting the claim, and for its development. *Smelting Co. v. Kemp*, 104 U. S. 636-655. It is absurd to say that a building erected on a mining claim is an improvement on such claim, when such building is not, and was not intended to be, of any use or benefit to the claim. That which does not, and was not intended to, improve the claim, is not an improvement within the meaning of the statute.

The judgment should be reversed.

We concur: STALLCUP, C.; MACON, C.

BY THE COURT. For the reasons assigned in the foregoing opinion the judgment of the district court is reversed.

(10 Colo. 272)

CHARLES v. AMOS.

(Supreme Court of Colorado. October 18, 1887.)

1. **ATTACHMENT—NON-RESIDENT—INTENTION IN LEAVING STATE—OPINION OF WITNESS.**
 Witnesses in an attachment suit against a non-resident testified that they knew defendant was coming back to the state, and that their knowledge was derived from what defendant told them, from his letters, and from their knowledge of his business. *Held*, that their knowledge was but a conclusion drawn from the declarations of defendant, and not proper testimony.

2. **SAME—INTENTION AT TIME OF LEAVING STATE IMMATERIAL.**
 Plaintiff in his affidavit in attachment alleged the non-residence of defendant. Subsequently to levying the attachment defendant returned to the state. On the trial, for the purpose of showing that he was not a non-resident at the time of levying the attachment, he offered evidence of his intention at the time he left the state to return to it. The trial court refused to admit the testimony. *Held*, that the intentions of the defendant at the time he left the state might not have been his intentions at the time of levying the attachment; that, whatever they were, they were immaterial, and the testimony was properly excluded.

3. **ACTION—BEFORE JUSTICE—IN WHAT TOWNSHIP BROUGHT—NON-RESIDENTS.**
 Gen. St. Colo. 1883, § 1932, provides that "suits before justices shall be commenced in the township in which the debtor resides, unless the cause of action accrued in the township in which the plaintiff resides, in which case the suit may be commenced where the cause of action accrued or is specifically made payable." *Held*, that the statute does not apply to non-resident debtors.

4. **NOVATION—CONSENT OF CREDITOR NECESSARY.**
 An agreement between defendant and his wife, to the effect that she would assume and pay the indebtedness of defendant to plaintiff, does not release defendant where plaintiff was not a party to the agreement.

5. **APPEAL—WAIVER OF OBJECTION TO JURISDICTION OF JUSTICE.**
 Defendant in an attachment suit objected to the jurisdiction of the county court, on the grounds that the justice, before whom the case was first tried, did not cause notice of the suit to be published as required by law; and that the constable did not retain the summons put into his hands for serving until the date of the trial. *Held*, that by filing his appeal-bond in the appellate court, the defendant waived objection to the jurisdiction of that court.

Commissioners' decision.

Appeal from Jefferson county court.

On November 19, 1883, Amos brought suit against Charles before a justice of the peace of Jefferson county, and on the same day a summons was issued by said justice, which on the twenty-third day of the same month was returned by the constable with the indorsement thereon, "Defendant not found." At the same time, Amos filed an affidavit in attachment before the justice of the peace, alleging, among other grounds, the non-residence of Charles in Colorado, upon which a writ of attachment was issued, and on the twenty-third day of November one Charles Lemsky was attached as garnishee. On November 28th, Lemsky appeared before the justice of the peace, and answered as garnishee, admitting his indebtedness to Charles in the sum of \$200, whereupon the justice continued the cause until the eighth day of December, on which last date (the defendant not appearing,) he rendered judgment against Charles for \$80, and costs of suit; and against Lemsky, as garnishee, for \$200. During the continuance of the cause from November 28th to December 8th, no notice was posted as required by section 2019, Gen. St. From this judgment Charles appealed to the county court of Jefferson county.

There were no written pleadings in the case in either court, but before the trial of the cause in the county court, and on the twenty-third day of January, 1884, counsel for defendant, Charles, moved to dismiss the cause upon the following grounds: "*First*. The justice of the peace who rendered the judgment in the above-entitled action had no jurisdiction of the defendant or of the cause of action. *Second*. This court has not jurisdiction to try this case on appeal, and to enter up judgment against the defendant. *Third*. The defendant did not at any time reside in the township or precinct wherein the

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suit was commenced, nor did the cause of action accrue in that township, nor was the same made payable there. *Fourth.* There was no summons in this action ever served on the defendant. *Fifth.* The defendant resided in the precinct of Morrison, where the cause of action accrued, and at the time of the commencement of this action, and long before." Which motion was overruled, and defendant duly excepted. The cause was then set for trial by the court, against the plaintiff's consent.

Upon the trial of the action; after the plaintiff had rested his case, defendant moved for a nonsuit upon the following grounds: "*First.* That the plaintiff had failed to show that the court had jurisdiction either of the cause of action, or of the defendant, or of his property. *Second.* It has not been shown that the defendant resides in the township or precinct in which suit was commenced, nor that the cause of action accrued in the township where the plaintiff resides, or that the cause of action was specifically made payable in the township where the suit was commenced; but, on the contrary, the evidence shows that the cause of action accrued in the township of Morrison, where the plaintiff and defendant both resided at the time, and in a different precinct from that where the suit was commenced. *Third.* The plaintiff has failed to show that the defendant had been served with summons, but, on the contrary, the return of the constable shows that no service was had on defendant. *Fourth.* There was no property attached under the writ of attachment, nor was there a copy of the writ served upon the defendant, or any other person, but the return of the constable indorsed on the writ shows that there was 'no property found.' *Fifth.* It has not been shown, either by the transcript of the justice of the peace or otherwise, that any affidavit had ever been made and presented to the justice that the defendant resides without the state of Colorado, and cannot be found therein, so that personal services of process cannot be had on him, or that he conceals himself, or that he stands in defiance of the officer with intent to prevent service of process upon him. *Sixth.* It has not been shown that the justice of the peace who rendered judgment in this case against the defendant, ever made an order of publication, or caused notice of the attachment to be published by posting three notices of the levy of said attachment, or of the day and hour at which the trial of the cause would be had at his office, or that any such notices were ever posted for ten days, or any other time prior to the day of trial. *Seventh.* That the constable did not retain the summons until the day of trial, but returned the same and it was filed with the justice of the peace on the twenty-eighth day of November, 1883." Which motion was also overruled, and defendant excepted. Defendant then offered testimony, and the court rendered judgment against the defendant in the sum of \$80, and costs, from which defendant appealed.

Joseph Mann, for appellant. *A. H. De France*, for appellee.

MACON, C. Appellant assigns 13 errors in this case. The second assignment goes to the alleged admission of improper testimony for the plaintiff. The record fails to show that any improper testimony was admitted by the court. All of plaintiff's testimony was proper, relevant, and material, provided the court had jurisdiction of the cause.

The third assignment is based upon the refusal of the court to permit the witness to testify what were Charles' intentions in leaving Morrison. Charles' intentions in the premises were immaterial, and, whatever they may have been, they could not affect the case. The evidence was offered for the purpose of showing that Charles was not a non-resident of this state when the attachment was issued; but if one man could be allowed to testify to the intentions of another, instead of being confined to a statement of facts or declarations from which intent may be inferred, this offer of defendant should not have been allowed, because Charles' intent when he left Morrison could not prove what his intent was when the writ of attachment was issued. His

letter to Amos, from Goshen, N. C., dated December 3, 1883, shows beyond dispute that he had given up all expectation of returning to Colorado.

The fifth assignment has no merit; it is: "The court erred in striking out the testimony of L. E. Charles and Charles Lemsky, witnesses, wherein they state that they know Mr. Charles is coming back to Morrison." Suppose it be admitted that Charles did contemplate returning to Morrison. These witnesses did not pretend to know or say what his object in returning was; they did not even intimate that he meant to reside in that or any other place in Colorado upon his return. The witness Mrs. Charles says: "I know Mr. Charles is coming back again to Morrison. I was well acquainted with Mr. Charles' business up to the time he left." She does not pretend to say he was coming back to reside there; and on cross-examination says, her knowledge of this fact is derived from what he told her before he went away, and from his letters. Her pretended knowledge was but her conclusion from the declarations of Charles, the defendant, and were not proper testimony. Lemsky's knowledge is not better founded, and the court did right in striking it out.

The sixth assignment is: "The court erred in rejecting other proper testimony on the part of defendant;" and upon that it is sufficient to say that the record shows no error of the court in this particular.

The eighth, ninth, tenth, eleventh, twelfth, and thirteenth assignments all go to the same point, namely, that upon the evidence the judgment should have been for defendant instead of for the plaintiff. Assuming the jurisdiction of the court, there can be no pretense that defendant was entitled to judgment; upon the whole evidence, there can be no doubt of the fact of his indebtedness to plaintiff, and his letter of December 3d, to Amos, is a clear admission of such indebtedness; the only excuse for not paying it being that "what I once called my wife agreed before more than a dozen witnesses to assume all indebtedness against the shop." With this agreement Amos had no connection, and by it he was not bound. It was, therefore, no defense to the action, and the court did not err in rendering judgment against defendant upon the evidence.

The first, fourth, and seventh assignments challenge the jurisdiction of the justice of the peace to render the judgment appealed from, as well as the jurisdiction of the county court. This objection to the jurisdiction rests upon three grounds: *First*, that the defendant did not at the commencement of the suit, nor at any time, reside in the township where the suit was commenced; *second*, that the justice did not cause notice of the suit to be published as required by law; and, *third*, that the constable did not retain the summons put into his hands for service until the date of the trial of the cause. The first ground has been disposed of by this court in *Wagner v. Hallack*, 3 Colo. 182, where it is held that the statute in question does not apply to non-resident debtors.¹ The second and third grounds relied on by appellant have also been before this court, and disposed of adversely to the view advanced by appellant. In *Wyatt v. Freeman*, 4 Colo. 14, it is held that by filing his appeal-bond in the appellate court, appellant enters his appearance therein, and cite with approval *Swingley v. Haynes*, 22 Ill. 216, and *Railroad Co. v. McCutchin*, 27 Ill. 11, in which cases it is held that, though the justice had no jurisdiction of the person of the appellant, by appealing and filing his appeal-bond he brings himself within the jurisdiction of the appellate court. The Illinois statute, which these cases construe, is substantially, in terms and meaning, identical with sections 64 and 65 of our justice and constable act.

¹Gen. St. Colo. 1883, § 1932: "Suit shall be commenced before justices in the township in which the debtor or person sued resides, unless the cause of action occurred in the township in which the plaintiff resides, in which case the suit may be commenced where the cause of action accrued or is specifically made payable."

There was no error in the proceedings of the county court, and the judgment should be affirmed.

We concur: STALLCUP, C.; RISING, C.

BY THE COURT. For the reasons assigned in the foregoing opinion the judgment of the county court is affirmed.

(10 Colo. 301)

McPHEE and another, Copartners, etc., and another, Sheriff, etc., v.
O'ROURKE.

(*Supreme Court of Colorado. October 18, 1887.*)

1. HOMESTEAD—DESIGNATION—"HEAD OF FAMILY."

Sections 1, 4, of the Colorado statute concerning homesteads, provide that every householder, being the head of a family, shall be entitled to a homestead exempt from execution and attachment, and that, when any person dies seized of a homestead and leaves a widow, husband, or minor children, such survivor shall be entitled to the homestead. The statute provides that the property to be exempted shall be designated in a certain manner, but contains no provision excepting from its operation creditors whose claims are for materials used in improving the property before such designation. *Held*, that a wife, living with her husband, and owning real estate, which she and her husband occupy as a home, is "the head of a family," under the statute, and is entitled to the exemption as against such creditors, and that, although the designation is for the purpose of preventing creditors from collecting their debts, the exemption may still be claimed.

2. CREDITORS' BILL—CONVEYANCE FROM ONE JUDGMENT DEBTOR TO ANOTHER.

If one of two judgment debtors conveys property to the other, such conveyance is not prejudicial to the rights of the judgment creditor, and cannot be made the basis of a creditor's bill to set aside the conveyance as fraudulent.

Commissioners' decision. Error to superior court of Denver.

Bridget O'Rourke, defendant in error, who was plaintiff below, filed her complaint there on the twenty-seventh day of April, 1883, in which she alleged facts, showing ownership and possession of a certain house and lot in the city of Denver, county of Arapahoe, under the value of \$2,000; and that she had been seized and possessed thereof from the first day of February, 1883; that during all that time she had been, and still remained, a householder, and head of a family, and so occupied the said premises, together with her family, as a homestead; that on the fifth day of February, 1883, she had duly designated the said premises as a homestead, by proper entry upon the records of the said county, where the deed conveying said property to her was recorded; that on the seventeenth day of February, 1883, a judgment had been rendered against her jointly with her husband, Dennis O'Rourke, in favor of the said McPhee & McGinnity, by a justice of the peace of said county, and a transcript thereof duly filed and entered in the office of the clerk of the district court of said county, so that on the said seventeenth day of February the judgment stood as a judgment of that court, and, accordingly, execution thereon then issued to the said Spangler, sheriff of the said county, who by virtue thereof then levied upon said premises, and on the twelfth day of March following, sold the same, by virtue thereof, to said McPhee & McGinnity for the sum of \$147.90, and accordingly issued to them a certificate of sale.

The relief asked was that said sale be set aside and held for naught, and that the said sheriff be enjoined from making a deed under the said certificate. Answer thereto was filed as follows: "They admit that the plaintiff, at the times mentioned, had the legal title to the premises described in the complaint, but they say that the equitable title belongs to Dennis O'Rourke, the husband of the plaintiff—in this, that the money with which said premises were purchased was the money of the said Dennis O'Rourke, and that he caused the title to said premises to be placed in the plaintiff, that he might,

and with intent to, defraud, hinder, and delay his creditors. They deny that, at the times mentioned in the complaint, the plaintiff, then or at any other time, was a householder or the head of a family; on the contrary, they aver that the plaintiff is, and was at the time mentioned, a married woman; and is and was the wife of Dennis O'Rourke, and that the said husband occupies the said premises, both now and at all times previous hereto, as the head of the family, and he maintains and provides for said family, and the plaintiff is now, and was at the times mentioned in the complaint, and at all other times, simply a member of the said family, and of which her said husband, Dennis O'Rourke, was and is the head. They deny that the said plaintiff has occupied said premises at any time heretofore, or does now occupy them with her family; but they admit that the said Dennis O'Rourke has, as head of the family, occupied said premises with his family, and that the plaintiff is a member thereof. They admit that the plaintiff did on the fifth day of February, 1883, cause the word 'homestead' to be entered of record at the page, in the margin of the record book, in which the deed conveying to her the legal title to said premises was recorded, and that the same was signed and attested as alleged; but they aver that, long before the time when said claim of 'homestead' was entered as aforesaid, the defendants McPhee & McGinnity had obtained the judgment mentioned in said complaint, and the plaintiff, well knowing the premises, caused said entry of 'homestead' to be made with a fraudulent intent to cheat, hinder, and delay her creditors, and particularly with the fraudulent intent to prevent the said McPhee & McGinnity from collecting their said judgment. They deny that the sale and certificate of purchase in complaint mentioned, or either of them, are invalid, and they also deny that the same or either of them is a cloud on plaintiff's title. And the defendants further aver that the debt upon which the said judgment was obtained was for lumber and other building material, all of which was sold by the defendants McPhee & McGinnity to the plaintiff and her husband, for use in and upon the said premises, and the said lumber and other material was all used by plaintiff and her said husband in the erection and repair of buildings, and other lasting and valuable improvements thereon, and the credit was given by said defendants to the plaintiff and her husband on the faith and credit of the said premises being liable to execution and sale to satisfy the said debt."

To which answer a general demurrer was filed and sustained; and, the defendants below abiding by their answer, judgment and decree were entered according to the prayer of the complaint as follows: "This cause coming on to be heard on the plaintiff's complaint, the answer of defendants, and the plaintiff's demurrer to the defendant's answer, and having been argued by counsel for the respective parties: Now, therefore, on consideration thereof, it is ordered, adjudged, and decreed, and the court doth hereby order, adjudge, and decree, that the facts alleged in said defendants' answer are not sufficient to constitute a defense to plaintiff's cause of action, and that the demurrer of the plaintiff thereto be, and the same is hereby, sustained. And the defendants having elected to stand by their said answer, and having refused to answer further, it is further ordered, adjudged, and decreed by the court that the sale of said premises described in plaintiff's complaint, to-wit: Lot No. twenty-six, (26,) in block numbered forty-five, (45,) in Evan's addition to the city of Denver, in the county of Arapahoe, and state of Colorado, and house and improvements thereon, to the defendants McPhee & McGinnity, by the defendant Spangler, on the twelfth day of March, A. D. 1883, as set forth in plaintiff's complaint, be, and the same is hereby, set aside, and declared null and void; and that the said judgment of said defendants McPhee & McGinnity be, and the same is hereby, declared to be no lien upon the above-described premises, and that the defendant Michael Spangler, sheriff of Arapahoe county, and his successor or successors in office, be, and

they are, perpetually enjoined and restrained from making any deed of the said above-described premises to the defendants McPhee & McGinnity, or to their assigns, in pursuance of the sale thereof, made by said defendant Spangler to said defendants McPhee & McGinnity, on the twelfth day of March, A. D. 1883, as alleged in plaintiff's complaint; and that the plaintiff have, and recover of and from said defendants, the costs of this suit to be taxed, and have execution therefor."

From which the cause is brought here by writ of error.

Markham, Patterson & Thomas, for plaintiffs in error. *J. P. Brockway*, for defendant in error.

STALLCUP, C. By the record and argument three questions are presented for consideration:

1. Under our statute concerning homesteads, has the wife the character of a head of the family, while occupying with her husband her property as a home, to enable her to designate and affect such home with the character of a homestead, so as to exempt it from seizure and sale for the joint debt of herself and husband? The first and fourth sections of the statute are as follows:

"Section 1. Every householder in the state of Colorado, being the head of a family, shall be entitled to a homestead not exceeding in value the sum of \$2,000, exempt from execution and attachment arising from any debt, contract, or civil obligation entered into or incurred after the first day of February in the year of our Lord 1868."

"Sec. 4. When any person dies seized of a homestead, leaving a widow, a husband, or minor children, such widow, or husband, or minor children shall be entitled to the homestead."

In the enactment of these provisions the legislature recognized a married woman as a person possessing to some extent the character of a householder and head of a family, though living with her husband. The purpose of the statute is to preserve the home for the family. When the wife is the owner of the property occupied as the home of the family, she is the only one capable of investing it with the exemption character provided by the statute. Under our statutes the married woman never did occupy the dwarfed position that afflicted her under the common law. Since the act of our legislature of 1874 the married woman has been without disability concerning her property and property rights; and, at the time of the passage of the homestead act in 1868, she owned and controlled all property she brought to the marriage, independent of her husband; had power to carry on business in her own name, to sue and be sued as if single, and to acquire property by her earnings and business, and to hold the same, as if single. So we conclude that, in the nature of things, and in the legislative mind, the husband and wife both possess the character of a householder and head of a family, at least to the extent to enable either of them owning the home they occupy as such, to designate it as a homestead, and that the statute, as is clearly apparent from the language used in section 4, above quoted, is expressive of such view. *Thomp. Homest.* §§ 220-222.

2. Should the act designating the homestead operate as against a creditor for material used in improvements upon the property before it was so designated? As to this question, it is sufficient to say that there is no proviso in the statute against such operation. By failing to take the steps necessary to secure a lien upon the premises, under the provisions of our mechanic's lien act, the right to subject the premises to such debt was lost.

3. Does it vitiate the homestead character of the property when the designation thereof as a homestead was for the purpose of preventing the creditor from collecting his debt? The purpose of the designation of the property as a homestead is to put it out of the reach of creditors while occupied as a home; and such purpose, and the consequent result of such designation,

are warranted by the statute, though occurring after the debt was contracted, and immediately before the creditor had attached or levied upon the property, and though the debtor had no other property liable for his debt. *Barnett v. Knight*, 7 Colo. 365, 3 Pac. Rep. 747. In no way does the statute rest upon the principles of equity, nor in any way yield thereto. By it we see the policy of the state is to preserve the home to the family, even at the sacrifice of paramount importance. The exemption under the homestead act being confined to debts contracted after the passage of the act, it may well be said that there can be no superior or controlling equity in the premises, and he who gives credit does so with knowledge of the statute, and the purpose and policy thereof, as well as the additional risk thereby occasioned. And whether the title to the home be in the maternal or paternal head of the family, they occupy a position in relation to the state making it more important that such home should be preserved to them, than that it should be taken to pay the legal demands against them collectible by attachment and execution. The duty and relation to the state in such case are of higher import than the duty and relation to such creditor. In the first section of his work on Homesteads and Exemptions, Mr. Thompson reproduces some expressions from eminent sources upon this view, as follows: "The late Senator Benton, advocating in the United States senate the adoption of a general homestead policy, said: 'Tenantry is unfavorable to freedom. It lays the foundation for separate orders in society, annihilates the love of country, and weakens the spirit of independence. The tenant has, in fact, no country, no hearth, no domestic altar, no household god. The freeholder, on the contrary, is the natural supporter of free government, and it should be the policy of republics to multiply their freeholders, as it is the policy of monarchies to multiply their tenants.' 'There is,' said TARBELL, J., in a case in Mississippi, 'unquestionably, no greater incentive to virtue, industry, and love of country than a permanent "home," around which gather the affections of the family, and to which the members fondly turn, however widely they may become dispersed.' 'The law,' said the supreme court of Iowa, in an early case, 'is based upon the idea that, as a matter of public policy, for the promotion of the prosperity of the state, and to render independent and above want each citizen of the government, it is proper he should have a home,—a homestead,—where his family may be sheltered, and live beyond the reach of financial misfortune, and the demands of creditors who have given credit under such law. And this policy is characterized as "liberal" and "benevolent." ' "

It is also contended by counsel for plaintiff in error that this property was acquired by the defendant in error, Bridget O'Rourke, by a conveyance from her said husband, Dennis O'Rourke, who was jointly indebted with her on the said demand of the said McPhee & McGinnity; that such conveyance was without consideration, and in fraud of his creditors, the said McPhee & McGinnity; and that such conveyance should be held void, and the property applied to the discharge of his said debt; that it was not rightfully her property when she designated it as a homestead. Such are the premises for a creditor's bill in equity; the consideration of which is impracticable in this action, by reason of the want of Dennis O'Rourke as a party to the action. *Allen v. Tritch*, 5 Colo. 222. But even had the husband, Dennis O'Rourke, been made a party, the legal status of the parties here would remain unchanged. The judgment of plaintiffs in error was against both the husband and wife, Dennis and Bridget O'Rourke. The conveyance of the property from one to the other could in no way prejudice plaintiffs in error in the collection of their judgment, as it is not such a conveyance as one conveying the property to a person whose property would be beyond the reach of the judgment. Besides, it has been held that when a conveyance to the wife is made or caused to be made by the husband, for the purpose of placing the home beyond the reach

of his creditors, the wife is not precluded thereby from claiming the benefit of the homestead statute, even as against such creditors. *Orr v. Schraft*, 22 Mich. 260; *Edmonson v. Meacham*, 50 Miss. 39.

The decree should be affirmed.

We concur: MACON, C.; RISING, C.

BY THE COURT. For the reasons assigned in the foregoing opinion the decree of the superior court of the city of Denver is affirmed.

(10 Colo. 316)

EVANS and others, impleaded, etc., v. YOUNG and another, Copartners, etc.

(*Supreme Court of Colorado*. October 18, 1887.)

1. MECHANIC'S LIEN—PURCHASE BY OWNER OF FEE OF LEASEHOLD SUBJECT TO.

A., being the owner of an entire estate, leased the same to B. for a term of years, who erected a building on the premises. A mechanic's lien was filed against the leasehold interest. B. subsequently sold his leasehold interest to A. Held, that the entire estate became subject to the lien.

2. JUDGMENT—BY DEFAULT—PRESUMPTION AS TO PROPER ENTRY.

When the record does not show that a default was not properly entered, the presumption arises that the required notice was given.

Commissioners' decision. Appeal from district court, Arapahoe county.

This action was commenced in the county court of Arapahoe county, by appellees, Young & Savin, against the Denver Natatorium & Physical Culture Association, the Colorado Mortgage & Investment Company, James H. Jones, and appellant John Evans. The complaint was filed April 1, 1882. All the defendants were duly served with summons. The complaint was upon an account of \$540, for building materials sold and delivered to the said natatorium association about the last of August, 1881, for and used in the building then being erected by the said association upon lots 29 and 30, in block 48, East division of Denver, said county, in which premises the said association then held a leasehold estate, upon a lease from the said John Evans. Said complaint also showed a mechanic's lien upon the said account, in favor of said Young & Savin, against the said leasehold estate; that the said mortgage company and James H. Jones were made parties, for that a deed of trust conveying the said leasehold estate to James H. Jones had been executed, by the said association, for the purpose of securing a loan from the said mortgage company, and said John Evans was made party, for that he was the owner of the estate subject to said leasehold estate, and was supposed to have acquired the said leasehold estate. On April 6, 1882, answer of said mortgage company and James H. Jones was filed, in which answer it was set forth "that, before the commencement of the said action, these defendants executed and delivered to the said John Evans an assignment of all the right, title, and interest theretofore held by these defendants in the lease of the premises described in the complaint, and these defendants claim no interest or estate in the premises mentioned." Upon which disclaimer, on the nineteenth day of May, 1882, the said defendants were dismissed from said action, upon the motion of the said Young & Savin, plaintiffs there. On the seventeenth day of April, 1882, for want of answer, demurrer, or motion, default was duly entered against said association. On the twenty-first day of June, 1882, said John Evans filed his answer, so that said Evans was the only contending defendant in the action. Upon the hearing of the cause, the court entered final judgment against the said association on the default, to the extent of limiting the lien to the said leasehold estate, and limiting the said leasehold estate to a term of five years, and for the amount claimed; and decreed in favor of the said Evans, and against the said Young & Savin, from which decree appeal was taken to the

district court by the said Young & Savin, and the cause was there referred to a referee to find and report a decree.

From the evidence it appears that on the fifth day of July, 1881, said Evans executed a lease for a term of 10 years of the said premises to said association. The terms of the lease were such that the lessee was required to pay \$125 per month rental, the taxes on the premises, and to erect a certain building thereon, and provided for the forfeiture of the estate, in case of failure to perform. The association at once entered into the possession and commenced the erection of the said building thereon, and about the last of August of the same year the said materials were sold, and delivered by said Young & Savin to said association, to and for the erection of said building; and in due time notice of a mechanic's lien was filed and asserted against the said premises. The building progressed, but not to completion.

On the twentieth day of September of the same year the said association borrowed from the said mortgage company the sum of \$3,000, and conveyed its leasehold estate in the premises to said James H. Jones in trust for security for such loan, and at the same time assigned and delivered to the said mortgage company the said instrument of lease of said premises for the same purpose. The said association finally failed to pay the said loan at maturity, and failed to complete said building, and in the month of March, 1882, the said debt being due and unpaid, the said deed of trust was duly foreclosed, and the said mortgage company was the purchaser at such sale, and received the deed from the said trustee accordingly, and thereby became vested with the said leasehold estate, subject to the said mechanic's lien claim. And on the first day of April, 1882, the said mortgage company paid to the said Evans all the rentals at that time due, after which, and on the same day, and for the sum of \$3,000, paid by said Evans therefor, the said mortgage company sold, assigned, and delivered to the said Evans the said leasehold estate, and also delivered the said instrument of lease, with a written assignment thereof on the back thereof, and also a bill of sale of material, etc., upon said premises; so that the said Evans then and there became vested with the said leasehold estate, and improvements thereon, together with the possession of said premises.

It also appears that the said lien had been duly asserted and filed, and that the said action had been commenced in due time; that, at the time of the transfer to the said Evans, said mechanic's lien claim was spoken of, it being stated on the part of the said mortgage company that they thought the said deed of trust to said mortgage company was prior in time to the said mechanic's lien. It also appears that, after the answer of the said mortgage company, and previous to the hearing and final decree in the cause, that the said mortgage company had purchased the entire premises from the said John Evans. The referee's findings and report were as follows:

"MARCH 18, 1884.

"Finding of referee as follows: *First.* That plaintiffs, Young & Savin, furnished the materials charged for, amounting in value to the sum of \$540.24, to the Denyer Natatorium & Physical Culture Association, to be used by that corporation in the building then in process of erection by it on lots numbered 29 and 30, in block 48, East Denver, then held by said corporation under lease by defendant John Evans for a term of years, and that said materials were used in said building. *Second.* That while said lease was in full force, and said lots were held thereunder, plaintiffs, in substantial compliance with the statute, filed in the office of the recorder of Arapahoe county notice of their claim, and of their purpose to claim a lien therefor upon the said lots and building. *Third.* That subsequently defendant John Evans, who held the fee in said lots, with notice of the lien as claimed by plaintiffs, purchased the term of said corporation held as aforesaid, and paid therefor the sum of \$3,000, and so merged the leasehold in the fee. As matters of law

he finds that plaintiffs had a valid lien upon the term and interest of the said corporation in the said lots, and building thereon, to secure the payment of their said debt, and that defendant John Evans took the said term and interest under his purchase aforesaid charged with the said lien; that the plaintiffs have now a lien upon said lots so held by said Evans, at least to the extent of \$3,000, the amount paid for the claim of said corporation to secure their said debt, to-wit, the sum of \$540.24, with interest thereon at the rate of 10 per cent. per annum from the first day of September A. D. 1881, and the costs of this suit. To foreclose and enforce this lien a decree may be prepared. It appears from the proof that the Colorado Mortgage & Investment Company, Limited, has purchased and now owns the said lots, (taking them with notice of the said lien, as it would seem,) but, said corporation not being a party to the suit, its rights will be reserved in the decreee.

[Signed]

"JAMES A. DAWSON, Referee.

"DECREE OF THE REFEREE.

"And this cause having come on to be heard upon the amended bill of complaint herein, and the answer thereto of the defendant John Evans, the default of the defendant the Denver Natatorium & Physical Culture Association having been heretofore duly entered of record, and upon the proofs taken in this cause; and it appearing to the court that the defendant the Denver Natatorium & Physical Culture Association did, on and before the first day of September, A. D. 1881, hold and possess a certain leasehold interest and estate in and to the lots numbered 29 and 30, in block 48, in the East division of the city of Denver, county of Arapahoe, and state of Colorado, which said lease was made by the defendant John Evans, who appears to have then been the owner of the fee-simple title to said lots, which said leasehold estate extended from the fifth day of July, A. D. 1881, for, during, and until the fifth day of July, 1891; and it further appearing to the court that the plaintiffs furnished lumber for the construction of a certain building partially erected by the said defendant the Denver Natatorium & Physical Culture Association, on the said lots 29 and 30, in block 48, under a certain contract with the defendant the Denver Natatorium & Physical Culture Association, by which contract the said defendant the Denver Natatorium & Physical Culture Association agreed to pay to the plaintiffs the sum of \$540.24, on the second day of September, A. D. 1881, at which date the last of said lumber was delivered by the plaintiffs upon said lots to the said defendant the Denver Natatorium & Physical Culture Association; and it further appearing to the court that the plaintiffs did, within forty days from the date when the last of said lumber was furnished to the said defendant the Denver Natatorium & Physical Culture Association, duly file its certain notice of a mechanic's lien on the said lots 29 and 30, in manner and form provided by law, and that this action was commenced within six months thereafter; and it further appearing to the court that on the twenty-eighth day of September, 1881, the said leasehold estate so held and possessed by the said defendant the Denver Natatorium & Physical Culture Association was duly assigned and transferred to the Colorado Mortgage & Investment Company of London, Limited, and that thereafter, and on or about the first day of April, 1882, the said lease and leasehold estate was by the said Colorado Mortgage & Investment Company duly assigned and transferred to the said defendant John Evans; and it further appearing to the court that the said defendant John Evans, on the first day of April, 1882, still continued to be the owner of the fee-simple title to said lots, and that, by the said assignment or transfer, the leasehold estate formerly held by the said defendant the Denver Natatorium & Physical Culture Association became merged into the fee-simple estate; and it further appearing to the court that the rights of the plaintiffs under their said notice of lien have never been legally foreclosed or destroyed; and the cause having been argued by counsel, and the court being

now sufficiently advised in the premises: therefore it is ordered, adjudged, and decreed that the plaintiffs do have and recover of and from the Denver Natatorium & Physical Culture Association the sum of \$682.15, and costs of suit. And it is further ordered, adjudged, and decreed that the said judgment be a lien on the said lots 29 and 30, in block 48, East Denver, Arapahoe county, Colorado; and that, in the event that the said sum is not paid forthwith, execution issue therefor; and that the sheriff of Arapahoe county shall be, and is hereby, directed to levy the said execution upon the said lots 29 and 30, and to sell the same, or as much thereof as may be necessary for the purpose of paying and discharging the said judgment, together with costs of suit. All rights of the Colorado Mortgage & Investment Company of London, Limited, not affected by notice shown in the record of this cause, are hereby reserved. I report the foregoing decree.

"JAMES A. DAWSON, Referee."

To which findings and report the following exceptions were filed on the part of the said Evans: "*First*. Because the findings of the said referee, and each of them, are contrary to the evidence introduced before the said referee. *Second*. Because the said findings, and each and every of them, are contrary to the law of the case. *Third*. Because the said referee permitted testimony to be introduced on the part of the plaintiffs contrary to law, and against the objection of the said defendant. *Fourth*. Because the said referee refused to permit the said defendant to introduce proper and lawful testimony offered in his own behalf. *Fifth*. And for other good and sufficient reasons apparent upon the face of said referee's report."

The exceptions were overruled by the court, and decree entered as reported; from which the cause is brought here on appeal by the said Evans. The errors assigned are as follows: "(1) The court erred in overruling appellant's demurrer to appellee's amended complaint. (2) The court erred in overruling the exceptions of appellant to the report of the referee herein. (3) The court erred in overruling appellant's objection to the following interrogatory propounded by the appellee to the witness Walter P. Miller: 'Please state the substance of those papers which were delivered, as you say, to Captain Gray, as the agent for Gov. Evans.' (4) The court erred in permitting appellees to read in evidence the certain trust deed marked 'Exhibit A,' the resolution of the Denver Natatorium & Physical Culture Association, 'Exhibit B,' and the notice and lease marked 'Exhibit C,' against the objection of appellant. (5) The court erred in permitting the witness Percy Austin to read in evidence, from a certain book purporting to be the record of the proceedings of the board of directors of the said Denver Natatorium & Physical Culture Association, the certain report of August 4, 1881, on page 11 thereof, and in overruling objection of appellant thereto. (6) The court erred in permitting the appellees to read in evidence the answer of Glyn W. E. Griffith, and in overruling objection of appellant thereto. (7) The court erred in permitting appellees to read in evidence a certain lease, set out in folios 232 to 245, and in overruling objection of appellant thereto."

H. C. Dillon, for appellant. John L. Jerome, for appellees.

STALLCUP, C. Counsel for appellant in their argument have arranged the errors assigned under three heads, and have accordingly presented the same for consideration.

1. It is argued that the lessee cannot bind the estate of the lessor with a lien. This proposition may be conceded; but when the lessor, being the owner of the entire estate, subject only to the lease, buys the said leasehold estate, and thereby becomes vested with the entire estate, and possession and control thereof, he does not thereby remove the incumbrance of a third party upon the estate so purchased. By so uniting the two estates, the lesser estate became extinguished by sinking into the greater estate, leaving the lien rest-

ing upon the entire estate, unless the two estates for equitable purposes should be held and treated as being separate and distinct. From the evidence it appears that appellant sold and conveyed the entire estate. Having so done, it may be doubtful if he could thereafter be permitted to treat the leasehold estate and the fee as separate and distinct. *James v. Morey*, 2 Cow. 286; *Koenig v. Mueller*, 39 Mo. 165.

But the two estates, when owned by the same person, are only regarded in equity as separate, when equitable considerations justify or require such action; and since appellant purchased the lease with full knowledge of the lien rights of appellees, and since the leasehold estate was of much greater value than the amount of the lien, as evidenced by the sum paid therefor by appellant, we are of the opinion that no equitable consideration exists requiring us to hold that an absolute merger did not take place. *Smith v. Roberts*, 91 N. Y. 476; *Koenig v. Mueller*, *supra*.

2. It is argued that the decree was invalid as to the Natatorium Association, and consequently invalid as to appellant. This argument rests upon the assumption that judgment was rendered against the association without legal notice of the proceedings after appeal. Assuming that appellant has the right to question this part of the decree, we must declare the objection not well taken. The prayer for the appeal and order of the county court allowing the same are general, and covered the entire decree. Counsel for appellant do not question the right of Young & Savin to take the appeal in this way. They assume that the whole cause, by the appeal, was taken to the district court for a trial *de novo*. The decree in the district court, which is part of the record proper, recites the filing therein of the amended complaint, the answer thereto of appellant, and the entry of default against the association. There is nothing in the record to show that this default was not properly entered, and, in favor of the regularity of the proceedings, the presumption arises that any notice required was given. If notice was not given the association of the proceedings, the record does not show the fact; and, if the record omits or misrecites any material matter, counsel should have procured a correction thereof.

3. It is argued that the decree was not supported by the evidence. It is contended on the part of appellant that the evidence shows that the said building materials were not sold upon credit to the said association, but to one Griffith, and on this account there was no right to a lien. If such were the facts in the case, they might defeat the lien; but, from the evidence adduced, the findings were against this view, and we see no reason to disturb such findings. It is also contended that the building provided for by the terms of the lease was not completed in the time therein specified, and the lease, by its terms, was subject to forfeiture. Be this as it may, the lease never was forfeited, and the leasehold estate never was so terminated, as no forfeiture was ever claimed or asserted by appellant. He preferred to acquire the estate by purchase, after receiving the rental to April 1st; thereby repelling any claim or intention of a forfeiture thereof. He then purchased the leasehold estate, together with the improvements and materials on the premises, and so received possession thereof. It is therefore apparent that he did not acquire the leasehold estate by forfeiture, but by purchase.

The decree should be affirmed.

We concur: MACON, C.; RISING, C.

BY THE COURT. For the reasons assigned in the foregoing opinion the decree of the district court is affirmed.

(2 Cal. Unrep. 768)

FRANKEL v. DEIDESHEIMER. (No. 11,573.)*(Supreme Court of California. June 29, 1887.)***DEED—CONSIDERATION—MARKET VALUE—FRAUD.**

Where the evidence was clear and unequivocal that a deed was made on or within a day or two of October 15, 1883, and there was no evidence to show that the property conveyed had at the time a market value in excess of the amount paid, and there was no evidence of fraud, *held*, that a finding of fact to the contrary, based upon presumptions could not be sustained.

In bank. Appeal from superior court, Sierra county.

Freeman, Bates & Rankin, Hundley, Gage & Ford, S. B. Davidson and Stanley A. Smith, for appellant. *P. Van Clief*, for respondent.

BY THE COURT. We are of opinion that the evidence is insufficient to justify the findings of fact in the court below in the following particulars, viz.: That the location of the Willow quartz lode was made at the request or for the use or benefit of the defendant, Philipp Deidesheimer; that Deidesheimer conveyed an undivided half of the American quartz lode to Busch on the twenty-first of April, 1884, or at any other time than within a day or two of October 15, 1883; that the deed from Deidesheimer was antedated; that the deed was executed or accepted with the intent or for the purpose of hindering, delaying, or defrauding any creditor of said Deidesheimer; that at the time the deed was executed an undivided half of the American quartz lode was of the apparent or market value of \$4,000, or of any sum exceeding \$1; that Deidesheimer transferred any interest in the American quartz lode, or in the Young America Consolidated Mining Company, for the purpose of, or with the intent of, hindering, delaying, or defrauding any creditor; that the consideration for the issuance and delivery of stock to Matilda Deidesheimer and Philipp Deidesheimer was that Busch should convey to any corporation an undivided half of the American quartz lode mining claim; that the issuance and delivery of shares of stock to said Matilda Deidesheimer, and the conveyance by Busch to the corporation, were directed, caused, or procured by said Philipp for any purpose, or at all; that said Matilda, without consideration, assigned or transferred to the defendants Julia and Ritza Betts any shares of stock; that such transfer was made for the purpose, or with the intent, thereby to defraud or cheat plaintiff, or that said Julia and Ritza had notice of such purpose or intent.

The evidence that the deed from Deidesheimer to Busch was executed on or within a day or two of October 15, 1883, is clear and unequivocal, and there is no evidence substantially in conflict therewith; the argument to the contrary is based upon presumptions arising out of presumptions. There is no evidence that at the time of the conveyance the property conveyed had a market value in excess of the amount paid by Busch. The evidence shows that, at the time of the location of the Young America claim, Deidesheimer's name was inserted in the notice of location by Busch as an act of friendship; and that as soon as Deidesheimer made an examination of the ground he declared his intention not to abide by the location, and offered to and did execute to Busch a deed of the property; and that not until some months after the delivery of the deed did the claim have any apparent or market value. We find no evidence of any fraud on the part of either of the defendants; on the contrary, the facts displayed by the evidence show that their transactions were in good faith.

Judgment and order reversed, and cause remanded for a new trial.

(73 Cal. 273)

FOX and another v. STOCKTON C. H. & A. WORKS. (No. 12,043.)*(Supreme Court of California. August 30, 1887.)***PLEADING—DENYING GENUINENESS OF WRITTEN INSTRUMENT.**

Plaintiffs alleged a joint contract by which defendant was to supply them with two harvesters. Defendant admitted the agreement to supply the harvesters, but claimed that it was several, and filed copies of the several agreements. Plaintiffs offered at the trial oral evidence to prove the contract as set up in their claim. Defendant objected on the ground that the plaintiffs had not, as provided in Code Civil Proc. Cal. § 448, filed an affidavit denying the genuineness and due execution of the written instruments. *Held* that, although the plaintiffs admitted the due execution and genuineness of the two contracts pleaded in the answer, yet as the two contracts made with plaintiffs severally would not prove that there might not have been one made with them jointly, there was no admission that the two were the contracts sued on, and that plaintiffs should have been allowed to prove the contract alleged in their complaint.

Department 2. Appeal from superior court, Stanislaus county; WILLIAM O'MINOR, Judge.

W. E. Turner, L. J. Maddux, and D. S. Terry, for appellants. W. L. Dudley and W. M. Gibson, for respondent.

SHARPSTEIN, J. The plaintiffs allege that they are farmers, and jointly interested in the cultivation of land in Stanislaus county; that the defendant, a corporation, in March, 1884, by and through its duly appointed and authorized officers, contracted and agreed with these plaintiffs to manufacture and deliver to them, on or about the ——— day of June, 1884, two 12-foot Shippee combined harvesters, with Shippee & Grattan improvements, at the agreed price of \$3,600; and then and there warranted, covenanted, and guaranteed that each of said harvesters should do and perform good and satisfactory work in the harvesting, cutting, and saving of grain, and that each of said harvesters should give good satisfaction in the doing and performing of the work for which they had been manufactured, to-wit, the harvesting, cutting, and saving of grain in the harvest fields; that relying upon and in consideration of said representations, covenants, agreements, warranties, and guaranties as aforesaid, made by and on behalf of said defendants to these plaintiffs, said plaintiffs did agree to take, receive, and accept said harvesters with said improvements, and pay therefor the aforesaid sum of \$3,600; that on or about the ——— day of June, 1884, said defendant did deliver, in pursuance of said contract, two 12-foot Shippee combined harvesters, with Shippee & Grattan improvements, and these plaintiffs received the same, and thereupon paid to the defendant the aforesaid sum of \$3,600; that the plaintiffs took said harvesters to their grain fields, and, with all proper precautions, aids, and management, undertook to work with said harvesters, but they failed to do any work of any value whatever in harvesting, cutting, or saving grain; and that, after ascertaining that said machines would not do the work which they were guaranteed by defendant to do, the plaintiffs returned them to the defendant, and demanded of defendant the sum paid for them, and the further sum of \$3,000 damages sustained by plaintiffs by reason of the promises aforesaid.

The answer of the defendant admits that it represented to plaintiffs that said machines were of great value in the harvesting of grain; denies that in March, 1884, it contracted to manufacture and deliver to plaintiffs two 12-foot Shippee combined harvesters and Grattan improvements, as alleged in the complaint. Other allegations are denied, which it is unnecessary to enumerate, as the decision of the cause must turn upon the second defense to the action, in which it is alleged that the defendant never entered into any contract or agreement with the plaintiffs jointly, but contracted with each of them separately; that it sold and delivered one machine to Fox, and afterwards another to Tilton; that the contracts of sale and delivery are in writ-

ing, and that copies of them are attached to the answer, and made part thereof. One of the copies attached purports on its face to be an agreement between the defendant and plaintiffs for the manufacture and delivery by the defendant to Fox of one 12-foot Shippee combined harvester, with Shippee & Grat-tan improvements, for the sum of \$1,800, gold coin of the United States. This is followed by other stipulations, which it is unnecessary now to consider. The other copy attached purports to be a contract between the defendant and the plaintiff Tilton, of like import with that between the defendant and plaintiff Fox.

On the trial the plaintiffs were proceeding to prove by oral testimony the contract as alleged in their complaint. The defendant objected on the ground that plaintiffs had not, as provided in section 448, Code Civil Proc., filed an affidavit denying the genuineness and due execution of the written instruments of which copies were contained in the answer. As we construe the questions, objections, and rulings, the court regarded the plaintiffs as occupying the position they would have occupied if they had declared upon or proved a contract or contracts in writing similar to those contained in the answer. This we think to be untenable. The plaintiffs admitted the genuineness and due execution of the instruments as contained in the answer; but did not, as we view it, admit that those were the contracts under which they purchased the machines mentioned in the complaint. The plaintiffs allege a contract made with them jointly. Two contracts made with them severally would not conclusively prove that there might not have been one made with them jointly. The due execution and genuineness of the instruments were admitted, but it was not admitted that those were the contracts sued on. The plaintiffs must be deemed to have denied all the other allegations of the answer. We think they should have been permitted to prove the contract alleged in their complaint, and that the court erred in denying them the right to do so; for which reason the judgment and order denying them a new trial are reversed, and the cause is remanded for a new trial.

We concur: MCFARLAND, J.; THORNTON, J.

(74 Cal. 11)

WEBBER v. CLARKE. (No. 11,923.)

(Supreme Court of California. October 31, 1887.)

1. QUIETING TITLE—ADVERSE POSSESSION—PLEADING.

Adverse possession under color of title was relied on by defendant in an action to quiet title. He, however, did not plead Code Civil Proc. Cal. § 323, which states what facts constitute adverse possession. *Held*, that it was unnecessary to plead it.

2. SAME—PERIOD OF ADVERSE POSSESSION.

Adverse possession, commencing in May, 1875, under color of title, was relied on by defendant in an action to quiet title. *Held*, that his title by adverse possession became perfected in five years, which need not be next preceding the commencement of the action.

3. SAME—PAYMENT OF TAXES.

Code Civil Proc. Cal. § 325, requiring the payment of taxes as an element of adverse possession, was passed April 1, 1878, and was not retroactive. Except for the years 1877 and 1883, defendant, who claimed by adverse possession under color of title, and his predecessors, paid all the taxes from 1873 to 1884. *Held*, that the non-payment for 1877 was immaterial, and the non-payment for 1883 unimportant.

4. SAME—UNINCLOSED LANDS—THOROUGHFARE FOR STOCK.

In an action to quiet title, defendant claimed the land under color of title and adverse possession. Plaintiff claimed that the track in controversy was a kind of thoroughfare for stock going to the mountains. *Held*, that this fact would not destroy defendant's right.

5. SAME—CONTINUOUS POSSESSION—POSSESSION DURING GRAZING SEASON.

Uninclosed land was taken possession of by defendant under color of title. He pastured his sheep upon it during the grazing season, which lasted from February to July. During the remainder of the year the land was not pasturable, and there was no one on it. *Held*, that this constituted continuous and adverse possession.

6. SAME—COLOR OF TITLE—TAX DEED.

Defendant entered and took possession under a tax-title deed, not void on its face, and believing that he had acquired an interest under the deed. *Held*, that it made no difference that his grantor had neither title nor possession.

7. SAME.

Defendant claimed under a sheriff's tax deed, executed on February 27, 1874, after a sale under a judgment of a district court, "duly made and given" on January 9, 1872, and also by adverse possession for the period required by the statute of limitations. *Held*, that the sheriff's deed, in due form, under a judgment regular on its face, constituted color of title, which, in connection with the possession shown, was a defense to the action.¹

8. SAME—CONSTRUCTIVE POSSESSION, EXTENT OF.

A tract of uninclosed, uncultivated grazing land was taken possession of by defendant, on which he herded his sheep. He claimed under a tax-title deed. *Held*, that he had constructive possession of the whole tract described in the document.²

9. APPEAL—FILING BRIEFS—POINTS—WAIVER OF ERRORS.

Code Civil Proc. Cal. c. 7, art. 2, § 129, (Sup. Ct. rule 2, sub 4,) provides that "ten days before the calling of a cause for argument, the appellant shall file with the clerk, and serve upon the other party, his printed points and authorities, together with a brief statement of such of the facts as are necessary to explain the points made. Five days before the calling of the case for argument, the respondent shall file and serve his points and authorities; and when the case is called for argument, the appellant may file and serve a reply to respondent's points." In his opening brief, appellant alleged numerous errors in the admission and rejection of evidence, but argued none of them. In respondent's brief, attention was called to the fact that all the errors specified in the statement were waived by appellant's brief. The appellant replied with argument upon 17 assignments of error. *Held*, that the technical errors alleged were waived. Appellant should have made the points he relied on in his opening brief.

Commissioners' decision. Department 2.

Appeal from superior court, Tulare county; WM. W. CROSS, Judge.

Wiggington, Creed & Hawes, (Geo. W. Lewis, of counsel,) for appellant.
Atwell & Bradley, for respondent.

HAYNE, C. The action is described by the appellant as "an action to quiet the title to a parcel of land described in the complaint and of ejectment for said lands." The plaintiff claims under a school-land patent from the state, dated May 25, 1875, which was issued upon a certificate of purchase, dated March 18, 1870. The defendant claims under a sheriff's deed, executed on February 27, 1874, after a sale under a judgment of a district court, "duly made and given" on January 9, 1872, and by adverse possession for the period required by the statute of limitations. The court below gave judgment for the defendant, and the plaintiff appeals.

1. Numerous errors in the admission and rejection of evidence are alleged. None of these are argued in the appellant's opening brief. The appellant's counsel there say: "There are many technical objections that exist as to the regularity of the tax proceedings sufficient to invalidate them; but we preferred to demonstrate upon principle and authority the invalidity of defendant's claim." That is all that is said with respect to the alleged errors in relation to "the regularity of the tax proceedings." As to errors in relation to other matters not a word is said. In the respondent's brief attention is drawn

¹ Color is not every pretense or claim of title, but consists in a writing or conveyance of some kind purporting to convey the land under which the claim of title is asserted. *Armijo v. Armijo*, (N. M.) 13 Pac. Rep. 92. Any instrument purporting upon its face to convey title to the grantee is sufficient to constitute color of title. *Swift v. Mulkey*, (Or.) 12 Pac. Rep. 76, and note. See *Weineg v. Holcomb*, (Iowa,) 34 N. W. Rep. 787.

² When a party has a deed for a tract of land, actual possession of a part will in law constitute possession of the whole not in the adverse possession of another. *Fisher v. Bennehoff*, (Ill.) 13 N. E. Rep. 150. In general, as to what must be the character of the occupancy to constitute adverse possession, see *Babson v. Tainter*, (Me.) 10 Atl. Rep. 63; *Iron Works v. Wadhams*, (Mass.) 9 N. E. Rep. 1; *Murphy v. Doyle*, (Minn.) 33 N. W. Rep. 220; *Hancock v. Burton*, (Cal.) 14 Pac. Rep. 392; *Scott v. Woodruff*, (Ark.) 4 S. W. Rep. 908.

to the fact that all the errors specified in the statement are waived by appellant's brief. And the appellant comes back with argument upon 17 assignments of error. There was no oral argument; and, by the terms of the order submitting the case on briefs, the respondent had no reply. We think that under subdivision 4 of rule 2 the appellant must make the points he relies on in his opening brief, and that he cannot reserve them for his reply. To permit that would be unfair to the respondent, and would increase the labors of the court. And while the court is undoubtedly at liberty to decide the case upon any points that its proper disposition may seem to require, whether taken by counsel or not, we think that, under the circumstances of this case, the technical errors alleged must be considered as waived. For that reason we do not notice them. See, generally, *Hihn v. Courtis*, 31 Cal. 404.

2. It is argued for the appellant, with much earnestness and ability, that the levy of the tax, upon which the judgment of the district court was founded, was void, for the reason that a tax cannot be imposed upon school lands before all the payments upon the certificate of purchase are made. But we do not think it necessary to pass upon that question. Whether the tax was void, and whether the judgment therefor was conclusive upon appellant, as a judgment *in rem*, or not, it was regular upon its face; and a sheriff's deed thereunder, in due form, constituted, to say the least, color of title, which, in connection with the possession shown, was a defense to the action.

Upon the question of possession the findings were as follows: "The purchaser, P. Byrd, during all the period from February 27, 1874, down to the twentieth day of May, 1879, * * * claimed the land by virtue of such deed, and rented the same to J. S. Williams, on the condition that the said Williams should exclude all other persons therefrom, and use and occupy the same to the exclusion of everybody. And the said Williams, during all that time, a period of more than five years, did publicly and openly, notoriously, and peaceably, and uninterruptedly occupy and possess said land, and all of it, to the exclusion of plaintiff and the whole world; and the plaintiff, her ancestors, grantors, or predecessors, were not, nor were any of them, seized or possessed of said land at any time within five years before this action was brought. * * * On the twentieth day of May, 1879, said P. Byrd sold and conveyed for a good and sufficient consideration, all the land aforesaid to J. S. Williams, who continued publicly, peaceably, openly, and notoriously in the possession thereof, to the exclusion of the plaintiff and the whole world, and paid the taxes thereon down to the twelfth day of November, 1880, claiming the same as his property under the sheriff's deed aforesaid to Byrd, and the conveyance from Byrd to him. On the twelfth day of November, 1880, said J. S. Williams, by his deed of conveyance, conveyed the land aforesaid to C. W. Clarke, the defendant herein, who went into possession thereof at once, under a claim of title founded upon said conveyances, and said defendant has ever since continued to, and does now, occupy and hold possession of said land under a claim of right and ownership, based upon said conveyances, peaceably, openly, notoriously, continuously, uninterruptedly, and adversely to the whole world, and paid all the taxes levied or assessed upon the land from the twelfth day of November, 1880, down to the time this action was brought, except in 1883, when the taxes were paid by some person unknown to defendant. The land described in the complaint constitutes but one parcel, and had been continuously occupied and used by defendant and his grantors, for more than five years before this action was brought, for the pasturage of their stock." It is argued that these findings are not supported by the evidence.

The tract in controversy is the east half of section 16, tp. 16 S., R. 23 E., Mount Diablo base and meridian. It was not inclosed or cultivated, and no one resided upon it. The surrounding country "was an open, uninclosed, uncultivated, unimproved country all around there." The nearest "improvements" were half a mile distant, and the nearest sheep camp about a mile

off. There is some conflict in the evidence, but, if the defendant's witnesses are to be believed, (and, in view of the findings, we must assume that they are,) the defendant and his grantors herded their sheep upon the land during the grazing season of each year; that is to say, from February to July. During the rest of the year the land was "not pasturable for sheep," and appears (during such time) to have been entirely unoccupied. The argument for the appellant is that such pasturage does not constitute a sufficient possession, and particularly that it was not continuous. And these are the questions to be resolved.

"By actual possession," said FIELD, C. J., in a leading case, "is meant a subjection to the will and dominion of the claimant, and is usually evidenced by occupation, by a substantial inclosure, by cultivation, or by appropriate use, according to the particular locality and quality of the property." *Coryell v. Cain*, 16 Cal. 573. And see *Brumagim v. Bradshaw*, 39 Cal. 44. Where, however, there is such subjection to the will and dominion of the claimant, manifested in some appropriate manner, residence upon the property is not essential, (*Barstow v. Newman*, 34 Cal. 91; *Goodrich v. Van Landingham*, 46 Cal. 601; *Kelly v. Mack*, 49 Cal. 524;) nor, in such case, is an inclosure necessary, (*Hicks v. Coleman*, 25 Cal. 132; *McCreery v. Everding*, 44 Cal. 252; *Sheldon v. Mull*, 67 Cal. 300, 7 Pac. Rep. 710. In the case of grazing land, in a grazing country, herding sheep upon it would seem to be an "appropriate use, according to the particular locality and quality of the property." Accordingly, we find that in two cases pasturage of cattle within an inclosure was held to be sufficient possession against intruders, (*Southmayd v. Henley*, 45 Cal. 102; *Pierce v. Stuart*, Id. 280;) and in *Sheldon v. Mull*, 67 Cal. 300 and 301, 7 Pac. Rep. 710, it was held that pasturage, without an inclosure, was sufficient; the cattle being confined to the land by herders.

There must, of course, be some definite boundaries to the possession. But it has been held in a long line of decisions that, where a party enters under color of title, and has actual possession of a part of the whole tract, he has constructive possession of the whole tract described in the document. *Hicks v. Coleman*, 25 Cal. 122; *Hoag v. Pierce*, 28 Cal. 191; *McKee v. Greene*, 31 Cal. 420; *Ayres v. Bensley*, 32 Cal. 631; *Russell v. Harris*, 38 Cal. 426; *Donahue v. Gallavan*, 43 Cal. 573; *Spect v. Hagar*, 65 Cal. 443, 4 Pac. Rep. 419. And it makes no difference that the grantor had neither title nor possession, (*Walsh v. Hill*, 38 Cal. 487, 488,) provided the document was not void on its face, and the party entering under it believed in good faith that he acquired an interest under it, (*Walsh v. Hill*, *supra*; *Cannon v. Lumber Co.*, 38 Cal. 674; *Wolfskill v. Malajowich*, 39 Cal. 281.) A sheriff's deed, under a judgment regular on its face, is color of title within the meaning of the above rule. *Russell v. Harris*, 38 Cal. 427; *Packard v. Moss*, 68 Cal. 127, 8 Pac. Rep. 818; and compare *Jones v. Gillis*, 45 Cal. 542, 543, and *Gregory v. Haynes*, 13 Cal. 595.

The rules established by the foregoing decisions have been embodied to a great extent in the Code of Civil Procedure. Section 322 embodies the rule as to entry upon a part of a tract under color of title; and section 323, in relation to what constitutes adverse possession, is as follows: "Sec. 323. For the purpose of constituting an adverse possession, by any person claiming a title founded upon a written instrument or a judgment or decree, land is deemed to have been possessed and occupied in the following cases: *First*, where it has been usually cultivated or improved; *second*, where it has been protected by a substantial inclosure; *third*, where, although not inclosed, it has been used for the supply of fuel, or for fencing timber for the purpose of husbandry, or for pasturage, or for the ordinary use of the occupant; *fourth*, where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared, or not inclosed according to the usual course and custom of the adjoining country, shall be deemed to have

been occupied for the same length of time as the part improved and cultivated."

The appellant seems to suppose that this section cannot be considered because it was not pleaded. But as was said in *Hagely v. Hagely*, 68 Cal. 352, 9 Pac. Rep. 305, the proper course is to plead the section establishing the period of limitation, omitting all reference to explanatory sections. It will be observed that the section provides in terms that pasturage of land, without an inclosure, may constitute an adverse possession. There can, therefore, be no further doubt upon this branch of the appellant's case. The question is whether the pasturage must continue throughout the whole year. As stated above, the defendant's pasturage was only during the grazing season, that is, from February to July,—the land during the balance of the year being "not pasturable." We think, however, that this was sufficient, there being no one on the land meanwhile. It is a settled rule with reference to cases of this character that it is sufficient if, in the language of FIELD, C. J., in *Coryell v. Cain*, above quoted, the dominion and control is "by appropriate use according to the particular locality and quality of the property." In this regard CROCKETT, J., delivering the opinion in *Brumagim v. Bradshaw*, 39 Cal. 46, said: "The general principle which underlies all this class of cases is that the acts of dominion must be adapted to the particular land, its condition, locality, and appropriate use. The philosophy of the rule is that, by such acts, the party proclaims to the public that he asserts an exclusive ownership over the land, and the acts which he performs are in harmony with his claim of title." See, also, *English v. Johnson*, 17 Cal. 116, 117.

Now, we think that pasturing during the pasturing season is "appropriate use according to the particular locality and quality of the property." To pasture the land when it was not "pasturable" would not only be not an appropriate use, but an impracticable one. In the case of cultivation, there is an interval of several months between the harvesting of one crop and the preparation of the soil for another. And there would be just as much sense in holding that the interval destroyed the continuity of the possession in the one case as in the other. To so hold would be, in effect, to hold for all practical purposes that adverse possession could not be acquired by pasturage; for obedience will be paid to nature's laws rather than to man's, and the thing supposed to be necessary would never be done. It is sufficient that the use is in accordance with the usual course of husbandry in the locality. We are of opinion, therefore, that the defendant's evidence tended to make out a case of adverse possession. It must be admitted that the plaintiff's evidence in rebuttal was strong. But the question of credibility of the witnesses was for the court below, and, under the well-settled rule, its conclusions as to the facts will not, under the circumstances, be disturbed.

The fact, if it be a fact, that the tract in controversy "used to be a kind of thoroughfare for stock going to the mountains," does not destroy the defendant's right. Even if there was a right of way in the public for such purpose, it would not be inconsistent with the defendant's possession. *San Francisco v. Calderwood*, 31 Cal. 589.

The case of *Thompson v. Pioche*, 44 Cal. 508, cited by counsel, does not militate against the conclusions we have reached.

It is proper to add, to prevent misconception, that in what we have said we have reference solely to the case before the court, viz., a use of land by one entering under color of title. It might be plausibly argued that, where the use is by one claiming title "not founded upon a written instrument, judgment, or decree," section 325 of the Code of Civil Procedure would operate to prevent mere pasturage from being a sufficient adverse possession. As to that we express no opinion.

3. It is urged that the defendant cannot make out a case of adverse possession, because neither he nor his predecessors paid all the taxes. The facts

are that they paid the taxes from 1873 to 1884, except for the years 1877 and 1883. The non-payment for 1877 is immaterial, for the reason that section 325, which requires the payment of taxes as an element of adverse possession, was not passed until 1878, and is not retroactive. *Sharp v. Blankenship*, 59 Cal. 288; *Railroad Co. v. Shackelford*, 63 Cal. 261; *Johnson v. Brown*, Id. 392. Nor is the non-payment for 1883 important. Taking the adverse possession to have commenced on May 24, 1875, the date of the issuance of the patent, the defendant acquired a title at the expiration of five years, viz., in May, 1880. The five years of adverse possession need not be next preceding the commencement of the action. *Cannon v. Stockmon*, 36 Cal. 540.

We therefore advise that the judgment and order denying a new trial be affirmed.

We concur: FOOTE, C.; BELCHER, C.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are affirmed.

(74 Cal. 38)

Ex parte KOHLER, on Habeas Corpus. (No. 20,330.)

(*Supreme Court of California.* November 3, 1887.)

1. CONSTITUTIONAL LAW—TITLES OF ACT—LAW AGAINST ADULTERATION OF WINE.

The California act approved March 7, 1887, (St. 1887, p. 46,) entitled "An act to prohibit the sophistication and adulteration of wine, and to prevent fraud in the manufacture and sale thereof," is not repugnant to Const. Cal. art. 4, § 24, which provides that "every act shall embrace but one subject, which subject shall be expressed in its title."

2. SAME—RESTRICTION UPON SALE OF WINE—DUE PROCESS OF LAW.

Neither is the act unconstitutional because so unreasonable in its restriction upon the sale of wines as to deprive the citizen of his property and liberty without due process of law.

3. INTOXICATING LIQUORS—PROVISION FOR BRANDING WINES—VIOLATION NOT CRIMINAL.

Section 8 of the above act, providing that "it is desired and required that all and every grower, manufacturer, trader, holder, or bottler of California when selling, or putting up for sale any California wine, * * * shall plainly stencil, brand, or have printed where it will be plainly seen,—First, 'Pure California Wine;' and secondly, his name or the firm's name, as the case may be, both on label of bottle or package," etc.,—is merely directory, and no punishment can be inflicted for selling pure California wine without such label or brand, or the label furnished in lieu thereof by the state.

In bank. Application for writ of *habeas corpus*.

Conviction had in police judge's court, San Francisco; JAS. LAWLOR, Judge.

Morkow & Stratton, for petitioner. *Edward B. Stonehill*, Dist. Atty., for the People. *M. M. Estee, amicus curiæ*, for the People. *John T. Doyle, amicus curiæ*.

PATERSON, J. The petitioner was convicted in the police court of the city and county of San Francisco of the crime of misdemeanor, committed in violation of the provisions of an act of the legislature of the state of California, entitled, "An act to prohibit the sophistication and adulteration of wine, and to prevent fraud in the manufacture and sale thereof," approved March 7, 1887. St. 1887, p. 46.

The salient provisions of the act are as follows: Section 1 defines pure wine for the purposes of the act. Section 2 prohibits the using of deleterious substitutes in the fermentation, preservation, and fortification of pure wines. Section 3 prohibits the use of materials injurious to consumers for the promotion of fermentation. Section 4 declares it to be unlawful to sell under the name of wine any substance other than pure wine, as defined by the act. Sec-

tion 5 makes an exception in the case of pure champagne and sparkling wine, so as to permit the use of sugar in sweetening the same. Section 7 provides for the printing and furnishing of labels by the comptroller of the state, setting forth that the wine covered by such labels is pure California wine. Section 8 reads as follows: "Sec. 8. It is desired and required that all and every grower, manufacturer, trader, handler, or bottler of California wine, when selling or putting up for sale any California wine, or when shipping California wine to parties to whom sold, shall plainly stencil, brand, or have printed where it will be easily seen—*First*, 'Pure California Wine;' and, *secondly*, his name or the firm's name, as the case may be, both on label of bottle or package in which wine is sold and sent; or he may in lieu thereof, if he so prefers and elects, affix the label which has been provided for in section 7. It shall be unlawful to affix any such stamp or label as above provided to any vessel containing any substance other than pure wine, as herein defined, or to prepare or use on any vessel containing any liquid, any imitation or counterfeit of such stamp, or any paper in the similitude or resemblance thereof, or any paper of such form and appearance as to be calculated to mislead or deceive any unwary person, or cause him to suppose the contents of such vessel to be pure wine. It shall be unlawful for any person or persons other than the ones for whom such stamps were procured to in any way use such stamps, or to have possession of the same. A violation of any of the provisions of this section shall be a misdemeanor, and punishable by a fine of not less than fifty dollars," etc.

The complaint charged "that said Henry Kohler, being a dealer and bottler of California wines, did sell to the prosecuting witness, one Jaspar, a bottle of California wine, which bottle, when so sold, did not have plainly or at all stamped thereon the words 'Pure California Wine,' nor did it have in lieu thereof the stamp as furnished by the comptroller of state."

Several questions are presented involving the construction of the act referred to and its constitutionality. It is claimed by petitioner that the act is not mandatory in requiring a pure-wine stamp to be placed upon pure California wine. The complaint did not charge petitioner with the sale of sophisticated or adulterated wine; it accused him merely of selling a bottle of California wine without having thereon a pure-wine stamp. It is claimed by counsel for the people that, under the act referred to, dealers in wine are prohibited from selling *pure wine* without the stamp designated by the act. Petitioner contends that while the pure-wine stamp *may be* used, there is no penalty prescribed for a failure to use it. The act is not objectionable upon the ground claimed by the petitioner that it embraces more than one subject, contrary to the requirements of article 4, section 24 of the constitution, which provides that "every act shall embrace but one subject, which subject shall be expressed in its title." However numerous the provisions of an act may be, if they can be fairly considered as falling within the subject-matter of legislation, or as proper methods for the attainment of the end sought by the act, there is no conflict with the constitutional provision above quoted. In any event, it is only where there is a clear violation of the constitution that the court is justified in declaring it unconstitutional. The great object to be attained by the "Act to prohibit the sophistication and adulteration of wine, and to prevent fraud in the manufacture and sale thereof" must have been to secure the manufacture and sale of none but pure California wine. The first section defines pure wine; the second section prohibits the use of deleterious substitutes; the fourth section prohibits the sale of any but pure wine, and every penalty affixed is for the purpose of protecting those who make and sell pure wine, and for punishing those who make and sell impure wine. Manifestly the provisions of the act all fall within the subject named in its title, and are necessary and logical methods for the attainment of the end desired by the legislature. The act, therefore, is not repugnant to article 4, § 24, *supra*.

Now, is the act unconstitutional because so unreasonable in its restriction upon the sale of wines as to deprive the petitioner of his property and liberty without due process of law? The power of the legislature to impose such regulations for the conservation of the health of its citizens has been so often discussed and affirmed here that it is useless to reopen the question. The manufacture and sale of liquors of all kinds, the sale of pure milk, the inspection and sale of meats, and the control of laundries and slaughter-houses are all subject to regulation. Whatever construction may be placed upon the act, it is difficult to see how a compliance with the law would injure an honest dealer in California wine.

A more difficult question is that which refers to the proper construction of section 8. Is it mandatory in requiring a pure-wine stamp to be placed upon *pure* California wine? Is a failure to place such stamp upon *pure* California wine "a violation of any of the provisions of this section?" All legislation directed against the adulteration and simulation of articles of food and drink is aimed at a common object—the preservation of the public health. The court will take judicial notice of the evils preceding such legislation, and the mischiefs intended to be prevented thereby, the character and importance of the interests of the state which may be affected thereby, and the usual course of business. A knowledge of these matters is often necessary to a full and fair understanding of the force and effect of the law, and is a valuable help in ascertaining its true intent and meaning. The growth of the wine-growing interests of this state is a matter of world-wide publicity. It is a well-known fact that California is the only state in the Union where the grape suitable for wine-making is cultivated in vineyards, and that her wines are rapidly growing in favor, and rivaling in quality the table wines of foreign countries. With the progress and success of this industry there has grown up and increased the manufacture and sale of spurious wines, which are not only injurious to health, but detrimental to the wine industry. Several attempts have been made in congress to prevent the trade in this cheap and unwholesome stuff, but without material effect. Finally, in 1886-87, when the evil had attained so great a magnitude as to attract public attention, the Grape-growers and Wine-makers' Association of California presented a bill to the legislature of this state, which, after being amended, was passed, containing the provisions above stated. The primary objects of the act were, doubtless, to prevent the sale of spurious wine under the designation of "California Wine," and to promote the public health. But there were other objects to be obtained incidentally. The wine-grower who produced good wine would not have to suffer the effect of a blending by the trade of his article of superior merit with an inferior one. It was evidently through the efforts of wine-growers who aimed at a high degree of excellence in wine-making that the first clause of section 8 was inserted. Some expression on the part of the legislature of the state was desired as authority for affixing a badge to their productions, by which the consumer could feel sure of the purity of the wine, and the identity of the producer. That the words "desired and required" were intended to express rather a legislative wish and permission than a mandate, is indicated, too, in the discordancy of the natural meanings of the words themselves. As words of legislative command, they are singularly inappropriate and inconsistent. It is difficult to understand how it can be made a penal offense to violate simply a legislative *desire*. The word "desired" cannot be ignored in the construction of the act any more than the word "required," and the former is at least as forcible in its expression of a request as the latter is in its expression of a command.

The act in all other provisions containing mandates and prohibitions is positive and forcible in its language. Thus it is noticeable that the same section further along provides: "It shall be unlawful to affix any such stamp," etc., and again, "It shall be unlawful for any person or persons other than

the ones for whom such stamps were procured to use," etc. Other sections of the act use the same language—words which are ordinarily employed in expressing the mandates and prohibitions of penal statutes. We do not think it was intended that the sale of wines admitted to be pure should be circumscribed, limited, or restricted. Such legislation is unusual. We know of no similar statute where anything more has been attempted than—*First*, to prohibit the adulteration and sophistication of food and drink, and *second*, if permitted, to compel the appropriate stamping and designation of such food and drink. The New York pure-wine law, approved in June, 1887, defines pure wines, half-wines, and made wines; prohibits the sale of adulterated wines, and requires the stamping of half-wines and made wines; but it does not in any manner attempt to regulate the sale of pure wines. If the legislature had intended to compel the use of stamps and labels on pure wine, it could easily have stated that the failure, neglect, or refusal so to use them was unlawful, and there would have been no ambiguity in its language. The fact that it is carefully stated in the act what shall be unlawful in other respects is strong evidence that the first clause of section 8 was not intended to be obligatory. It is always to be presumed that the legislature will express its intention in clear and explicit terms in prescribing the obligations for a violation of which a penalty is affixed. In cases of this kind the limitations and restrictions should be plain and free from doubt. *Hill v. Decatur*, 22 Ga. 208.

It is a general rule that statutes affixing penalties should be strictly construed, and all doubts resolved in favor of the accused. *People v. Tisdale*, 57 Cal. 107. When measured by the mischief contemplated by the legislature, an additional reason is presented for giving to section 8 a permissive scope, rather than a mandatory one, so far as the stamping of pure wines is concerned. The act defines pure wine, prohibits adulteration and deterioration, and prohibits the sale of impure wine. The comptroller is authorized to furnish labels, and penalties are provided for the use thereof on other than pure wines. This seems to be the natural scope of the act, and all that is necessarily indicated in its title. There can be no fraud in the sale of pure wine. The title is a part of the act, and must declare its object; and in all cases where the legislative intent is ambiguous, judicial reference may be had to the title of the act to assist in determining its meaning. *Weed v. Maynard*, 52 Cal. 459; *Barnes v. Jones*, 51 Cal. 303.

We think, therefore, that the affixing of labels on pure wine is not obligatory, and that the proper construction of section 8, wherein it declares that a violation of any of its provisions is a misdemeanor, is to impose a penalty for a violation of only those provisions which are therein specifically declared to be unlawful. It results that the complaint states no offense, and the petitioner must be discharged.

So ordered.

We concur: TEMPLE, J.; SHARPSTEIN, J.; MCKINSTRY, J.; MCFARLAND, J.

(74 Cal. 85)

TRIPP v. DUANE and others. (No. 9,490.)

(Supreme Court of California. November 5, 1887.)

1. QUIETING TITLE—DETERMINING TITLE NOT IN ISSUE—WHO MAY COMPLAIN.

When the only question at issue between parties is the title to 33-96 of a certain piece of land, and a decree is entered quieting the title in favor of plaintiff, and against defendant, of only such 33-96, defendant has no ground for complaint because the decree, as to other defendants who do not appeal, seems to quiet the title of plaintiff to the whole piece of land.

2. SAME—CONVEYANCE BY CO-TENANT—EQUITABLE LIEN OF THIRD PARTY FOR ADVANCEMENTS—WAIVER BY TAKING TRUST DEED.

It appeared that one Ellis made a conveyance of 33-96 of a tract of land to plaintiff's grantors, which Ellis had not yet paid for. Afterwards he and his co-

tenants made a deed of trust to one P. as a security for \$8,000 advanced by P. to the state as purchase money for such land. The deed of trust provided that the land might be sold by the trustee upon public notice for a specified time. Afterwards P., in his individual capacity, conveyed to M., who conveyed to D., one of the co-tenants of Ellis. Both of these conveyances were without consideration. Subsequently P. gave the required notice of sale, and, as trustee, sold the land to plaintiff. In an action by plaintiff to quiet his title to the 33-96 of the land as against D., held that, by taking the deed of trust as security, P. had waived his equitable lien for the advancement of \$8,000, and it was not error to decree the title in plaintiff without requiring him to pay his proportion of the \$8,000.

3. SAME—PURCHASE FROM TRUSTEE AFTER COMMENCEMENT OF ACTION.

And although a supplemental complaint showing the sale, after the beginning of plaintiff's action, by P. as trustee to plaintiff, was not admitted, as against D., yet, without evidence of the sale, plaintiff was under no obligations, so far as D. was concerned, to pay any part of the \$8,000 before his title to 33-96 should be quieted as against D.; and even though a deposition by P. showing the sale, and payment by plaintiff to him of the purchase money, after this action was begun, were considered, such deposition, as against D., would be merely immaterial.

In bank. Appeal from superior court, city and county of San Francisco; J. G. MAGUIRE, Judge.

This was an action to quiet title. The facts are sufficiently stated in the opinion, except the text of the document therein referred to as folios 109 to 113, which is as follows:

"We, Geo. W. Ellis, Creed Haymond, and C. P. Duane, hereby grant, bargain, sell, and convey unto Wm. H. Patterson all the estate, title, and interest which we either and all of us now have, or may hereafter acquire, of, in, and to the land described, and intended to be described, in a certain so-called pre-emption claim or pre-emption notice, record whereof is contained in the land records of the city and county of San Francisco, in Liber B of Miscellaneous Deeds, page 665; and also all the lands described in two certain deeds made by the tide-land commissioners to G. W. Ellis, and bearing date November 24, 1875. This conveyance is in trust to secure the payment of \$4,000 due to said Patterson from the said Ellis, \$2,000 due from the said Haymond to said Patterson, and \$2,000 from the said Duane to the said Patterson, and payable in U. S. gold coin, with interest at the rate of one and one-half per cent. per month, and payable on or before 60 days from the date thereof. The said Patterson to have full possession and control of said land, and the absolute power of disposition of said land for the purposes of the trust, if such payments are not made at or before 60 days from the date hereof. Such disposition is to be made upon one week's notice in any daily paper published in the city and county of San Francisco. Upon the payment of the whole of said sum of \$8,000, and interest, the said Patterson is to reconvey said land; or upon the payment by the said Ellis of the sum of \$4,000, and interest; he will reconvey one-half of said property to said Ellis, or upon the payment of \$2,000, and interest, by said Haymond, he will reconvey to said Haymond $\frac{1}{2}$ thereof, or upon the payment of \$2,000, and interest, by said Duane, to reconvey $\frac{1}{2}$ of said property to said Duane.

"Witness our hands and seals this thirtieth day of November, 1875.

"GEO. W. ELLIS.	[Seal.]
"CREED HAYMOND,	[Seal.]
"C. P. DUANE.	[Seal.]
"WM. H. PATTERSON."	[Seal.]

George W. Tyler and E. D. Wheeler, for appellant. Philip A. Galpin, for respondent.

SEARLS, C. J. This is an action by plaintiff to quiet his title to 33-96 of the real estate described in the complaint. In 1853, George W. Ellis filed in the recorder's office of the city and county of San Francisco a pre-emption claim on 160 acres of salt marsh and tide land belonging to the state of California. Between that time and October 21, 1875, said Ellis executed, to different parties, bargain and sale deeds of undivided portions of said claim,

amounting in the aggregate to 33-96 of the whole claim; and the grantees of said undivided interest conveyed, by good and sufficient deeds, the same to plaintiff, prior to October 21, 1875, which deeds were all recorded prior to that date. On the twenty-fourth of November, 1875, the state of California made its deed to Ellis of the lands described in the complaint; the same being portions only of the land described in Ellis' pre-emption claim. Plaintiff claims title to 33-96 of the land described in the complaint by reason of said pre-emption claim of Ellis, and the deed from the state to Ellis, of date November 24, 1875.

When the deed from the state to Ellis was ready for delivery, Ellis had no money, and \$8,000 had to be paid to the state before the deed would be delivered, and thereupon defendant Ellis applied to W. H. Patterson to advance the \$8,000 to the state for the purchase money of the land, and take the land as security for its repayment. Thereupon Ellis, Duane, and Haymond executed to Patterson the paper found at folios 109 to 113, both inclusive, and Patterson paid the \$8,000 purchase money, received the deed from the state to Ellis, and had the same recorded. The \$8,000 not having been paid in 60 days, as provided in the instrument, nor any part thereof, W. H. Patterson deeded to Morrissey, and Morrissey to Duane, "all the right, title, and interest which said Patterson derived in said land by virtue of the deed of Ellis *et al.* to him of date November 30, 1875," without advertising such sale for 60 days, so as to free said real estate from the trust under which Patterson held the land, which said deeds were immediately recorded. At the commencement of this suit, neither the plaintiff nor Ellis had paid Patterson or Duane any portion of said \$8,000, the purchase money of said land so paid by said Patterson to the state, and plaintiff sought in his complaint to quiet his title to 33-96 of said land, without paying or offering to pay to Patterson or to Duane any portion of the said purchase money.

The paper from Ellis, Duane, and Haymond to Patterson, as above mentioned, was a conveyance to the latter of all the estate of the former in the land in question, in trust to secure the payment of the \$8,000, with interest, and payable in 60 days from November 30, 1875, the date thereof, and, if not paid, Patterson was authorized to sell the property after one week's notice in any daily paper published in the city and county of San Francisco. The conveyance by Patterson to Morrissey was made after the expiration of the 60 days, but without the notice prescribed, was without consideration, and was executed by Patterson in his own name, and not as a trustee. The deed from Morrissey to Duane was also without consideration.

After the defendant Duane had filed his amended answer in the case, the interest of Patterson in the trust deed was duly sold as provided for in that instrument, and was purchased by the plaintiff herein, who thereupon applied to the court for leave to file a supplemental complaint setting up those facts, which was refused by the court as to Duane, and granted as to the other defendants. Upon the trial of this case, the plaintiff offered the deposition of W. H. Patterson in evidence, to prove the facts contained in the supplemental complaint he had filed. Defendant Duane objected, upon the ground that all these matters thus sought to be proved occurred after the joining of issue in this case, and therefore the testimony was incompetent, irrelevant, and immaterial, and that no supplemental complaint had been filed, so far as Duane was concerned. The court did not admit the testimony at the time, but reserved its ruling. Before the court decided the case, it read and considered the deposition of Patterson, which had not been admitted in evidence or read, and based in part its finding and decree thereon, and ruled and decided that defendant Duane had no right, title, or interest in the land claimed by plaintiff in his original complaint, viz., 33-96 of the premises described, and quieted plaintiff's title thereto, and to the whole of it, as against the other defendants.

Defendant Duane alone appeals from an order denying a new trial, and

makes the following points: *First*, the court erred in quieting the plaintiff's title to the whole of the real estate described in the complaint, when he only sues to quiet his title to 33-96 of the same; *second*, the court erred in ruling that plaintiff was entitled to maintain this action without paying or offering to pay 33-96 of the purchase money of the land paid by Patterson, and in ruling that defendant Duane had no title or interest in the land; *third*, the court erred in reading and considering the evidence not admitted at the trial, and basing its findings and decree thereon.

The answer to the first point is that, as against appellant Duane, the court did not quiet the plaintiff's title to but 33-96 of the premises. This is what plaintiff demanded against said defendant in his complaint. The court found as a fact that "the plaintiff, at the commencement of this action, was seized in fee of 33-96 of said title to said premises." As a conclusion of law it was found: "(1) That, at the commencement of this action, the plaintiff was seized of 36-96 of the premises described in the complaint, and is entitled to the relief prayed for in his complaint against the defendants Charles P. Duane and H. H. Judson, as far as 33-96 is concerned."

The decree follows the findings, and decrees "that, at the commencement of this action, the plaintiff was, and now is, seized in fee of 33-96 of the premises described in the complaint; * * * that the defendants Charles P. Duane and H. H. Judson have, nor have either of them, any right, title, or claim thereto, and that the title of the said plaintiff thereto be, and the same is, quieted, as against the claim of each of said defendants; and each of said defendants is * * * restrained from bringing any action * * * against said plaintiff * * * in regard to his title or possession of said 33-96 of said premises." When the court decrees that defendants Duane and Judson have no title thereto, it must, by every rational rule of construction, be held to apply to the 33-96 part decreed to belong to plaintiff. The title to the remaining 63-96 of the tract of land was not in any way in issue as between plaintiff and Duane, and this action does not settle, or, as we construe it, purport to settle, it. The fact that, as against the other defendants between whom and plaintiff the merits of the supplemental complaint were considered, the findings and decree went beyond the 33-96, cannot alter the *status* of the case as to plaintiff and Duane.

The next error assigned is based upon the action of the court in quieting the title of plaintiff to 33-96 of the property without requiring him to pay 33-96 of the sum of \$8,000, and interest, advanced by Patterson to pay for the land, and procure the title from the state.

It may be stated generally that where one person pays the consideration money for the purchase of land, and the conveyance is made to another, the latter holds the title in trust for the person who pays the consideration. 2 Story, Eq. § 1201; *Hidden v. Jordan*, 21 Cal. 99; *Bayles v. Baxter*, 22 Cal. 575; *Millard v. Hathaway*, 27 Cal. 119; Civil Code, § 353. The trust thus raised is implied by law, is a resulting trust, and may be proved by parol. *Roberts v. Ware*, 40 Cal. 637. These implied or resulting trusts cannot prejudice the rights of purchasers or incumbrancers of real property for value, and without notice of the trust. Civil Code, § 856. In *Leggett v. Dubois*, 5 Paige, 117, it was said: "A resulting trust is the mere creature of equity, as a resulting use is of law; and it cannot therefore arise where there is an express trust declared by the parties, and evidenced by a written declaration of such express trust." So, too, a vendor of real estate has a lien on the land sold for the purchase money, unless he has taken security for his payment, though he has executed the conveyance. *Salmon v. Hoffman*, 2 Cal. 138; *Hill v. Grigsby*, 32 Cal. 55; *Baum v. Grigsby*, 21 Cal. 172; *Sparks v. Hess*, 15 Cal. 186; *Williams v. Young*, 21 Cal. 227. But this lien, which arises in equity, is waived by taking a mortgage to secure the purchase money. The silent lien of the vendor is extinguished whenever he manifests an intention to abandon or not

to look to it; and in *Hunt v. Waterman*, 12 Cal. 301, it was said this intention is manifested by taking other and independent security upon the same land, or a portion of it, or upon other land. See, also, *Camden v. Vail*, 23 Cal. 633, and *Remington v. Higgins*, 54 Cal. 620. We refer to the doctrine and cases in relation to the lien of vendors of real estate, because they depend upon the same principle, raise the same implied trust, and are subject to most of the same rules, with like trusts arising from the advancement of the purchase money for land, where the deed is taken in the name of another.

The case, then, stands in this wise: Ellis had conveyed to others, by deeds of bargain and sale, purporting to convey the legal title, under whom plaintiff held by like conveyances, 33-96 of the land, and the conveyances were duly recorded. The legal title was as yet in the state, but would pass by operation of law from Ellis to Tripp, to the extent of 33-96, whenever procured by the former. Under these circumstances, Patterson advanced \$8,000 to Ellis to pay to the state the purchase price of the land, and it was so paid, and the patent issued to Ellis. Had Patterson stopped here, equity would have raised an implied trust in his favor to the extent of the money advanced, and as against the interest of the owners to the extent of the benefits received. But this would have been an equitable lien raised by operation of law, and could be waived by taking a deed of trust from Ellis, Duane, and Haymond for their interest in the land as security for the money advanced. Patterson must be presumed to have waived his implied lien upon that portion of the land previously conveyed by Ellis as aforesaid, and, there appearing nothing in the record to rebut this presumption of waiver, the implied equitable lien does not exist, and Patterson must be remitted to the relief afforded by his deed of trust.

It follows that, as there was no lien upon the 33-96 interest in the land held by Tripp, he was under no obligation, legal or equitable, to pay any portion of the \$3,000 as a condition to the quieting of his title to the 33-96 of the land.

The deposition of Patterson was admissible in evidence in favor of plaintiff and against the other defendants than Duane. As against them, there were issues, no doubt, under his supplemental complaint, in which he claimed, or appears, to have succeeded to the rights of Patterson. The deposition was to the effect that, since suit brought, Tripp had paid Patterson the \$8,000, and interest, and thereupon the court so found, all of which, as against the other defendants, was entirely proper. It is apparent that the court was of opinion that, as against the 33-96 interest held by Tripp, and decreed to him, no payment of the \$8,000 was necessary. Indeed, the bill of exceptions expressly states that "the only points relied upon by defendant Duane on this motion was the error of the court in granting the relief prayed for in the complaint to plaintiff, without his paying, or offering to pay, 33-96 of the purchase money paid to the state by Patterson for the title to the property, either to Patterson or his assign, and the error of the court in considering evidence not admitted upon the trial." It does not appear affirmatively, from the bill of exceptions, that the testimony of Patterson was used as against Duane; but, if it be conceded that it was, it was simply immaterial testimony. We are of opinion he was not bound to pay the \$8,000, or any part of it, and proof that he did so cannot weaken his right.

Holding, then, as we do, that any interest which Duane may have in the remaining 63-96 of the premises in question is not affected by the proceedings or decree in this action, and that, as to the 33-96 thereof, the title was properly quieted in plaintiff, Tripp, the order appealed from is affirmed.

We concur: TEMPLE, J.; MCFARLAND, J.; SHARFSTEIN, J.; MCKINSTRY, J.; THORNTON, J.

(74 Cal. 81)

PEOPLE v. GUITIERREZ. (No. 20,347.)

(Supreme Court of California. November 5, 1887.)

LACERTY—POSSESSION OF STOLEN GOODS—PRESUMPTION—INSTRUCTIONS.

An instruction "that if the defendant was in recent possession of the stolen goods the law raises the presumption that he is the thief, and this possession, if not competently explained by the defendant, is conclusive evidence of his guilt," is plainly erroneous; and although this was followed by instructions on behalf of the defendant that "the possession of stolen property, although a circumstance in determining the guilt of the defendant, is not alone sufficient to convict;" and that "the possession of stolen articles soon after the missing of the same is an insufficient circumstance upon which to convict the defendant," yet these instructions would not correct the previous error, as the mind of the jury would be left in doubt which was the correct rule of law.¹

In bank. Appeal from superior court, San Bernardino county; HENRY M. WILLIS, Judge.

Baker & Blair, for defendant. *Geo. A. Johnson*, Atty. Gen., for respondent.

TEMPLE, J. The exceptions to the information do not seem to be well founded. The procedure was in accordance with the case of *People v. Lewis*, 64 Cal. 401, 1 Pac. Rep. 490, and with recent decisions of this court. *Ex parte Young Ah Gow*, 15 Pac. Rep. 76.

The court instructed the jury, at the request of the prosecution, as follows: "The jury is instructed that, if the defendant was in recent possession of the stolen goods, the law raises the presumption that he is the thief; and this possession, if not competently explained by the defendant, is conclusive evidence of his guilt." This instruction is plainly erroneous. The effect of testimony is a question for the jury and not for the court, although this court has held of this precise testimony—inconsistently with the general rule, perhaps—that it is not sufficient to justify a verdict of guilty. Then, beside assuming that the goods were stolen, the instruction states that the defendant must explain the recent possession, ignoring the proposition that the evidence of the prosecution itself may afford such explanation in whole or in part.

The instructions given at the request of the defense, however, were as follows: "(1) The possession of stolen property, although a circumstance in determining the guilt of the defendant, is not alone sufficient to convict. (2) The possession of stolen articles soon after the missing of the same is an insufficient circumstance upon which to convict the defendant." These instructions are clearly in conflict with that given at the request of the prosecution. The point was material, and read together, the jury would still be left in doubt as to the law. If we suppose the jury took the instructions given at the request of the defendant as the correct statement of the law, still it leaves that portion of the instruction given at the instance of the prosecution to stand which is not in conflict with that asked for by the defense to stand. The effect of this would be to instruct the jury that the recent possession of stolen goods raises a presumption of guilt, although not sufficient to convict. This is still a charge as to the value and effect of evidence.

We see no material error in the other instructions of the court. Judgment reversed, and cause remanded for a new trial.

We concur: SEARLS, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.; THORNTON, J.; MCKINSTRY, J.

¹ As to the weight to be assigned to the fact of the possession of stolen goods recently after the theft, see *State v. Kirkpatrick*, (Iowa,) 34 N. W. Rep. 301, and note; *People v. Flynn*, (Cal.) 15 Pac. Rep. 102; *Beau v. White*, (Tex.) 5 S. W. Rep. 525.

(74 Cal. 98)

Estate of STEWART. (No. 11,214.)

(Supreme Court of California. November 7, 1887.)

1. WILL—DISPOSITION OF COMMUNITY PROPERTY.

A devise to a wife of "one-half of all my estate," followed by a specific bequest of \$3,000 for immediate support, where the estate was worth nearly half a million, and the devisor had been an active, energetic business man, accustomed to use and handle the property as his own, and the whole tenor of the will, in minor details, indicated the testator's intent to dispose of the whole, *held*, to pass one-half of the whole estate held as community property of the husband and wife.

2. SAME—ACCEPTANCE BY WIDOW.

Where the widow of a testator filed a written acceptance of the terms of the will, she thereby confirmed the disposition of the community property made in the will, and indicated her election to abide by its provisions.

McFARLAND, THORNTON, and SHARPSTEIN, JJ., dissenting.

In bank. Appeal from superior court, San Joaquin county; A. VAN R. PATERSON, Judge.

The testator, Frank Stewart, died from an accident received two days before his demise, between which time and his death he made the will in controversy, the material portions of which are as follows: "*First*. After all my just debts are paid, I give and bequeath to my beloved wife, Bettie Stewart, one-half of all my estate; the south-east quarter ($\frac{1}{4}$) of block No. 113, east of Center street, in the city of Stockton, including my present residence, and all of the balance of the east half of said block No. 113, except one hundred feet of the north half of said block fronting on Hunter street, by 150 feet on Flora street; also all the household and kitchen furniture, to be taken by her at ten thousand dollars, if she choose to accept such property at that price, to be included in the one-half of my estate; also give and bequeath to her in cash the sum of three thousand dollars, to be paid to her from the first sales of property, and at once; also give and bequeath to my beloved adopted daughter, Bessie Stewart Payne, twenty shares of stock of the Stockton Building & Loan Association. [Here follow several specific legacies.] *Seventh*. The remainder of my estate to be distributed equally between my brother and sisters, in four parts, that is to say, to Wm. M. Stewart, Amanda Brown Harris, and Lou V. Moore, and the living heirs of my deceased sister, Betty Ann Winn,—the heirs to be counted as one of the inheritors,—and the four to have share and share alike. * * *

"In witness whereof, I have hereunto set my hand and seal this twenty-sixth day of July, 1883. FRANK STEWART." [Seal.]

The widow of deceased, after his death, filed the following acceptance of his will:

"*To the Hon. the Superior Court of said County of San Joaquin*: I, Bettie Stewart, the surviving wife of Frank Stewart, deceased, respectfully represent that in and by the last will of said deceased, duly admitted to probate by this court on the twenty-second day of August, 1883, the said deceased gives and bequeaths to me one-half of all his estate; the south-east quarter of block 113, east of Center street, in the city of Stockton, in said county, including his late residence, and all of the balance of the east half of said block No. 113, except 100 feet of the north half of said block fronting on Hunter street, by 150 feet on Flora street; also all the household and kitchen furniture, to be taken by me at \$10,000, if I should choose to accept said property at that price, to be included in the one-half of the estate of said deceased; that I hereby make known my election, and accept the said real and personal property under the terms of said will for the said sum of \$10,000, to be included in the one-half of said estate.

"*Dated April 28, 1885.*

Mrs. BETTIE STEWART."

In distributing the estate, the court decreed to the widow of deceased one-half of the estate, and \$3,000 for her immediate support. The distribution of

the estate was contested on the ground that deceased was only disposing of his half of the property held in common with his wife, and that she was entitled to three-fourths of the whole estate, as deceased left no descendants.

Aug. Muenter, for appellant. *S. L. Carter* and *D. S. Terry*, for residuary legatees and respondents. *W. L. Dudley*, for executors.

BY THE COURT. There is no merit in the motion to dismiss the appeal herein. It is therefore denied.

No citation of authorities is required to show that a will is to be construed according to the intention of the testator. Such is the rule prescribed by the Code. It is elementary. It has always been a cardinal canon. As said in *Morrison v. Bowman*, 29 Cal. 337, the intention of the testator is to be kept in view as the pole star in the construction or interpretation of the will. The language of every clause in the will before us bears evidence of the fact that the testator intended to deal with the whole of the community property; and all the provisions of the will, taken together, afford most convincing proof of the fact that he believed he was dealing with the whole of the community property when he used the words "all my estate." He speaks of the home place as "my residence," and deals with the household and kitchen furniture as his own, regardless of any claim or right in his wife. He disposes of certain shares of stock as if no one but himself had any interest therein. He refers to a certain stock of grain, and the business in connection therewith, as "my [his] grain business," when he must have known (if he was dealing with a half interest only) that his wife would take the other half by operation of law, and with his executors would have the right to control and manage the same after his death, and provides that Major Batte shall wind up the business, and fixes his compensation at \$2,000 therefor. The estate is worth nearly half a million dollars. According to the contention of appellant, the widow, by operation of law and the provisions of this will, will take three-fourths of the whole estate. It is singular, indeed, if the testator knew that his wife was to receive under the law and the first clause of the will over \$300,000 in bank stock and lands, that he should have been so anxious to have sales of property made at once in order that she might be paid \$3,000 upon which to live. It is not at all likely that a husband who loved his wife so much that he desired her to have three-fourths of this great estate, would ask her to pay \$10,000 for one-half of his half interest in a piece of property, the whole of which, appellant admits, was worth only about \$14,000, and that, too, for the property which had been the home of himself and his beloved wife, and the sanctuary of his household gods. Furthermore, if the testator intended the debts to be paid out of his estate, he knew that, if the specific legacy of \$3,000 should be paid to his wife, twenty shares of stock and \$35,000 in cash to his adopted daughter, Bessie, \$2,500 to one nephew, and the same amount to another, \$1,000 to Katie, the niece of his wife, \$5,000 to the Stockton Free Library, \$2,000 to Batte, and that his wife would, by operation of law and the terms of his will, receive three-fourths of the whole of the estate, there would be nothing left after the payment of the costs and expenses of administration, for his sister and brothers. It is admitted that he was a careful business man of more than ordinary ability, and of course he knew the value, character, and extent of his property.

When read together, the provisions of the will are the best expression—short of a direct statement to that effect—that he was dealing with the whole of the community property under the phrase "all my estate." Every clause in the will bears a clear and indisputable badge of that intention. He dealt with the property just as he had been accustomed to deal with it through a long, active, and successful business life; just as he had in accumulating and disposing of the property during his life-time, without consulting his wife, or asking her to join with him in any conveyance. He uses the phrase "my es-

tate" in the sense that he had been accustomed to use it all his life. It *was* his estate. He could dispose of it absolutely without the consent of his wife during his life, and he thought undoubtedly that he could do so, and that he was doing so, by his will.

It is to be regretted that the presumption which prevails in New York and other states, where the right of dower exists, was ever applied to the construction of wills in this state. In those states, in order to cut off the right of dower, the wife must join in the conveyance. With us there is no estate in dower, (section 173, Civil Code;) and the husband is taught, through a long and active business life, to regard the community property as his own, to speak of it as his own, and to dispose of it as his own. It is true that the presumption referred to as applicable in other states has been adopted here, and it is perhaps well that we should adhere to it; but, where the intention of the testator is so clearly expressed as it is in the will before us, that presumption must give way. So long as our laws recognize the right of the husband to dispose of his property by will, the courts should strive to carry out the real intention of the testator, and for that purpose give greater weight to the natural and ordinary meaning of the language used in the will than to mere presumptions of law, which are intended as aids for the construction of wills in doubtful cases only. "The widow, having accepted the devises and bequests provided for her by the will, thereby made her election and confirmed the disposition made by her husband of the common property." *Noe v. Splitalo*, 54 Cal. 209; *Morrison v. Bowman*, *supra*.

The decree and order are affirmed.

McFARLAND, THORNTON, and SHARPSTEIN, JJ., dissenting.

(74 Cal. 104)

WADSWORTH v. WADSWORTH. (No. 12,393.)

(*Supreme Court of California*. November 8, 1887.)

APPEAL—TIME OF FILING UNDERTAKING—EXTENSION—TRANSCRIPT.

Code Civil Proc. Cal. § 940, provides that an appeal is ineffectual unless an undertaking is filed within five days after service of notice of appeal. Section 1054 provides that the time for filing undertakings may be extended, not to exceed 30 days, by the court or judge. Plaintiff filed her notice of appeal August 18, 1887. August 23d the time for filing an undertaking was extended 20 days, and on September 12th again extended 10 days. It was filed September 22d. *Held*, that the undertaking was filed in time, and, as the appeal was not perfected until the undertaking was filed, the period of 40 days for filing the transcript in the supreme court had not expired when the motion to dismiss the appeal was made.

In bank. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

W. C. Burnett, for appellant. W. B. Tyler, for respondent.

SEARLS, C. J. Motion to dismiss an appeal. It appears that plaintiff filed her notice of appeal to this court on the eighteenth day of August, 1887. On the twenty-third day of August an order of the judge of the court below was made and filed, extending the time of plaintiff to file an undertaking on appeal 20 days, and on the twelfth day of September a similar order was made and filed, extending the time for a further term of 10 days. An undertaking was filed September 22, 1887, which was in due time provided, the court below or a judge thereof having authority to extend the time for filing such undertaking by said orders. Section 940 of the Code of Civil Procedure provides that "the appeal is ineffectual for any purpose, unless within five days after service of the notice of appeal an undertaking be filed," etc. This section, standing alone, would be conclusive; but it is, we think, subject to the provision of section 1054 of the same Code, which provides that the time for doing certain things, among which are the filing of undertakings, may be ex-

tended, not exceeding 30 days, by the court or a judge thereof upon good cause shown. It follows that the undertaking was filed in time, and as the appeal was not perfected until the undertaking was filed, the period of 40 days for filing the transcript in this court had not expired when the motion to dismiss was made.

The motion to dismiss upon the grounds, (1) that the transcript was not filed in time; and (2) that the undertaking on appeal was not filed within five days after service and filing of the notice of appeal, is denied.

We concur: MCFARLAND, J.; TEMPLE, J.; PATERSON, J.; SHARPSTEIN, J.; THORNTON, J.

(74 Cal. 106)

McMANN v. SUPERIOR COURT OF SAN FRANCISCO. (No. 12,329.)

(*Supreme Court of California.* November 8, 1887.)

1. JUDGMENT—COSTS—REMITTITUR FROM SUPREME COURT—DURATION—WHEN STATUTE BEGINS TO RUN.

Code Civil Proc. Cal. § 958, provides that, when the clerk receives a *remittitur* he shall attach it to the judgment roll, and enter minute of the judgment of the supreme court on the docket against the original entry. Section 1034 provides that the cost bill must be filed within 30 days after the filing of the *remittitur*, and that thereafter execution may issue as upon a judgment. On May 3, 1882, judgment was rendered in the supreme court for costs accruing there. The *remittitur* was filed in the court below May 9, 1882. The cost bill was filed May 10, 1882. Execution was issued May 10, 1887. *Held*, that the statute limiting the duration of judgments to five years began to run from the time of making the entry in the docket. There was, therefore, no authority for issuing the execution, and the court did not err in recalling it.

2. SHERIFF—FUNDS COLLECTED UNDER EXECUTION IMPROPERLY ISSUED—POWER OF COURT TO COMPEL RETURN OF.

The petitioner, as sheriff, had collected money on an execution improperly issued. The court ordered the money returned, and the sheriff applies for a writ of review for the purpose of having the order vacated. *Held*, that the sheriff being an officer of the court, it has power to control his conduct when acting under color of its authority, and has power to order him to refund the money collected under a process improperly issued.

In bank. Application for writ of review, superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

J. P. Foulds, for petitioner. Edward P. Cole, opposing.

TEMPLE, J. This is an application for a writ of review, in which it is sought to have an order vacated which required the petitioner, as sheriff, to refund certain moneys collected upon an execution, which, it is claimed, was void, for the reason that the judgment upon which it was issued had ceased to be operative, because it had been entered more than five years. The execution was for costs which accrued in the supreme court. The judgment was rendered here May 3, 1882. The *remittitur* was issued May 6, 1882, and was filed in the court below May 9, 1882. The cost bill was filed May 10, 1882. Execution was issued May 10, 1887.

The sections of the Code bearing upon the subject are section 958, Code Civil Proc., which provides that, when the appeal is from a judgment, the clerk, on receipt of the *remittitur*, must attach it to the judgment roll, and enter a minute of the judgment of the supreme court on the docket against the original entry, and section 1034, Code Civil Proc., which provides that the party to whom costs are awarded must file his cost bill within 30 days after the *remittitur* is filed, and thereafter he may have an execution therefor as upon a judgment. Execution may be issued upon a judgment at any time within five years after its rendition, and it is contended that the language, "he may have an execution therefor as upon a judgment," not only directs the mode and manner of issuing execution, but also makes applicable the

limitation as to time. It is obvious, however, that the sole purpose of the language used was to give the party entitled to the costs an execution therefor.

The case of *Kerns v. Graves*, 26 Cal. 156, is analogous to the case at bar. A judgment had been obtained before a justice of the peace, and a transcript filed in the office of the county clerk. The statute provided, as in section 899, Code Civil Proc., that execution might be issued by the county clerk "as upon judgments recovered in the higher courts." This court held that execution could only issue within five years after the judgment rendered by the justice of the peace, and that the execution was still upon and by virtue of the judgment rendered by the justice.

In making the entries required by section 958, the clerk of the superior court acts by authority of this court. No action is required on the part of the superior court to authorize the entries or the issuance of the execution. The execution issues pursuant to the judgment rendered in this court, which is thus docketed and made the judgment of the superior court. It becomes the judgment in that court as soon as the *remittitur* is filed and the entries made. This view was taken in the case of *Marysville v. Buchanan*, 3 Cal. 212, approved in *McMillan v. Richards*, 12 Cal. 467. In the first-mentioned case it is said: "The present appeal is from an order of the district court, refusing to set aside an order of the judge in chambers staying proceedings upon an execution for costs, issued by the clerk of the district court upon a *remittitur* from this court filed with him, and from an order of the district court quashing said execution. * * * By statute (Pr. Act, 358,) the *remittitur* from this court is transmitted to the clerk of the court below, and by him it is attached to the judgment roll and a minute of the judgment of this court is entered on the docket against the original entry. The judgment of the court, [this court,] then, stands as the judgment of the district court. If the judgment of this court orders a new trial, the clerk of the district court will proceed to place the cause on the calendar. If it award costs, he will, on application of the party in whose favor it is given, issue execution for the same. In either case he acts, not by authority of the district court, but of this court."

The statute commencing to run from the entry made in the docket, there was no authority for issuing the execution, and the court did not err in recalling it. *White v. Clark*, 8 Cal. 513. Nor do we think the power of the court to order the sheriff to refund the money can be doubted. He was acting as an officer of the court and under color of its process. Thus acting, he demanded and received moneys illegally. The money was paid to him in his official capacity as an officer of the court, and because of the process improperly issued. Certainly, the court must have the power to control the conduct of its officers, when acting under color of its authority or of its process. Section 1286, Code Civil Proc.

We think the writ should be denied. So ordered.

We concur: SEARLS, C. J.; MCFARLAND, J.; PATERSON, J.; MCKINSTRY, J.; THORNTON, J.; SHARPSTEIN, J.

(74 Cal. 110)

PEOPLE *ex rel.* LYNCH v. MARTZ. (No. 12,178.)

(*Supreme Court of California.* November 10, 1887.)

PUBLIC LANDS—LAND IN LIEU OF SCHOOL LAND—FORFEITURE.

In a suit brought to cancel a patent issued by the state on an application to purchase 320 acres of state land, in lieu of school land, made in 1880, plaintiff claimed that the same land had been sold to his grantor, upon his application made in 1869; that the land was a part of the grant for school purposes; and that the application was approved, and a certificate of location issued to his grantor. The grantor, however, did not present his certificate, or make any payment on his location, until after he had by law forfeited his rights to the land. In 1872 the legislature passed

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an act for the relief of purchasers of state lands, providing that when application had been made to purchase lands, and the whole or part of the purchase money paid, and a certificate of purchase or a patent had been issued, the title to the land vested in the purchaser, or his assigns, upon full payment therefor: provided, that no other application had been made for the purchase of the same land prior to the issuance of the certificate of purchase: and provided, that the act should not apply to school lands, except to the amount of 320 acres to one purchaser. The complaint did not allude to this act, nor claim relief by it from the forfeiture suffered by the plaintiff's grantor, nor did it allege that plaintiff's grantor had not already had the benefit of the act to the extent of 320 acres of school land. *Held*, that a general demurrer to the complaint should have been sustained.

In bank. Appeal from superior court, San Bernardino county; JAMES A. GIBSON, Judge.

H. C. Rolfe, for appellant. *Curtis, Otis & Conner*, for respondent.

TEMPLE, J. This is a suit brought to cancel a patent issued on an application to purchase 320 acres of land, in lieu of school lands granted to the state, made in May, 1880. Plaintiff claims that the same land had been previously sold to John Mullen, assignor of the relator, upon his application made in 1869, under the provisions of the act of March, 1868, (St. 1867-68, p. 507.) The land having been accepted by the register of the United States land-office in part satisfaction of the grant for school purposes, the surveyor general of the state approved the location, and issued to Mullen a certificate of location on the twenty-first day of August, 1869. Mullen did not present his certificate, or make any payment thereon, to the county treasurer, until October 15th following, which was 55 days after he received the certificate of location. The statute required the purchaser to make this payment within 50 days after the approval of the surveyor general. Section 23, Act March 28, 1868. In *Eckart v. Campbell*, 39 Cal. 256, this court, in construing this statute, held that the failure of an applicant to make this payment within 50 days was conclusive evidence that the applicant had abandoned his privilege; in other words, that the requirement was a condition precedent, failing in which, the applicant forfeited his rights.

The legislature, however, passed, March 27, 1872, an act entitled "An act for the relief of purchasers of state lands," the first section of which reads as follows: "When application has been made to purchase lands from this state, and payment made to the treasurer of the proper county for the same, in whole or in part, and a certificate of purchase or patent has been issued to the applicant, the title of the state to said land is hereby vested in said applicant, or his assigns, upon his making full payment therefor: provided, that no other application has been made for the purchase of the same lands prior to the issuance of said certificate of purchase: provided, further, that this act shall not apply to school lands, except to the amount of 320 acres to any one purchaser." St. 1871-72, p. 587. The complaint contains no allusion to this act, and, of course, does not show that Mullen had not already been the beneficiary of the act to the extent of 320 acres. A general demurrer was interposed, in which one of the grounds was that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and, the defendant declining to answer, judgment was entered for plaintiff, from which this appeal is taken.

We think it was incumbent upon the plaintiff to show affirmatively that he was entitled to the benefit of the act. There was no presumption of law upon the subject. The demurrer, therefore, should have been sustained. Judgment reversed, and cause remanded, with directions to sustain the demurrer.

We concur: SEARLS, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.; MCKINSTRY, J.; PATERSON, J.

(74 Cal. 151)

PHILLIPS and another v. GOLDTREE and others. (No. 9,504.)

(Supreme Court of California. November 12, 1887.)

PARTNERSHIP—FICTITIOUS NAME—ACTION BY—PLEADING—FAILURE TO FILE CERTIFICATE.

Where, in an action by partners doing business under a fictitious name, the complaint is perfect in all other respects, there is no failure to state facts sufficient to show a cause of action merely because it contains no statement that a certificate of partnership had been filed, as provided by Civil Code Cal. §§ 2466, 2468, attaching a legal incapacity to maintain an action upon any contracts made or transactions had in the partnership name to a failure to file such a certificate; and an objection that no such certificate has been filed must therefore be taken by answer; otherwise, under Code Civil Proc. Cal. § 434, it is waived. Affirming 13 Pac. Rep. 313.

In bank.

W. J. & E. Graves, J. M. Wilcox, and Edward P. Cole, for appellants.
J. R. Brandon, for respondents.

BY THE COURT. This case was heard and decided by department 2. 13 Pac. Rep. 313. On petition of defendants, a hearing in bank was ordered. For reasons given in the department opinion the judgment is affirmed.

(74 Cal. 141)

MAYNARD v. POLHEMUS. (No. 9,565.)

(Supreme Court of California. November 12, 1887.)

COVENANT—TO SELL ONLY TO GRANTOR—NOT BINDING ON HEIRS—RESTRAINT OF ALIENATION.

In September, 1882, N. sold to C. a tract of land; the deed containing the provision that, if C. should ever sell the land, it should be sold to N. at the purchase price. C. held possession until 1862, when he died, leaving, by will, the land to R., who remained in possession until her death in 1879. In 1864, N. conveyed to defendant all his interest in the land. In an action by the administrator of R. to quiet title, *held*, that the proviso in the deed was a personal covenant, invalid as a restraint of alienation, and not binding on the heirs and assigns of C.

Department 1. Appeal from superior court, San Mateo county; E. F. HEAD, Judge.

Cope & Boyd, for appellant. *A. H. Loughborough*, for respondents.

PATERSON, J. This is an action in which the administrator and heirs of Bridget McD. Rice are seeking to have quieted their title to a tract of land in San Mateo county. The complaint alleges that Nicholas De Peyster, in September, 1852, granted and conveyed the land in controversy to one Cooper. The deed contained the following clause: "To have and to hold the aforesaid premises unto the said John B. Cooper, his heirs, and to his and their sole use forever; with the sole provision that if the said Cooper should ever sell any of the aforesaid property, it shall be sold to the said De Peyster at the aforesaid price." Cooper went into possession under this deed in 1857, and from that time until his death held the same. He died in November, 1862. By his will, duly admitted to probate, he devised the land to Bridget McD. Rice, who held possession of the premises until her death, which occurred in July, 1879. The plaintiff Maynard was appointed administrator of the estate in February, 1880. Improvements to the value of about \$3,500 have been put upon the land by said Cooper and Rice, and the land itself has greatly increased in value. Defendant claims under a deed from De Peyster, executed on the thirty-first day of March, 1864, and his claim is founded solely upon the provision contained in the deed and quoted above.

The complaint set forth the facts, demurrer was filed by the defendants, which was overruled, and the defendant declining to answer, judgment went for plaintiff as prayed for. Appellant claims that this provision in the deed

to Cooper is valid, and that the right to enforce it passed by De Peyster's deed of March, 1864, to the defendant.

If the proviso referred to be construed as a covenant, it was merely personal, and not binding, upon the heirs or assigns of Cooper. It does not appear that De Peyster attempted to bind the heirs of Cooper by any covenant. All claim on behalf of De Peyster and his grantees under the proviso ceased upon the death of Cooper. At common law it was necessary, in order to make the heir responsible, that he be expressly named in the covenant of his ancestor. *McDonald v. McElroy*, 60 Cal. 496. If it be doubtful whether a clause such as that quoted above be a covenant or a condition, the court should declare it to be a covenant. Chancellor Kent, speaking of a similar provision, said: "It is very questionable whether such a condition would be good at this day." 4 Kent, Comm. 131. Regarded as a condition, it is unreasonable and contrary to the policy of the law, because in restraint of alienation. *Murray v. Green*, 64 Cal. 363; Civil Code, §§ 711, 715. Judgment affirmed.

We concur: TEMPLE, J.; MCKINSTRY, J.

(74 Cal. 148)

ST. ORES v. MCGLASHEN. (No. 9,875.)

(Supreme Court of California. November 12, 1887.)

1. DAMAGES—EXEMPLARY—MALICE—PREPONDERANCE OF EVIDENCE.

In an action for damages for assault and battery, defendant asked the court to instruct the jury that, before they could give exemplary damages, they should be satisfied beyond a reasonable doubt that the alleged assault was maliciously committed. *Held*, that a preponderance of evidence is all that is necessary to warrant a finding of exemplary damages in civil cases.

2. SAME—ASSAULT—MALICE—INTOXICATION.

In an action for damages for an assault, defendant asked the court to instruct the jury that if they believed the defendant to have been so intoxicated that he did not know what he was doing, and was therefore incapable of forming an intent, they should not assess exemplary damages. *Held*, that the instruction was properly refused, as restricting the question of malice to too narrow limits.

In bank. Appeal from superior court, San Luis Obispo county; D. S. GREGORY, Judge.

Graves, Turner & Graves, for appellant. *F. Adams* and *V. A. Gregg*, for respondent.

SEARLS, C. J. This is an action to recover damages for an assault and battery, committed by defendant. Plaintiff had a verdict and judgment for \$1,100 and costs. The appeal is from the judgment, and from an order denying a new trial.

The seventh instruction asked by defendant, and refused by the court, enunciated the proposition that, before the jury could give exemplary damages against the defendant, they should be satisfied beyond a reasonable doubt that the alleged assault and battery committed by the defendant (if any) upon the plaintiff, was maliciously committed by said defendant. The instruction does not embody the law as applicable to civil cases. A preponderance of evidence is all that is necessary to warrant a finding in such cases, and the rule that prevails in criminal cases, and which requires evidence to satisfy the mind beyond a reasonable doubt, has no place here. It follows that the instruction was properly refused.

The only other instruction refused, which it is claimed should have been given, is the third. This instruction states, in substance, that, while intoxication is in itself no excuse or defense for the commission of a wrong, yet this goes only to the justification of the wrong; "but when it is alleged, as it is here alleged, for the purpose of inflaming the damages sought to be recovered against the defendant for that wrong, and to make them not only com-

pensatory, but vindicatory," etc., then and in such a case, if the jury believed from the testimony that defendant was so intoxicated that he did not know what he was doing, and was therefore incapable of forming any intent whatever, they should not assess exemplary damages, but confine their verdict to actual damage.

The complaint does not charge or show that defendant was intoxicated, and the statement shows affirmatively that the testimony as to intoxication was introduced by defendant. No instructions on the subject were, so far as appears, offered or given on behalf of plaintiff. The statement in defendant's instruction, therefore, that intoxication of the defendant was alleged for the purpose of inflaming the damages, involved an assumption of facts not warranted by the record; and the instruction was properly refused for that cause, if for no other. "The fact that a tort was committed while a defendant was intoxicated, is no excuse whatever. This has been held in actions for slander. It is conceivable, however, that the amount of the recovery might be considerably affected by showing that the wrong was committed under such conditions that no one would have been likely to attach importance to the utterances." Cooley, Torts, 114; *McKee v. Ingalls*, 4 Scam. 30; *Reed v. Harper*, 25 Iowa, 87. In the last case cited, the court refused to instruct the jury "that, if they believed from the evidence that the defendant was so intoxicated at the time he spoke the words (it being an action for slander) that he did not know what he was about, the plaintiff could not recover." The court refused to so charge, but instructed the jury that it was their duty to consider all the facts and circumstances attending and surrounding the speaking of the words; and its action in that behalf was upheld.

In cases of tort, exemplary damages are not confined to cases in which malice on the part of defendant appears. Section 3294 of the Civil Code provides that "in any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant." It will be observed that malice is but one of several causes for which exemplary damages may be given, yet the instruction as asked would make it the sole cause, and its absence conclusive of plaintiff's right to recover exemplary damages. Many of the statements contained in the instruction are correct as propositions of law; but the clause which would make the question turn upon the absence of intentional malice restricts the question to too narrow limits, and the instruction was properly refused.

The case as presented by the evidence shows a wanton attack by defendant upon an aged cripple, and the perpetration of personal injuries fully warranting the verdict, independent of all question of exemplary damages. The judgment and order appealed from are affirmed.

We concur: MCFARLAND, J.; TEMPLE, J.; SHARPSTEIN, J.; PATERSON, J.; MCKINSTRY, J.; THORNTON, J.

(74 Cal. 144)

Estate of SHILLABER. (No. 11,484.)

(Supreme Court of California. November 12, 1887.)

1. WILL—DIRECTION AS TO DISPOSITION OF PROPERTY—REFERENCE TO LETTERS SUBSEQUENTLY WRITTEN.

A will written entirely by the testatrix contained this clause: "I give and bequeath to my said executor my silverware, jewelry, paintings, organ, clothing of every description, carriage, library, *bas reliefs*, bronzes, statuary, excepting my three large pieces, viz., 'Delilah,' 'Saul,' and 'Lost Pleiad,' and request him to dispose of the same in the manner specified in my letter to him of this date." At the time of making the will the letter had not been written, but was afterwards dictated by the testatrix. Held that, under the evidence and the language of the will, the letter was properly excluded from probate as a part of the will.

2. SAME—REQUESTS VOID FOR UNCERTAINTY—ADMISSION TO PROBATE.

Certain bequests were made in a will, to be disposed of in the manner specified in a letter written to the executor by the testatrix. *Held*, that though the bequests in that part of the will might be void for uncertainty, they being but a small part of the estate, the will was properly admitted to probate.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

McAllister & Bergin, for appellant. *Wm. Hoff Cook*, for respondent.

PATERSON, J. The document which was admitted to probate in this proceeding is wholly in the handwriting of Mrs. Shillaber, deceased. The third clause of the will reads as follows: "I give and bequeath to my said executor my silverware, jewelry, paintings, organ, clothing of every description, carriage, library, *bas relievos*, bronzes, statuary, excepting my three large pieces, viz., 'Delilah,' 'Saul,' and 'Lost Pleiad,' and request him to dispose of the same in the manner specified in my letter to him of this date." After the execution of this will she dictated a letter to Carroll Cook, Esq., named in her will as executor thereof. This letter is in the handwriting of Mr. Cook, but is signed by the deceased. It commenced as follows: "SAN FRANCISCO, Cal., September 8, 1884. To Carroll Cook, Esq., San Francisco, Cal.—MY DEAR NEPHEW: In my will, which I have this day executed, I have left certain personal property to you, to be disposed of by you as I should by letter direct. I desire the following disposition made thereof, viz., " etc. (Here follow directions for the disposition of the articles above named.)

The court found—and the finding is supported by evidence—that the letter was dictated and signed after the execution of the will. Upon the objection that the letter was not in existence at the time of the execution of the will, it was excluded, and the document, which is wholly in the handwriting of Mrs. Shillaber, was admitted to probate. It is claimed by appellant that the two documents were designed to constitute one instrument; that they are such in law, and as they are not wholly in the handwriting of the deceased, they do not constitute a valid olographic will.

All the authorities to which our attention has been called agree that any paper may be referred to, and may be a part of a will, if such paper be in existence at the time of the execution thereof. If the will be duly executed and attested, the paper referred to, whether attested or not, will become a part of the will, if it be already in existence, and is clearly described and identified. The identification must be by a description given of the paper in the will. In the case at bar the letter referred to was not in existence at the time of the execution of the will. It has been held that "a reference in a will may be in such terms as to exclude parol testimony, as where it is to papers not yet written, or where the description is so vague as to be incapable of being applied to any instrument in particular; but the authorities seem clearly to establish that, where there is a reference to any written document, described as *then existing*, in such terms that it is capable of being ascertained, parol evidence is admissible to ascertain it, and the only question then is whether the evidence is sufficient for the purpose." *Allen v. Maddock*, 11 Moore, P. C. 454. We think that, under the evidence and the language of the will, the letter was properly excluded.

It is claimed that without the letter the will is incomplete, for only through the letter can the beneficiaries therein named make title to the bequests provided for them. We think, however, that the will, being effective in other parts, was properly admitted to probate, although the bequests named in the third article above quoted be void for uncertainty. *George v. George*, 47 N. H. 45; *Brown v. Burdett*, 21 Ch. Div. 667. The property named in the third article is evidently but a small part of the estate. It is all personal property, and intestacy as to any portion of the estate should be avoided if possible. Our Code provides that, "of two modes of interpreting a will, that is to be

preferred which will prevent a total intestacy." It is not clear that the will without the letter is incomplete. It has been held that as to personal property a document like this letter, although not entitled to probate as a part of the will, is sufficient to enable the beneficiaries named in it to proceed in a court of equity, after the property is distributed to the executor under a clause of the will similar to that quoted above, to compel the executor to execute the trust in accordance with the directions contained in the letter. *In re Fleetwood*, 15 Ch. Div. 594.

Judgment and order affirmed.

We concur: TEMPLE, J.; MCKINSTRY, J.

(74 Cal. 125)

In re Estate of ZEILE. (No. 11,956.)

(*Supreme Court of California.* November 12, 1887.)

WILL—CODICIL—CUMULATIVE LEGACIES—ADVANCEMENTS.

Decedent, a resident of San Francisco, left a will made May 19, 1883, which bequeathed to certain relatives residing in Germany, a proportionate share of the proceeds of 1,000 shares of bank stock. The will contained the proviso that any advancements the testator might personally make to the legatees, should be in whole or partial satisfaction of their respective legacies. Decedent went to Germany, and ordered that large sums of money be sent him there. In August, 1883, decedent made a codicil, in which he bequeathed to his relatives in Germany proportionate shares of the money he then had. In this codicil the testator ratified his former will, directing that it remain unchanged, and confirming the bequests he had made. *Held*, that the legacies bequeathed in the codicil were cumulative, and not to be regarded as advancements, within the meaning of the proviso in the former will.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

J. B. Reinstein, (J. M. Searwell, of counsel,) for appellant. Seldon S. & George T. Wright, Joseph P. Kelly, and Sawyer & Burnett, (S. Heydenfeldt, of counsel,) for respondents.

MCKINSTRY, J. Deceased died at Monte Carlo, Monaco, April 26, 1884, being then a resident of San Francisco, and leaving property in that city and county. He left a will, executed and published in this state on the nineteenth of May, 1883, which was duly probated in San Francisco, a portion whereof reads: "Item 6. I give and bequeath unto my relatives residing in Germany, one thousand (1,000) shares of the stock of the Bank of California, the same to be sold by my executors at or as soon after my decease as is practicable, for its reasonable value, and the proceeds to be divided as follows, to-wit: To my sister Mathilde, one-fourth, ($\frac{1}{4}$;) to the children, residing in Germany, of my brother David, one-fourth, ($\frac{1}{4}$;) share and share alike; to the children of my dead sister, Mrs. Maier, one-fourth, ($\frac{1}{4}$;) share and share alike; to the children of my dead sister, Mrs. Froescher, one-fourth, ($\frac{1}{4}$;) share and share alike. And I hereby declare that any advancements that I may hereafter personally make to the above-mentioned legatees, or to either of them, shall be deemed a partial satisfaction of said legacy, equal in amount to the sum so advanced, and I direct that an equal amount shall be deducted from the proceeds of the sale of bank stock, and added to my residuary estate."

Subsequent to the execution of the will in California, decedent left for Europe, and at Rottweil, Wurtemberg, on the seventeenth of August, 1883, made a supplemental will or codicil, portions whereof read:

"(I.) I have already disposed by testament of my estate in California. That testamentary disposition shall remain unchanged, and I again ratify the same.

"(II.) However, I have already made arrangements to have a sum of money sent from California to a bank in Germany or Wurtemberg, of which I shall dispose in favor of other relatives. The following sums of money shall be

paid: (1) To my sister, Mathilde Zeile, unmarried, at Reutlingen, sixty thousand (60,000) marks. To my brother, David Zeile, of the town of Weil, fifty thousand (50,000) marks. (3) To the wife of the tanner Hummel, at Reutlingen, whose first name at this moment I do not remember, daughter of my deceased sister, whose name I do not just now recall, formerly widow of the baker Maier, of Tübingen, seventy-five thousand (75,000) marks. (4) To the children of my deceased sister Gottlobin, formerly wife of the tanner Froescher of Reutlingen, to-wit: (a) To the son, who is tanner in the upper country, and is married, whose first name is at this instant unknown to me, twenty-five thousand (25,000) marks. (b) To her daughter Pauline, now living, widow of the architect Fuchs at Reutlingen, that is, to each of the children of this marriage, minors, whose names are at this instant unknown to me, twenty thousand (20,000) marks; with proviso that the income is to go to the children, and that there shall be a guardianship of the estate until they become of age or marry. (c) To her daughter Mathilde, now living, wife of the manufacturer Haux, at Reutlingen, that is to the children born and to be born of this marriage, (there are four children at present,) jointly (50,000) fifty thousand marks; with the proviso that the income goes to the children; that there shall be a guardianship of the estate until they arrive at the age of majority, or until they marry, and that at that point of time they are to receive their shares; that in case of the possibility of other children being born, the guardian's court will have to determine how such shall be paid over, and also with the further proviso that, if one of these children should die during the age of minority, the share of such child shall go to his brothers and sisters. The children living shall hold in trust for the children born hereafter.

"(III.) All the personal property of any kind, as well as money which I shall leave in Germany at my decease, beyond that of which I have disposed in the foregoing paragraph, shall go to the four branches named in the foregoing paragraph, in such manner that only those mentioned in the foregoing paragraph shall be entitled, and that those of each branch are to share with each other in the proportion of the sums given them in the foregoing paragraph.

"(IV.) If, unexpectedly, the funds in Germany should be insufficient for the purpose of paying the sums in paragraph 2, then the heirs of the estate in California shall supply the deficiency.

* * * * *

"(VII.) All bequests which I have made or which I shall make by this last testamentary disposition be expressly confirmed, whether these bequests are given to relatives, strangers, or for charitable purposes and institutions. Likewise, any testamentary papers written or subscribed by me shall have the same effect as if they were here incorporated."

On application for distribution of the proceeds of the bank stock, which had been sold by the executors by order of the court, the superior court found that no part of such proceeds had been paid to Mathilde Zeile, sister of testator, or to Marie M. Hummel, daughter of testator's sister Mrs. Maier, or to Karl Froescher, son of the sister of testator, Mrs. Froescher. Also that the sum bequeathed to Marie M. Hummel (appellant) by the Rottweil will or codicil was more than her share of the proceeds of the bank stock. And the court held that the sums of money bequeathed by the Rottweil will or codicil to the persons mentioned in item 6 of the California will were intended by the testator to be, and were, "advancements," within the meaning of the term as used in item 6, and should be deducted from the legacies given to the same persons in that item. The superior court treated the legacies given by item 6 of the California will as "specific legacies," and no question has been made by either party as to the correctness of that ruling. The thousand shares of bank stock were to be sold by the executors, and the proceeds divided among the legatees named. The

dividends collected by the executors were incidents to the stock, and were, of course, to be distributed in like proportions with the proceeds of sale. The will did not merely provide that sums of money should be distributed to the legatees, payable primarily out of the fund arising from the sale. The legacies were not merely demonstrative. They were specific. If the shares of stock had become worthless, the legatees would have been entitled to nothing.

There is no question of *ademption*, in the strict sense, here. The specific thing has never been taken away. The bank stock continued to be a portion of testator's property until his death, and was a part of his estate afterwards. But the first question, as applied to this appeal, is, what was the specific legacy left to Marie M. Hummel? The legacy to her was not of one-eighth of the proceeds of the 1,000 shares of bank stock absolutely; but of one-eighth, less the amount of any "advancements" the testator might "personally make" to her after the execution of the California will. Whatever the nature of the "advancements," they were to be personal acts of Frederick Zeile in his life-time. It would seem plain, also, that, whether or not the execution of a will containing provisions like those last above recited was intended by the testator, when the California will was made, to constitute an "advancement" to appellant of an amount equal to the legacy to her named in such an instrument, must depend upon the language of the California will, and the effect of oral testimony, if any, properly admissible to explain the intent of the testator when the California will was made. Whether the legacy to appellant in the first instrument was satisfied by a bequest in the subsequent instrument, (intended as a substitute for that legacy,) is a different question. The California will was republished at Rottweil, and all its provisions reaffirmed and ratified.

Unless the term "advancements" of itself included a legacy mentioned in a subsequent codicil, or the language of the second instrument, in connection with that of the first, or of such language with oral testimony, properly admitted to explain the first instrument, shows the testator intended the second legacy to be in substitution or satisfaction for the legacy in the California will, the second legacy must be held to be cumulative. It is well settled, except where the two legacies are for the same sum, and both testamentary instruments express the same motive for the gift, that, where a testator gives a legacy of quantity, *simpliciter*, and also a second legacy of quantity to the same legatee, the second legacy is regarded as cumulative, and not as substitutionary, unless the language of the second will or codicil shows an intent to the contrary.

Whether the testator meant, when he used the word "advancement," that any legacy he might give in a subsequent will or codicil to one of the persons named in item 6 should be deemed an advancement, is to be determined by reference to the language of the California will, and the evidence showing the circumstances surrounding the deceased when he made that will. Whether, when he provided a legacy for appellant in the Rottweil will, he intended the same as a substitute for the legacy left her in the California will, and not as cumulative, is to be determined by reference to the language of the Rottweil will, or of the Rottweil and California wills together, in the light of the testator's then surroundings, and of events (so far as evidence of such was admissible) which preceded its execution.

Prior to our Codes, the term "advancements," was applied to gifts by a parent, in his life-time, to a child, of the whole or a part of what it is supposed the child would inherit from the parent; sometimes also to such gifts by one standing *in loco parentis*. By the Civil Code the term is extended so as to include like gifts by an ancestor to a child "or other lineal descendant." Civil Code, § 1395.

It may be conceded, as claimed by respondents, the word is not employed in item 6 as in the provisions of the Civil Code. It by no means follows, how-

ever, that the testator intended the word to embrace any legacy to one of the same persons, which he might give by a subsequent testamentary instrument, not revocatory of the will in which the word is found. Webster gives as definitions of "advancement:" "The payment of money in advance; money paid in advance." A payment in advance implies a payment *beforehand*,—before an equivalent is received, or before the happening of an event in the contemplation of the parties to a contract. When used in a will, unless another event is mentioned prior to which the advance is to be made, or the context otherwise indicates a different meaning, the words, "payments in advance to be applied in satisfaction of a legacy," import payments prior to the happening of the event on which the will is to take effect, to-wit, the death of the testator.

Counsel for respondents cite Professor Pomeroy's work on Equity Jurisprudence as authority for the proposition that the legacy to appellant in the Rottwell will was an "advancement" within the meaning of the word as used in the California will. The learned writer, speaking of the effect of a legacy in a will made *after* a settlement on a child, says: "The settlement or agreement to give a portion may sometimes contain a provision to this effect: that, if the parent should afterwards, during his life-time, make an advancement to the donee, such advancement should be a complete or partial satisfaction of the portion. If, instead of making a technical advancement, the parent should afterwards, by his will, leave a legacy or a residue, the legacy given under such circumstances is held to be a compliance with the provision, and to operate as a satisfaction in full or in part of the portion." 1 Eq. Jur. § 567. He cites in a note *Onslow v. Michell*, 18 Ves. 490; *Noel v. Lord Walsingham*, 2 Sim. & S. 99; *Fazakerley v. Gillibrand*, 6 Sim. 591; *Papillon v. Papillon*, 11 Sim. 642. We have not had access to the Irish report, but it would seem the English cases, although they appear to do so, when examined and fully explained, do not support the text. See *Cooper v. Cooper*, 8 Ch. App. 825, 826. However this may be, Mr. Pomeroy shows very clearly in another place that the doctrine of presumptions applicable with respect to the dealings of a parent as to a child has no place in cases like the present. 1 Eq. Jur. § 548.

Lord ROMILLY, M. R., said: "It is of paramount importance to consider in all cases * * * whether the doctrine of presumption against double portions, or the doctrine of construction of instruments, applies." "If the original gift was to a stranger, the doctrine of satisfaction becomes applicable according to the words of the original donor." *Cooper v. Cooper*, 8 Ch. App. 819, note.

In the case before us, the testator might have used language to indicate that by "advancement" he meant not only a gift of money or property prior to his death, but also a subsequent bequest to a legatee named in the California will. But in the absence of such language there is no *presumption* that he used the word in a sense differing both from its technical and proper signification. As it was not employed as a technical term, the presumption is he employed it in the sense approved in general literature and by common usage. The language in immediate connection with "advancements" strengthens rather than weakens the hypothesis that the testator intended a gift in his life-time. "Any advancements that I may hereafter *personally* make," etc.

It is true, a subsequent codicil would be made by him, and made by him in his life-time. But the words, while apt and appropriate in respect to gifts consummated in his life-time, are such as would not ordinarily or "naturally" be resorted to when the testator was speaking of gifts to take effect only on his death. In the latter case, the substance of the thing to be conferred would not be delivered by the testator personally, but by his executors after his decease.

The testimony of the witness called by the parties contesting the application of appellant and others, (respondents,) did not establish or tend to estab-

lish that the word "advancements" was used to designate or include any subsequent legacy to appellant. The witness said: "I was about two months in drafting said will, as the doctor [testator] made frequent changes, and I had to rewrite it. It took him a long time to make up his mind about some of his property. When he came to the matter of these German heirs, he seemed already prepared. The 1,000 shares of the capital stock of the Bank of California he designed for them, and he proceeded to divide it up just as it is written in the will,—four families, each one-quarter. After I had written it and read it to him, he remarked that when he arrived in Germany he intended to give some money to such of his relatives there as might need it, to distribute some money among them, and whatever that amount might be to either of them must come out of their share of the proceeds of the bank stock. It was under that instruction that that clause was framed. The will was not signed when completed. He kept it a couple of days examining it, but made no remarks to me that I remember. He made the statement about the German heirs. He seemed to be prepared and settled it as above stated. Before the will was executed, he wanted Judge Heydenfeldt to read the will. He came and read it. Judge Heydenfeldt said it was all right. I am under the impression the doctor used the word 'distribute' in reference to the German heirs. He said: 'Distribute some money among these people.'"

The statement of decedent to witness that, "*when he arrived in Germany,*" he intended "to give" or "distribute" some money to or among such of his relatives there as might need it, accords, at least as well with a purpose to make presents to such relatives personally, as with an intention to make different and substitutionary testamentary provision for such of them as he had named in his will. It is significant that in terms he expressed no intention of providing for his relatives in Germany by supplemental will or codicil. There is no suggestion in the testimony of Taft that deceased entertained such intention. It cannot be derived from the word "distribute," a word appropriately applicable to an allotment or division of money among the German relatives by the testator in his life-time. Our conclusion is that, when the California will was made and published, the deceased intended that the legacies mentioned in item 6 should be reduced only by actual payments made by himself personally; that is, in his life-time.

The evidence shows that the decedent took with him when he left for Europe about \$35,000, and that he afterwards wrote for, and there was sent him by his agent, the witness Taft, \$125,000. Decedent wrote for the last sum at Nice, December 22, 1883, but in his letter, stated that he had already directed his agent to send him "every two or three months all the cash on hand." The court below found that Taft, testator's agent, sent the \$125,000 from San Francisco on the sixteenth day of January, 1884, and that on the twenty-third of the same month he sent another sum of \$5,000. When the California will was made and published, the testator intended that any sum of money he might personally give to the persons named in item 6 should be deducted from the legacy to such persons. His language proves, at least, that he then contemplated the probability of such advances. Neither the fact that the decedent caused very large sums of money to be placed in Europe, nor his letter of December 22, 1883, indicates any change of his original purpose to make gifts or advances personally to some of those mentioned in item 6. Can we say his intention was changed or modified prior to the making of the Rottweil will?

"Although two bequests may be made to the same person, and although these bequests may differ in their amounts, incidents, and forms, * * * still the special language used by the testator in making the second gift, or the language found in other parts of the will, may sufficiently show his intention to give the second legacy for or in satisfaction of the prior one. * * * It is impossible to lay down any general rule governing such cases; each case

must stand upon its own circumstances. The question is, then, simply one of interpretation in order to ascertain the real intent of the testator. But, in arriving at this intent, the court will, if necessary, look at all parts of the will. The court may also be called upon to interpret the testamentary language, rather than to apply any rule of presumption, when the second instrument, *e. g.*, the codicil, *expressly refers to the former one*. The terms of the second instrument,—perhaps codicil,—may be such, *when all taken together*, as to show an intent that the second gift was to be in substitution or in satisfaction, and not cumulative." 1 Pom. Eq. Jur. § 548.

Paragraph 1 of the Rottweil will reads: "I have already disposed by testament of my estate in California. That testamentary disposition shall remain unchanged, and I again ratify the same." And in paragraph 7 the testator confirms all bequests which he had already made, and declares that any testamentary papers subscribed by him shall have the same effect "as if they were here incorporated." The two instruments are therefore to be read as one writing, the whole expressing the intent of the testator at the date of the Rottweil will so far as his intent appears from the writing, with regard to the disposition of his property.

There may be some significance in the circumstance that, after a large amount of money had been sent to him, which he might, perhaps, have given to or distributed among his relations "personally," the testator did not make such personal donations, but proceeded to prepare a codicil wherein he inserted bequests to some of the persons named in item 6. This fact, however, if it can be considered at all, should have little weight in any inquiry, the purpose of which is to ascertain whether the testator, then at Rottweil, intended that the term "advancements" should include the second legacies. The suggestion is but conjectural, that he may have meant what his language does not imply. It is as easy to suppose the testator changed his mind and decided to give to some of those named in item 6 further and cumulative bequests out of the moneys sent to Europe, as that he determined such further bequests should be treated as "advancements."

We may conjecture that, finding himself growing more ill, his decease, perhaps imminent, and believing that he would not be able "personally" to distribute the moneys, he concluded to make the "advancements" by new bequests. On the other hand, we may conjecture that, returning after long absence to companionship with some of his earlier friends, to whom he was connected by the ties of kindred, his surroundings recalling in his old age the home of his childhood, and all its endearing associations, he may have decided to make provision for some of his relatives in addition to that made by the California will. But all such surmises are more or less fanciful, since they are not based upon the language of the instruments, and are built on presumptions, rather than evidence,—presumptions of facts from which different inferences may be drawn, as prominence is given to some or the other of them.

By paragraph 7 of the Rottweil will the California will is to be treated as "incorporated" in the former. Item 6 of the California will contains the provision: "Any advancement that I may hereafter personally make [to the legatees named in the item] shall be deemed a partial satisfaction," etc. Not only did the testator fail to declare, in express terms in the Rottweil will, that the legacies therein given to those named in item 6, should satisfy, in whole or in part, the former bequests, but it may be said he reaffirmed his desire that those bequests should be reduced only by advancements he might "*hereafter* personally make." The force of this suggestion is, however, by no means conclusive. When it is said that the two instruments are to be read as one, it is not to be assumed that literal effect is to be given to every clause of both. This may not be possible without violating the reasonable rules of interpretation applicable to every writing. If it satisfactorily appear from

other portions of the wills that the Rottweil legacies were intended to satisfy, fully or *pro tanto*, those given in item 6, the provision in that item as to advancements may be disregarded; or the language used at Rottweil, read with the first will, may show that, whatever its meaning disconnected from the Rottweil will, the testator at the time the Rottweil will was made, intended the word "advancements" to cover the Rottweil legacies.

In paragraph 1 of the will or codicil made at Rottweil the testator declares: "I have already disposed by testament of my estate in California. That testamentary disposition shall remain unchanged, and I again ratify the same." The bank stock was part of the estate in California, and, so far as appears on the face of the instrument, the whole purport and intent of the Rottweil will was to make disposition of the moneys he had arranged to have sent to "Germany or Wurtemberg."

In paragraph 2, immediately after ratifying the disposition of the California will, the testator says: "However, I have already made arrangements to have a sum of money sent from California to a bank in Germany or Wurtemberg, of which I shall dispose in favor of other relatives. The following sums of money shall be paid." He then proceeds to bequeath sums to relatives residing in Germany, some of whom were given legacies by item 6 from his "estate in California," and some of whom were not mentioned in the California will.

We find nothing to indicate that the legacies given to such of the donees as were mentioned in item 6 were not to be additional or cumulative, unless it be in the expression, "of which I shall dispose in favor of *other relatives*." Now, the sums given by the testamentary instrument executed at Rottweil to Mathilde Zeile, testator's sister, and to his niece, the appellant, were given absolutely. Whether they were intended as "advancements" or not, the right to them, subject to administration, vested unconditionally on the death of Frederick Zeile, except so far as the rights of those named in item 6 of the California will might be limited by the happening of the unexpected contingency spoken of in paragraph 4 of the Rottweil will. Whenever the second legacy is regarded as substitutionary, and not as cumulative, the satisfaction of the prior legacy, to the extent of the second, is absolute. The former legacy, to that extent, creating no right in the legatee, there is no claim of an election between the two on his part.

When, therefore, the testator proposed to dispose of the moneys sent to Europe to "other relatives," he could not have intended to exclude from his bounty those to whom it was expressly extended. Yet some of those to whom legacies were given by the Rottweil will were not named in item 6 of the California will. Those were the *other* relatives, and the clause can only be read as intended to give legacies, from the sums sent to Europe, as well as to those to whom donations were made by item 6 as to the "other relatives" mentioned.

In paragraph 4 of the Rottweil instrument the testator provided for an event which he regarded as possible, although not probable, and which never came to pass. If, unexpectedly, the funds in Germany should be insufficient to pay the sums in paragraph 2, the heirs of the estate in California were to make up the deficiency. In paragraph 5 he applied the word "heirs" to legatees. But if, in paragraph 4, he intended to include in the word "heirs" all the devisees and legatees named in the California will, there is nothing in the language which indicates his purpose that the bequests in paragraph 2, or the residuary interests given by the Rottweil instrument, should be "advancements" in satisfaction of the legacies of the item 6 of the California will.

Starting, then, with the presumption that the second legacy to appellant was intended to be cumulative, unless the language used by the testator shows it was to be in substitution, does the language of the testator overcome this presumption? As we have attempted to show the term "advance-

ments" does not of itself, either in its technical or in any popular sense, cover a subsequent legacy; and, after a careful examination of the language of the two instruments published at Rottweil, we have been unable to discover therein an intention upon the part of the testator that the word should bear such peculiar signification as that its scope should include the Rottweil legacies, or any intention that those legacies should satisfy, in whole or in part, the bequests of the proceeds of the bank stock.

Judgment and order reversed, and a new trial granted to appellant Marie M. Hummel.

We concur: TEMPLE, J.; PATERSON, J.

In re Estate of ZEILE. (No. 11,980.)

(*Supreme Court of California.* November 12, 1887.)

Department 1. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

Edmund Tanzy, (*J. M. Seawell*, of counsel,) for appellant. *Seldon S. & George T. Wright*, *Joseph P. Kelly*, and *Sawyer & Burnell*, (*S. Heydensfeldt*, of counsel,) for respondents.

BY THE COURT. On the authority of *In re Estate of Zeile*, ante, 455, (No. 11,956, filed this day,) it is ordered, the portion of the judgment appealed from is reversed, the order denying a new trial reversed, and a new trial granted to Karl Froescher.

In re Estate of ZEILE. (No. 11,979.)

(*Supreme Court of California.* November 12, 1887.)

Department 1. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

M. S. Eisner, (*J. M. Seawell*, of counsel,) for appellant. *Seldon S. & George T. Wright*, *Joseph P. Kelly*, and *Sawyer & Burnell*, (*S. Heydensfeldt*, of counsel,) for respondents.

BY THE COURT. On the authority of *In re Estate of Zeile*, ante, 455, (No. 11,956, filed this day,) it is ordered, the portion of the judgment of the superior court appealed from is reversed, and the order denying a new trial is reversed, and cause remanded for a new trial as to appellant Mathilde Zeile.

(15 Or. 342)

OREGON & WASHINGTON MORTGAGE SAV. BANK OF OREGON v. CATLIN,
County Judge, and others.

(*Supreme Court of Oregon.* October 24, 1887.)

1. TAXATION—BANKS—DEDUCTION OF DEPOSITS—SWORN STATEMENT.

The plaintiff bank filed with the county board of equalization a statement of its assessable property in that county, and asked to be allowed to deduct as indebtedness the individual deposits of its customers. Subsequently, on its own application, it was allowed and ordered by the board to make an amended return. Thereupon plaintiff attached to the original list and submitted a list of the names of individual depositors, and the amount deposited, with a statement that the deposits there mentioned were all due and payable at the bank. This was not sworn to. Held, that this was not a compliance with Hill's Code Or. § 2752, which provides; among other things, that no such indebtedness shall in any case be deducted unless the person assessed "delivers to the assessor a written statement," duly sworn to, specifying the name and place of residence of the creditor, the nature of the debt, the names of other parties, if any, who are liable therefor, and which statement shall show that the debt or portion sought to be deducted has not been deducted in any other county, etc., and that the action of the board in refusing the deduction was right.

2. SAME—BOARD OF EQUALIZATION—REVIEW OF ACTION—COUNTY PROPER PARTY DEFENDANT.

In proceedings to review the action of a county board of equalization of taxation, the county, and not the board, is the proper party defendant.

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

McDougall & Bower, for plaintiff and appellant. *H. E. McGinn* and *N. D. Simon*, for defendant and respondent.

LORD, C. J. This is a writ of review brought by the Oregon & Washington Mortgage Savings Bank of Oregon to review the action of the board of equalization of taxes for Multnomah county, Oregon. The appeal is from the judgment of the circuit court of that county affirming the decision of the board, and dismissing the writ. The facts alleged, in substance, are: That the plaintiff, at the time therein stated, filed with the defendants, as such board, a statement of its assessable property in Multnomah county, together with a statement of its indebtedness. That thereafter, on application of the plaintiff, the board allowed and ordered the plaintiff to make an amended return, and that after the same was filed it was ordered by the board that the claim for indebtedness be disallowed, and that the bank be assessed for the amount as stated in such return. To this the plaintiff excepted, and sued out the writ, with the result as stated.

The grievance of the plaintiff is this: that it should be allowed to deduct from its taxable property, as indebtedness, the individual deposits of its customers. Before, however, the officer is authorized to make such deductions, when allowable, the statute requires the party assessed to make a sworn statement of facts enumerated therein. It provides, among other things, that "no such indebtedness shall in any case be deducted, unless it be real *bona fide* indebtedness due from the person assessed," etc. "Nor shall a deduction be made in favor of any person assessed unless he or she delivers to the assessor a written statement, duly sworn to, specifying the name and place of residence of the creditor, the nature of the debt, the names of other parties, if any, who are liable therefor, and which statement shall show that the debt or portion thereof sought to be deducted has not been deducted in any other county or place in the state from the assessment of such person for that year," etc. Hill's Code, § 2752. The original list shows that the plaintiff had a fraction over \$140,000 taxable property according to its own sworn statement, and that it had only been assessed for about half that amount—\$70,000—or 50 per cent. of the amount admitted to be subject to taxation. By what principle, or by authority of what law, this mode of taxation is authorized or permitted, we are unable to discover or to understand. In this respect the assessment certainly affords the plaintiff little reason for complaint. It shows, however, a deduction of \$101,000 was claimed as indebtedness for deposits, without stating the facts required by the statute for which a deduction for indebtedness is allowed. To obviate this defect, and to secure the deduction of indebtedness as claimed, the plaintiff was allowed and ordered to file an amended return, in which the facts upon which the deduction was based, as required by law, should be exhibited. Instead of doing this, the plaintiff simply attached to the original list, or submitted, several sheets of paper upon which were written the names of the individual depositors, and the amount deposited, with a statement that the deposits there mentioned were all due and payable at the bank. It is needless to say that this was not a compliance with the law or the order of the court, nor such a statement as would enable the board to ascertain the right of the plaintiff to the reduction claimed. Nor was it sworn to, so that, if found to be false, the punishment which the law pronounces in such cases could be enforced. Mr. Cooley says: "In some states the list has been required to be given in under oath; and that where this is the statute the tax-payer will take no benefit from the list unless it is sworn to." Cooley, Tax'n, 357. Upon this point our statute is explicit. Before a deduction for indebtedness can be made, the statement must not only be sworn to, but the facts specified must be stated as required by the statute. As this was not done, the board was not authorized to do otherwise than reject it.

There is also another objection, which is fatal to this proceeding. The

county and not the board is the proper party. In *Wood v. Riddle*, 14 Or. 254, 12 Pac. Rep. 385, it was said by STRAHAN, J.: "In all analogous cases in this state, from *Thompson v. Multnomah Co.*, 2 Or. 34, to *Pruden v. Grant Co.*, 12 Or. 308, 7 Pac. Rep. 308, the county or other public corporation whose acts are to be reviewed, must be a defendant, and must have the privilege of being heard before its acts can be annulled on writ of review.

The judgment must be affirmed.

(15 Or. 351)

DICKEY v. HENARIE.

(*Supreme Court of Oregon. October 25, 1887.*)

1. NOTICE—OF CLAIM UNDER WRITING—NOTICE OF ALL WRITING CONTAINS.

Plaintiff subleased of M. the front portion of certain premises for a cigar stand, the rear portion being used for a saloon by M. Plaintiff's lease gave him the exclusive right and privilege to sell cigars and tobacco in and upon the entire premises during the entire term of M.'s tenancy. The lease was in writing, but not recorded. Subsequently, and while plaintiff was in possession of the cigar store, M.'s interest in the entire premises, together with the saloon, was attached and sold on execution, being bid in by an agent of defendant. At the time of the sale plaintiff caused notice to be given that he had "a sublease of the cigar store," but there was no evidence that defendant had any notice of plaintiff's exclusive right of furnishing all cigars sold in the saloon. Plaintiff brought this action for damages in consequence of defendant's refusal to permit him to sell cigars in the saloon. The court charged the jury that "the rule of law is substantially this: When a party gives notice to another, and says that his claim is in writing, that is notice of all the writing contains." *Held error.*

2. SAME—IMPLIED NOTICE OF WRITING.

The court also charged: "I submit this question, whether the manner in which this notice was given would lead defendant to know that a writing existed." *Held*, that the instruction was misleading and erroneous.

3. SAME—DUTY TO MAKE FURTHER INQUIRY.

The court also charged: "If you find general notice of claim and possession of part of the premises, then you should find whether a reasonable man or a prudent man would have inquired further." *Held error.*

4. SAME.

The court also charged: "If [defendant] and his agent had notice at the time of the sale by the sheriff that [plaintiff] claimed a lease of the cigar store in fact, I leave it to you as a question of fact whether a reasonable man would not inquire of plaintiff as to the terms and conditions of the lease. It is not necessary that they should have read the lease; but if they had been notified at that time that there was a lease, and had reasonable ground to believe that it was in writing, they were bound to inquire into the contents of the lease, and the law bound them by the contents of the lease." *Held error.*

5. SAME—NOTICE AFTER LEVY OF ATTACHMENT.

The court also charged: "It is not necessary that the defendant should have had any notice of plaintiff's claim at the time of the attachment. It is sufficient that he was notified prior to the sheriff's sale." *Held error*, being in conflict with Civil Code Or. § 148, which provides that, "from the date of the attachment, * * * the plaintiff, as against third persons, shall be deemed a purchaser in good faith, and for a valuable consideration, of the property, real or personal, attached," etc.

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge. *T. A. Stevens and Killen & Starr*, for respondent. *Gearin & Gilbert*, for appellant.

THAYER, J. The respondent commenced an action against the appellant in the circuit court for Multnomah county to recover damages in consequence of being deprived of an alleged right to sell cigars and tobacco in the Argonaut Saloon, in the city of Portland.

It appears that one Edward Martin owned a leasehold interest in a certain portion of "Green's Building," situated at the north-east corner of First and Alder streets in said city. The portion of said building was the store formerly occupied by A. I. Weiler & Co., and from whom said Martin leased. That the said Martin on the twentieth day of March, 1886, sublet to the respondent the

north front portion of said store for a cigar stand. The other portion thereof was used by him (said Martin) for the said saloon. The letting by Martin to respondent was for the term of two years, and the lease contained a clause "that in consideration of the covenants therein contained upon the part of the said H. W. Dickey, to be kept and performed by him, the said Edward Martin leased, demised, and let unto him all of that certain portion of what was known as 'Green's Building,' then being fitted up and occupied as a cigar stand, being the north front portion of said store, together with the exclusive right and privilege to sell, vend, and have sold, in and upon the entire premises formerly occupied by the firm of A. I. Weiler & Co., cigars and tobacco, during the entire term of the lease of said premises from the said firm to the said Edward Martin." That on the fifth day of May, 1886, the appellant, in an action against said Edward Martin, attached his interest in the entire premises. That at the time of the attachment the respondent was in possession of the cigar store. That it fronted upon the street, and was partitioned off from the saloon, but communicated with it by means of a small window, which could be opened and closed.

The sheriff, when he levied the attachment, closed up the saloon, and it remained closed until the sheriff's sale on the twenty-fourth day of October, 1886, at which time it was bid in by one Conroy for appellant. The respondent, during the time the saloon was closed, remained in possession of the cigar stand the same as before the attachment. The appellant, after purchasing Martin's interest in the leasehold estate, again opened and continued to carry on the saloon, but refused to recognize the respondent's right "to sell, and have sold," cigars and tobacco, as provided in his lease from Martin, which was the grievance complained of.

The case was tried by jury, who returned a verdict in favor of the respondent for the sum of \$500, upon which the judgment appealed from was entered.

A question seems to have been made at the trial as to whether the appellant was legally required to allow the respondent such privilege claimed by him in regard to selling cigars and tobacco in the saloon. The latter's lease from Martin was in writing, but not upon record, and a question arose as to whether the appellant or his agents had any notice of there being any such lease. In order to prove such notice, the respondent testified at the trial that at the time of the sheriff's sale he gave notice to the sheriff, and the latter to all the by-standers, including the appellant's agents, that he had a sublease of the cigar store. The sheriff also testified to the same effect. This seems to be all the testimony there was concerning notice. There was evidence that one O'Brien, an agent of the appellant, knew, prior to the attachment, that the respondent had the exclusive right of furnishing all the cigars sold in the saloon, but it was not contended that the said agent was informed that the respondent had the lease from Martin, nor that the appellant, or any of the appellant's agents, had any such information.

The court gave the following charge to the jury: "(1) The rule of law is substantially this: When a party gives notice to another, and says that his claim is in writing, that is notice of all that the writing contains. (2) I submit this question, whether the manner in which this notice was given would lead defendant to know that a writing existed. (3) If you find general notice of claim and possession of part of the premises, then you should find whether a reasonable man or a prudent man would have inquired further. (4) The right to sell cigars in the main saloon is as much the part of the grant as the exclusive possession of the cigar store proper. (5) It is not necessary that the defendant should have had any notice of the plaintiff's claim at the time of the attachment. It is sufficient that he was notified prior to the sheriff's sale. (6) If Conroy, the purchaser, and Henarie and O'Brien, his agent, had notice at the time of the sale by the sheriff that Dickey claimed

a lease of the cigar store in fact, I leave it to you as a question of fact whether a reasonable man would not inquire of Dickey as to the terms and conditions of the lease. It is not necessary that they should have read the lease; but if they had been notified at that time that there was a lease, and had reasonable ground to believe that it was in writing, they were bound to inquire into the contents of the lease, and the law bound them by the contents of the lease." To each of these instructions the appellant duly objected and excepted.

The questions in the case arise out of the court's instructions. It seems to me that they are all faulty, unless it be the fourth.

The first one—that when a party gives notice to another, and says that his claim is in writing, that is notice of all that the writing contains—cannot be correct. Saying that the claim was in writing might make it the duty of the person to whom it was said to inquire as to the contents of the writing; and cases might arise where, if such person failed to make the inquiry, he would be deemed to have been guilty of a degree of negligence fatal to his claim to be considered a *bona fide* purchaser. *Williamson v. Brown*, 15 N. Y. 354. In this case, however, the respondent stated that he had a sublease of the cigar store. What more could be inferred from that than what the words implied? Would any one suppose that, because he had a sublease of the cigar store, he had also the exclusive privilege to sell, vend, and have sold cigars and tobacco in the saloon? Whether the lease was in writing or not was of no consequence; he said what it was, and the appellant could not have supposed it contained anything more than what he said. If he had said that he had a claim to the premises, and that it was in writing, it would then have behooved the appellant to inquire regarding the contents of the writing,—to have sought an inspection of it; but under the circumstances he had no occasion to make any inquiry. The respondent stated what he had, and the appellant accepted the statement. If a person were about to purchase a farm, and an occupant were to say that he had a lease of the orchard, the purchaser would not be informed that the occupant also had a right to the meadow or wood land, or have information sufficient to put him upon inquiry as to any such right. Good faith in such a case demands that a party state fully and fairly the extent of his claim; otherwise, persons dealing legitimately in regard to the property would be liable to be misled to their prejudice.

The second instruction was misleading. It left the jury to infer that, in the manner in which the notice was given led the appellant to know that a writing existed, it would make him chargeable with all it contained. Such might have been the case had the respondent not have said what his right was, but, when he said that he had "a sublease of the cigar store," he might reasonably be supposed to have stated the extent of his right. The statement tended to negative any right to the saloon.

The third instruction was also misleading. I cannot see that a reasonable or prudent man, having general notice that the respondent claimed and had possession of the cigar stand, under the circumstances of this case, should have inquired whether he had not been granted the right to vend cigars in the saloon, or any other right in regard to the saloon. The respondent made known his right, and the appellant had the right to suppose that he was claiming the extent of it. The court charges the jury that the right to sell cigars in the main saloon was as much a part of the grant as the exclusive possession of the cigar store proper. Conceding this, yet it does not follow that, because the respondent was invested with the latter right, he had also been granted the former. The fact that the cigar store was partitioned off from the saloon would, it seems to me, imply that the respondent's cigar business in that locality was circumscribed. In any event, that fact, in connection with the claims he interposed, would not incite any inquiry as to whether another and additional right had not been granted him, however reasonable or prudent a man he might be.

The form of the instruction, it seems to me, is objectionable. The jury were directed, if they found general notice of claim and possession of a part of the premises, to find whether a reasonable man or prudent man would have inquired further, but were not informed as to the law upon the subject. Nor do I think it should have been left to the jury as to whether a reasonable man or a prudent man would have inquired further, in the event suggested. I think the court should have told the jury what the appellant's duty was in case they found the general notice of claim and possession of a part of the premises referred to in the charge, and not left them to speculate upon what a reasonable man or a prudent man would have done in the premises, and to draw their own inference as to the result of their finding.

The fifth instruction is in direct conflict with the provision of the statute upon the subject. Section 148, Civil Code, provides that "from the date of the attachment until it be discharged, or the writ executed, the plaintiff, as against third persons, shall be deemed a purchaser in good faith, and for a valuable consideration, of the property, real or personal, attached, subject to the conditions prescribed in the next section as to real property." This court, in *Boehreinger v. Creighton*, 10 Or. 42, held that under this provision an attaching creditor without notice of a prior unrecorded deed of the property, made by the debtor in the writ to a third person, was not affected by such deed, and recognized the right of such creditor as attaching from the time of the levy, and as having priority over such deed where the creditor had not received notice of it prior thereto.

The sixth instruction stands upon the same footing as the others referred to as being faulty; the case will therefore have to go back for a new trial.

Judgment reversed, and new trial ordered.

(15 Or. 356)

GUMP and another v. HALBERSTADT and another.

(Supreme Court of Oregon. October 31, 1887.)

FRAUDS, STATUTE OF—PROMISE TO PAY DEBT OF ANOTHER.

Plaintiff had taken steps to bring an action on a promissory note made by H., and also to levy an attachment on his property, but forebore the suit and attachment on the verbal promise of L. to pay the note within a reasonable time thereafter. *Held*, that the promise of L. was within the statute of frauds, (Code Or. § 775), and could not be enforced.

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.
Alex. Bernstein, for appellants. *Geo. H. Williams*, for respondents.

LORD, C. J. This was an action to recover money, which was tried by the court without a jury, and judgment entered upon the following findings of fact and conclusions of law: "(1) That on October 1, 1884, the defendant Joseph Halberstadt, being indebted to plaintiffs, on that day executed and delivered to them his certain promissory note in writing, bearing date October 1, 1884, whereby Halberstadt promised to pay, 90 days after date, to the order of plaintiffs, \$88.40; (2) that afterwards, said defendant paid on said note the sum of \$35.86, and at the date of the commencement of this action there remained due and unpaid on said note the sum of \$52.56, which is still due and unpaid; (3) that on the ——— day of September, 1885, the plaintiffs, being the owners and holders of said promissory note, were proceeding to collect the same from the defendant Halberstadt, and had already taken proper legal steps to bring an action on said note against Halberstadt, and to levy an attachment on his property, of which doings of the plaintiffs the defendant Lewis then and there had due notice. Whereupon the defendant L. H. Lewis requested the plaintiffs to forbear to sue said Halberstadt on said demand, and then and there promised to plaintiffs that, if plaintiffs would forbear at that time to sue said Halberstadt, he, said L. H. Lewis, would, within a reason-

able time thereafter, pay, or cause said debt of said Halberstadt to be fully paid, to plaintiffs. That a reasonable time after said promise of defendant Lewis had elapsed before the commencement of this action, and no part of this demand has been paid, except \$35.86, as aforesaid, and said Lewis failed and wholly neglected to pay or cause to be paid any part of the balance of \$52.56 due on said note as aforesaid. (1) That the promise of said Lewis to pay or cause to be paid said demand against said Halberstadt, not being in writing, was void, and he is not bound thereby. (2) That said defendant L. H. Lewis is entitled to judgment for his costs and disbursements."

There is but one question presented by this appeal, and that is whether the verbal promise of the defendant Lewis to pay the debt or balance due on the note, in consideration that the plaintiffs would forbear to sue and attach the property of the defendant Halberstadt, was void by the statute of frauds.

It is provided by the Code that, "in the following cases, the agreement is void, unless the same, or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged, etc. (2) An agreement to answer for the debt, default, or miscarriage of another." Code, § 775.

It is admitted that no writing of the defendant's promise was given, or that he received any consideration or benefit for his promise to pay the debt of the defendant Halberstadt. Nor did the plaintiffs intend to release the original debtor, Halberstadt, from his obligation, as the present action indicates, but regarded the defendant Lewis only as an additional security for the debt, the debt itself still remaining in full force and unaffected by the transaction. It was clearly an agreement to pay or answer for the default of another, without any consideration inuring to the defendant Lewis, who made the promise, and, not being in writing, falls within the language of the statute and is void. It may be that to forbear to sue and attach, or to discontinue a cause, and to relinquish property attached, would constitute an adequate consideration for the promise of the defendant Lewis; but this does not remove the difficulty, unless the agreement is in writing. To forbear to sue when requested, was a sufficient consideration at common law to support the promise, and it is still a sufficient consideration, if *expressed* in writing, as required by the statute.

"The mere fact," says Mr. Reed, "that the consideration of the guaranty is a forbearance on part of the promisee to proceed against the party answered for, will not make an exception to the statute." 1 Reed, St. Frauds, § 38, and notes of authorities. Baylies, Sur. § 12, p. 80, and note 2. In *Watson v. Randall*, 20 Wend. 201, it was held that an agreement to forbear to sue a debtor is a good consideration for the promise of a third person to pay the debt; but to render the promise obligatory it must be in writing. "The cases are all uniform on the point," said NELSON, C. J., "that the promise to pay in consideration of forbearance is within the statute." "To bind one, therefore," said SHAW, C. J., "for the debt or default of another, two things must concur: *First*, a promise on good consideration; and, *secondly*, by evidence thereof in writing." *Nelson v. Boynton*, 3 Metc. 396. The general rule is stated to be that, while the debt remains a subsisting demand against the original debtor, the promise of a third person is collateral, and must be in writing; but there is an exception to this rule, to which we may presently advert. ROANE, J., said: "The distinction seems to be this: that where the person on whose behalf the promise is made is not discharged, but the person promising agrees to see the debt paid, so that the promisee has a double remedy, the promise is considered as collateral, and must be in writing." *Wagoner v. Gray*, 2 Hen. & M. 612. An agreement to forbear suit against the original debtor, at the request of a third person, to answer for the debt, is a collateral promise, and is within the statute, and void unless in writing.

In *Robinson v. Gilman*, 43 N. H. 491, BELL, J., said: "To except a prom-

ise from the statute, it is never sufficient that the promisee has agreed to allow time to the debtor, (*Jackson v. Rayner*, 12 Johns. 291; *Smith v. Ives*, 15 Wend. 182; *Packer v. Wilson*, Id. 343; *Watson v. Randall*, 20 Wend. 201;) or to forbear to bring a suit against him at the time, (*Simpson v. Pat-ten*, 4 Johns. 422; *King v. Wilson*, 2 Strange, 873; *Fish v. Hutchinson*, 2 Wils. 94; *Kirkham v. Marter*, 2 Barn. & Ald. 613, 1 Saund. 211a;) or has discharged suit against him, (*Nelson v. Boynton*, 3 Metc. 396; *Tomlinson v. Gell*, 6 Adol. & E. 564;) or has released to the debtor any lien, (*Mallory v. Gillett*, 21 N. Y. 412; *Fay v. Bell*, Hill & D. 251;) or pledge, (*Clancy v. Piggott*, 2 Adol. & E. 473;) or an attachment, (*Smith v. Weed*, 20 Wend. 184;) or levy, (*Mercium v. Mack*, 10 Wend. 461; *Chater v. Beckett*, 7 Term R. 201.)"

Mr. Brown holds that the mere relinquishment of a lien by the creditor does not take the promise out of the statute. Brown, St. Frauds, 195-204; Brandt, Sur. § 50; 1 Reed, St. Frauds, § 38.

In *Nelson v. Boynton*, 3 Metc. 396, the creditor sued his debtor, and seized his property under an attachment. The defendant promised to pay the debt, in consideration of a discontinuance of the action. This was done and the lien of the attachment lost, but the debt remained against the original debtor. After a careful discrimination of the authorities, SHAW, C. J., declared that the promise was void because not in writing. In *Mallory v. Gillett*, 21 N. Y. 412, the plaintiff had performed repairs on a boat which was in his possession, having a lien on it for the value of his work. He refused to part with the possession until the lien was satisfied, when the defendant promised, if he would deliver the boat to the owner, he would pay the amount due, whereupon the boat was delivered to the owner. It was held that the engagement or promise, being to pay the debt of another, was void, because there was no note or memorandum thereof in writing. See, also, *Waldo v. Simonson*, 18 Mich. 345; *Stewart v. Campbell*, 58 Me. 439.

The findings in the case at hand do not indicate definitely that a suit was actually begun, and a lien created, under the attachment which was relinquished by the plaintiffs by reason of the promise of the defendant Lewis, but rather that legal steps were being taken to begin a suit for that purpose, which the defendant Lewis knew, and by his promise to pay the debt induced the plaintiffs to forbear to prosecute. The findings ought to have been made more definite; but, in this view, the case has no footing to stand upon. The oral argument, however, assumed and seemed to concede that a suit had been actually commenced, and a levy made, under an attachment which the plaintiffs had abandoned by discontinuing their suit, at the request of the defendant Lewis, on his promise to pay the debt of the defendant Halberstadt; and on this theory it was claimed that the promise of the defendant Lewis was not founded upon forbearance alone, but the added new and original consideration of harm or prejudice to the plaintiffs, as one of the newly-contracting parties, which the relinquishment of the lien by discontinuance of the suit involved.

In *Dunlap v. Thorne*, 1 Rich. (S. C.) 213, BUTLER, J., said: "When one person has a complete and enforceable lien on the property of his debtor, a promise of a third to pay the debt, on condition that the property under the lien is given up, will be held binding, and not within the statute of frauds. This, upon the ground that the release of the lien is the surrender of a security operating in the nature of a payment, and therefore, if not a benefit to the promisor, is a prejudice to the creditor to the extent of his loss." See, also, *Shook v. Vanmater*, 22 Wis. 507. But this view does not seem to be well sustained on principle or authority, and is subjected to a crushing criticism by Mr. Brandt, in which he suggests (precisely what is the fact in the case at hand) that the surrender of the lien does not usually extinguish the original debt, and that, when it does have that effect, the promise is not within the statute. He says: "The surrender of the lien, being a detriment to the

creditor, is undoubtedly a sufficient consideration for the promise; but why it should take the promise out of the statute, any more than any consideration which is a detriment to the creditor, or in fact any other sufficient consideration, it is difficult to perceive." Brandt, Sur. § 50.

In *Curtis v. Brown*, 5 Cush. 488, SHAW, C. J., said: "It is not a sufficient ground to prevent the operation of the statute of frauds that the promisee has relinquished an advantage, or given up a lien, in consequence of the promise, if that advantage has not also directly inured to the benefit of the promisor. The cases in which it has been held otherwise are those where the promisee has relinquished some lien, benefit, or advantage for securing or recovering his debt, and where, by such relinquishment, the same interest or advantage has inured to the benefit of the promisor. In such case, although the result is that the payment of the debt of a third person is effected, it is so incidentally and indirectly, and the substance of the contract is the purchase by the promisor of the promisee of the lien, right, or benefit in question." *Wills v. Brown*, 118 Mass. 138; *Furbish v. Goodnow*, 98 Mass. 296.

In *Fullam v. Adams*, 37 Vt. 401, POLAND, C. J., said: "We believe it will be found that, in all the cases now regarded as sound, where it has been held that a parol promise to pay the debt of another is binding, the promisor held in hands funds, securities, or property of the debtor devoted to the payment of the debt, and his promise to pay attaches upon his obligation or duty growing out of the receipt of such fund." While it is true that some of the authorities cited indicate that the promise must be an original undertaking on a valid consideration, moving from the creditor to the promisor, to take the case out of the statute, (*Wills v. Brown*, *Furbish v. Goodnow*, *Robinson v. Gilman*, *supra*.) others indicate that it makes no difference in regard to the party, debtor or creditor, from whom the consideration moves, to have that effect, (*Fullam v. Adams* and *Mallory v. Gillett*, *supra*.)—a distinction which makes no difference, so far as affects this case, as there is no pretense that the relinquishment of the lien inured to the benefit of the defendant Lewis, or that he held any funds or securities or other property of the defendant Halberstadt to be devoted to the payment of the debt.

As the case stated is not within the exceptions of the statute which makes such parol promise binding, there was no error, and the judgment must be affirmed.

(20 Nev. 38)

STATE *ex rel.* SPRINGER *v.* PREBLE. (No. 1,251.)

(Supreme Court of Nevada. October 23, 1887.)

PUBLIC LANDS—PURCHASE OF LANDS GRANTED TO STATE—PREFERRED APPLICANT ENTITLED TO 640 ACRES.

Under the Nevada act of 1881 (St. 1881, p. 115) amending the act of 1873 entitled "An act to provide for the selection and sale of lands that have been, or may hereafter be, granted by the United States to the state of Nevada," as further amended by the act of 1885, (St. 1885, p. 105,) an applicant claiming a preferred right of purchase is not limited to 320 acres, but is entitled to 640 acres.

On rehearing. For original opinion see 14 Pac. Rep. 584.

HAWLEY, J. Respondent in his petition for rehearing claims—for the first time—that when relator's "application to purchase was made, and affidavit of preferred right filed, a party was entitled to a preferred right to only 320 acres of state lands." This claim is based upon the theory that under the provisions of section 3 of the act fixing the price, and defining the amount of land allowed to each applicant, (St. 1881, p. 115,) the first applicant is the only party entitled to purchase 640 acres of land. Section 3 reads as follows: "All agricultural and grazing lands selected under the two-million-acre grant of June 16, 1880, may be sold in tracts equal to one section to each applicant, notwith-

standing such applicant may have heretofore purchased three hundred and twenty acres of the state."

A rehearing was granted for the purpose of considering the question whether this statute applies to applicants claiming a preferred right, as well as to first applicants.

It is conceded that the lands in question are of the character designated in section 3. In determining the question at issue, the various statutes relating to the sale and purchase of state lands must be considered *in part materia*. Section 12 of the act of 1873, in direct terms, limits the applicant of a preferred right to 320 acres. The same limitation is expressed in section 13 of the act of 1873 as to all applicants. "No person shall be allowed to purchase more than three hundred and twenty acres of land from the state under the provisions of this act." St. 1873, p. 124, § 13. Thus the law stood until 1881, when the legislature declared in an independent act that certain lands might be sold "in tracts equal to one section to each applicant," and that "all acts and parts of acts heretofore passed, so far only as they conflict with the provisions of this act, are hereby repealed." St. 1881, p. 116. The effect of the statute of 1881 was to repeal the limitation of the number of acres expressed in section 12, as well as in section 13, of the act of 1873, and to extend the amount of land which each applicant might be allowed to purchase to 640 acres. The statute is not susceptible of any other construction. No distinction was made, or intended to be made, as to the amount of land which any applicant of either class might purchase. It is apparent, upon an examination of the various statutes upon this subject, that the legislature never intended to be guilty of the absurdity and injustice of allowing an applicant who simply made the first application to purchase lands, without ever having had any occupation or possession thereof, 640 acres, and limiting the right of an applicant who had occupied and possessed the land—and for that reason was allowed a preferred right—to only 320 acres.

The respondent, to maintain his case, relies upon the further fact that in 1885 section 12 of the act of 1873 was changed so as to give an occupant or party in possession "a preferred right to purchase all the land that he or she may be entitled to purchase." St. 1885, p. 105, § 13. This fact, however, does not give any strength in support of respondent's views; but, on the other hand, it is in perfect harmony with the construction which we have given to the statute of 1881, and, when read and considered in connection with the previous statutes, clearly shows that it was always the intention of the legislature, when enacting laws upon this subject, to give both classes of applicants the right to purchase the same amount of land. The act of 1885 was intended to embrace the entire law of the state relative to the "selection and sale of lands," and the legislature incorporated therein many, if not all, of the essential provisions of the act of 1873, with such changes as had been made by the subsequent acts, including the act of 1881, and added such other provisions as were deemed necessary to make a complete law upon the subject; hence when section 12 of the act of 1873 came up for review, it was so changed as to conform to the then existing laws, and section 13 of the act of 1873 was likewise changed, so as to read substantially the same as section 3 of the act of 1881, providing for the sale of lands "in tracts equal to one section to each applicant;" and this is the only section defining the amount of land that any applicant of either class is entitled to purchase. The statutes referred to are too plain to require any further comment or discussion.

Let the writ of *mandamus* issue as heretofore ordered.

LEONARD, J.. (*concurring*.) Without expressing any opinion as to the correctness of the reasoning and judgment of the court heretofore filed herein, but deeming the same the law of the case, I concur in this opinion and order.

(20 Nev. 71)

LEETE v. SUTHERLAND. (No. 1,268.)

(Supreme Court of Nevada. November 1, 1887.)

APPEAL — REVIEW OF ORDER GRANTING NEW TRIAL — PRESUMPTION THAT AFFIDAVITS WERE SUFFICIENT.

An appeal from an order of the trial court granting a new trial on the grounds of surprise and irregularity in the proceedings, cannot be reviewed where the record does not disclose the necessary affidavits, but it will be presumed that such affidavits were used in support of the motion, and the order will stand.

Appeal from district court, Ormsby county; R. RISING, Judge.

H. F. Bartine, for plaintiff and respondent. *T. Coffin*, for defendant and appellant.

BELKNAP, J. This is an appeal from an order granting a new trial. Application for the order was made to the district court upon the ground of irregularity upon the part of the adverse party, and in the proceedings of the court, and surprise which ordinary prudence could not have guarded against.

Motions for new trials for these causes must be supported by affidavits. The record does not contain the affidavits used in support of the motion. We are, therefore, unable to review the ruling of the district court. In the absence of an affirmative showing to the contrary, the presumption is that affidavits were used in support of the motion, and that the ruling was correct.

The order of the district court is affirmed.

(20 Nev. 73)

STATE *ex rel.* WILKINS v. HALLOCK. (No. 1,270.)

(Supreme Court of Nevada. October 28, 1887.)

STATES AND STATE OFFICERS—APPROPRIATIONS—PAYMENT FROM FUND FOR FOLLOWING YEAR.

Where the legislature, at each biennial session, appropriated money for the support of the government for the two years then running, and where the legislature acquiesced in the construction put upon the law by the fiscal officers of the state, that the appropriation was intended to meet, within the named fiscal years, the liabilities incurred during those years, *held*, that the comptroller properly refused to settle a liability incurred during the twenty-second fiscal year from a fund appropriated for the support of the government during the twenty-third and twenty-fourth fiscal years.

Application for *mandamus*.

T. Coffin, for relator. *The Attorney General*, for respondent.

BELKNAP, J. The statute entitled "An act to authorize and require the payment of rewards in certain cases" (section 1918, Gen. St.) requires the governor of the state to offer a standing reward of \$250 for the arrest of each person engaged in robbery upon the highway. The reward is payable upon the conviction of the person or persons arrested. During the year 1885, the relator arrested two persons in the act of committing a robbery upon the highway. They were convicted of the offense within the same year. In the year 1877, he presented his claim for the sum of \$500 for the services, to the state board of examiners. The claim was allowed. The comptroller refuses to issue his warrant for the amount. It is his duty to issue it, if there is a fund in the state treasury subject to its payment.

It is claimed that the sum of \$2,000, appropriated for the payment of rewards offered by the governor, and found in section 28 of the general appropriation bill, is applicable to the payment of the claim. St. 1887, p. 114. By the first section of this law it will be seen that the appropriations therein made are for the various purposes mentioned, "and for the support of the government of the state of Nevada, for the twenty-third and twenty-fourth fiscal years." At each biennial session the legislature appropriates money for the

purpose of carrying on the government for the two years then running. The appropriating clause employed in bills of this character is uniformly the same, in form, as that above quoted. The fiscal officers of the state government have uniformly construed these laws, by usage, as intending an appropriation for the limited time only; that is to say, the appropriation is to meet, within the named fiscal years, the liabilities incurred during these years. Unexpended balances against which no warrants have been drawn are considered as having lapsed, and are carried to the general fund of the treasury. This manner of treating appropriations made for the support of the civil government is known to the legislature from the annual reports of the comptroller, submitted at each session for its information, (section 1809, Gen. St.), and presumably becomes known to the members in apportioning the revenues of the state, and in informing themselves concerning the general transactions of the comptroller's office. The legislature has acquiesced in and sanctioned this construction, by employing the same general language in the appropriating clause at each successive session, and by the enactment of special deficiency bills in cases where the liabilities contracted for the particular purpose, and within the given period, exceed the amount of the appropriation.

Obeing the intention of the legislature, the comptroller properly refused to settle a liability incurred during the twenty-second fiscal year from a fund appropriated for the support of the government during the twenty-third and twenty-fourth fiscal years. *Mandamus* denied.

(5 Utah, 362)

UNITED STATES v. CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS and others.

(*Supreme Court of Utah*. November 5, 1887.)

1. TERRITORIES—ACTS MAY BE AMENDED OR ANNULLED BY CONGRESS—NO RESERVATION NECESSARY.

Acts of territorial legislatures may be amended or abrogated by congress, even though the right so to do is not especially reserved in the organic act of the territory.

2. SAME—CHURCH OF LATTER-DAY SAINTS—CHARTER GIVES NO VESTED RIGHTS.

The Utah act of January 19, 1855, incorporating the Church of Jesus Christ of Latter-Day Saints, conferred upon such corporation certain rights and privileges, and the charter so granted was accepted by the church. *Held*, that this grant and acceptance did not give the corporation any vested rights.

3. SAME—ACT OF CONGRESS ANNULLING PORTIONS OF CHARTER—EXCEPTED PORTIONS NOT MADE UNITED STATES LAW.

The act of congress of July 1, 1862, § 2, annulling certain portions of the charter of the Church of Jesus Christ of Latter-Day Saints, did not, by excepting a portion of the charter from the operation of the act, make such excepted portions, in effect, a law of the United States.

4. SAME—ACT OF CONGRESS ANNULLING CHARTER—POWER TO DISSOLVE CORPORATION.

The act of congress of March 3, 1887, § 17, annulled the charter granted by the legislature of the territory of Utah to the Church of Jesus Christ of Latter-Day Saints. *Held*, that congress had power, by the same act, to dissolve said corporation.

5. SAME—POSSESSION OF REALTY IN EXCESS OF LIMIT—APPOINTMENT OF RECEIVER.

The act of congress of July 1, 1862, § 3, provides that no corporation or association for religious purposes shall acquire or hold, in any territory of the United States, real estate of greater value than \$50,000. From the showing of facts it appears that the corporation known as the Church of Jesus Christ of Latter-Day Saints holds property largely in excess of the limit fixed by congress. *Held*, that this showing is sufficient to authorize the appointment of a receiver for the corporation.

Original case in supreme court.

Geo. S. Peters, Wm. J. Clarke, and Henry W. Hobson, for the United States.
J. O. Broadhead, J. E. McDonald, F. S. Richards, and Le Grande Young, for defendants.

ZANE, C. J. The complainant filed in this court its bill in chancery under an act of congress in force March 3, 1887. The bill prayed that a decree be

made by this court forfeiting the charter and dissolving the corporation known as the "Church of Jesus Christ of Latter-Day Saints," as well as for the appointment of a receiver of the assets of the corporation, until disposition could be made thereof according to law, and for other relief. The motion for the appointment of a receiver is now submitted for our decision, on the bill and the facts as stated in a stipulation entered into by the parties and filed in the case.

On the eighth day of February, 1851, the assembly of the so-called state of Deseret, afterwards organized as the territory of Utah, passed an ordinance incorporating the Church of Jesus Christ of Latter-Day Saints. After the organization of the territory of Utah, this ordinance was re-enacted January 19, 1855, by the legislature and approved by the governor of the territory. This is the charter in question. Its terms are as follows:

"An Ordinance Incorporating the Church of Jesus Christ of Latter-Day Saints.

"Section 1. Be it ordained by the general assembly of the state of Deseret, that all that *portion* of the *inhabitants* of *said state* which now are, or hereafter may become, residents therein, and which are known and distinguished as 'The Church of Jesus Christ of Latter-Day Saints,' are hereby incorporated, constituted, made, and declared a body corporate, with perpetual succession, under the original name and style of 'The Church of Jesus Christ of Latter-Day Saints,' as now organized with *full power* and authority to *sue and be sued*, defend and be defended; in all courts of law or equity in this state; to establish, order, and regulate worship; and *hold and occupy real and personal estate*, and have and use a seal, which they may alter at pleasure.

"Sec. 2. And be it further ordained that said body or church as a religious society, may at a general or special conference, elect one 'trustee in trust,' and not to exceed twelve assistant trustees, to *receive, hold, buy, sell, manage, use, and control* the *real and personal property* of said church, which said property shall be *free from taxation*; which trustee and assistant trustees, when elected or appointed, shall give bonds, with approved security, in whatever sum the said conference may deem sufficient, for the faithful performance of their several duties; which said bonds, when approved, shall be filed in the general church recorder's office, at the seat of general church business, when said bonds are approved by said conference; and said trustee and assistant trustees shall continue in office during the pleasure of said church; and there shall also be made, by the clerk of the conference of said church, a certificate of such election or appointment of said trustee and assistant trustees, which shall be recorded in the general church recorder's office, at the seat of general church business; and when said bonds are filed, and said certificates recorded, said trustee or assistant trustees may receive property, *real or personal*, by gift, donation, bequests, or in any manner, not incompatible with the *principles of righteousness* or the *rules of justice*; inasmuch as the same shall be *used, managed, or disposed of* for the benefit, *improvement, erection of houses for public worship and instruction*, and the *well-being* of said church.

"Sec. 3. And be it further ordained that, as said church holds the constitutional and original right, in common with all civil and religious communities, 'to worship God according to the dictates of conscience;' to reverence communion agreeably to the principles of truth, and to *solemnize marriage compatible with the revelations of Jesus Christ*,—for the security and full enjoyment of all blessings and *privileges embodied in the religion of Jesus Christ*, free to all, it is also declared that said church does and shall possess and enjoy continually the power and authority, in and of itself, to originate, make, pass, and establish *rules, regulations, ordinances, laws, customs, and criterions*, for the good order, safety, *government*, convenience, comfort, and control of said church, and for the punishment or forgiveness of all offenses relative to fellowship, according to church covenants; that the pursuit of *bliss*, and the

enjoyment of life, in every capacity of public association and domestic happiness, temporal expansion, or spiritual increase upon the earth, may not legally be questioned: provided, however, that each and every act or practice so established, or adopted for law or custom, shall relate to solemnities, sacraments, ceremonies, *consecrations, endowments, tithings, marriages, fellowship,* or the religious duties of man to his Maker; inasmuch as the doctrines, principles, practices, or performances support virtue and increase morality, and are not inconsistent with or repugnant to the constitution of the United States, or of this state, and are founded in the revelations of the Lord.

"Sec. 4. And be it further ordained that said church shall keep, at every fully organized branch or stake, a registry of marriages, births, and deaths, free for the inspection of all members, and for their benefit.

"Sec. 5. And be it further ordained that the presidency of said church shall fill all vacancies of the assistant trustees, necessary to be filled, until superseded by the conference of said church.

"Sec. 6. Be it further ordained that no assistant trustee or trustees shall transact business in relation to buying, selling, or otherwise disposing of church property, without the consent or approval of the trustee in trust of said church."

The purposes of the corporation as indicated by the powers conferred upon it by this charter are numerous and varied. Some of them, it is true, are expressed in vague terms; but the capacity is granted to act in various ways, and to make laws and regulations with respect to very many subjects. The corporation is confined to no particular purpose. No precedent can be found for conferring upon a private corporation such a variety of capacities. Some of them, it is believed, are above the reach of human laws. The law-making power of the state, for the purpose of better government and for the public good, enacts charters conferring a portion of the powers intrusted to it upon the people of a city or village; others authorizing charitable, educational, or religious institutions; and others providing for various pursuits and enterprises. These artificial agencies are provided in order that the people may more conveniently and successfully co-operate for the good of all, and for the advancement of human happiness.

The charter of a corporation should always specify the purpose for which the corporation is organized, and powers adapted to that purpose should be granted. If the corporation is to be a public one, powers adapted to the regulations of conduct and to public purposes should be given, with such incidental capacity to do business as may be essential to such an organization, and no more. It should never be allowed to engage in general business. If a charter authorizes the organization of a company to acquire and operate a railroad, the power to engage in agriculture should not be granted also. So, if a worshiping congregation should desire to purchase a lot of ground, and to build a church and a parsonage, and to employ a minister, the charter should authorize the corporation to do so, but should not confer upon such an organization powers adapted to municipal government, or to the purchase and sale of real and personal property without limit, nor should such corporations engage in general business.

It is an accepted doctrine that the common weal demands that private corporations should be limited each to a particular and specified purpose. Even when so limited, they often acquire great influence. If the legislature, by the instrumentality of the same charter, may authorize the organization of a company for all purposes, if the company may enter upon every field of enterprise, and engage in every pursuit, and may also control human conduct by means of the powers of a municipal government, and at the same time may possess those of a religious corporation, such corporate influence will be manifested as never before. The charter of the Church of Jesus Christ of Latter-Day Saints is most extraordinary in the extent of the authority it assumes to

confer upon, and in the number, the variety, and the scope of the powers it places in the hands of, a religious body. It declares, in effect, that all the Mormon people, who at the time of its enactment were, or who might afterwards become, residents of the territory, are a body corporate, with perpetual succession.

This corporation, at the time of its organization, embraced nine-tenths of the inhabitants of the territory,—many thousands of people. At the present time it includes probably more than 120,000, and if, in the future, people should continue to be gathered in from all quarters of the globe as they have in the past, their number at no distant day will reach a quarter of a million. The corporation extends over the whole territory, including numerous congregations in various localities. At the head of this corporate body, according to the faith professed, is a seer and revelator, who receives in revelation the will of the Infinite God concerning the duty of man to himself, to his fellow-beings, to society, to human government, and to God. In subordination to this head are a vast number of officers of various kinds and descriptions, comprising a most minute and complete organization. The people comprising this organization claim to be directed and led by inspiration that is above all human wisdom, and subject to a power above all municipal government,—above all “man-made laws.” These facts belong to history, therefore we have taken notice of them.

Upon such a religious organization as this, unusual and extraordinary powers are conferred by this charter, such as the right of acquiring and disposing of real and personal property without limit, and with exemption from taxation; the authority to solemnize marriage according to revelation; the continuous and inherent authority to make laws and “criterions” for the good order, safety, government, convenience, comfort, and control of the church, which is equivalent to saying the Mormon people; also for the punishment or forgiveness of all offenses relative to fellowship, according to church covenants,—that is to say, the church may impose or inflict any punishment, if according to its covenants; what those covenants may be the public may not know. Further, it is declared that the enjoyment of life in every capacity of public association, domestic happiness, and temporal expansion upon the earth, may not legally be questioned. Here is a wide field of human conduct for a government to agree not to question. Human beings have the capacity to associate publicly for very many purposes, and such association may become disorderly, and require legal control. In “domestic happiness” this church professes to believe is included polygamy; in the estimation of others, domestic happiness might include some other practice injurious to society. In the same manner “temporal expansion” might take a direction requiring control. This grant of power was followed by a proviso that the laws and customs established should “relate to solemnities, sacraments, ceremonies, consecrations, endowments, tithing, marriages, fellowship, or the religious duties of man to his Maker; and that the same support virtue and increase morality, and are not inconsistent with or repugnant to the constitution of the United States or of this state, and are founded in the revelations of the Lord.”

The above terms, “solemnities, sacraments, ceremonies, consecrations, and endowments” may be polygamy and unlawful cohabitation in disguise; in fact marriage is included in terms in the charter, without specification of the kind of marriage. This is probably the first time that any legislature committed the regulation of marriage and tithing to a private corporation. It is safe to assume that the right to regulate such matters was never before attempted to be contracted away to a church or any other body of men. Nor are we aware that the right to regulate man’s duty to his Maker was ever included in a contract. And, finally, this charter provides that such laws and customs shall be founded in the revelations of the Lord. This too, probably, is the first time that a legislature expressly limited the rules and laws that a corporation

might make by the revelations of the Lord, and make a grant thereof to any person, natural or artificial.

In this charter the respondent insists the church gained a vested right upon its acceptance, and that congress has no power to disapprove or to annul it. We know of no precedent for holding that a corporation could obtain a vested right in a charter like this. Had the territorial legislature the power to grant a vested right to such a charter? The case of *Dartmouth College v. Woodward*, 4 Wheat. 518, has been regarded as settling the question that the charter of a private corporation constitutes a contract between a state and the corporation. By this contract the corporation, in consideration of presumed benefits to the public, obtains a vested right in the charter, unless the constitution or a general law of the state, or the charter itself, reserves the right to amend or appeal. But we find no case holding that a charter granted by the legislature of a territory gives such a vested right.

Again, it will be found, we think, that the powers granted by a state in such charters were limited to some particular purpose; that they did not embrace powers which the legislature possessed for the purpose of government, to be exercised by that body alone, or conferred upon some municipal government for the same purpose. Such powers are never granted by the people to the legislature to be bartered and sold. A government based upon the will of the people must ever keep such authority within reach of the people's will. Legislatures are but the agents of the people, with authority to make laws within constitutional limits, but without authority to give or to contract away powers to make laws to govern the people so that private parties may gain vested rights in them. The charter in question assumes to grant to the corporation power to make regulations and laws with respect to marriage, tithing, fellowship, etc. It confers in express terms upon the church power and authority to originate, make and pass rules, regulations, ordinances and to establish customs and "criteria," for the government, convenience, and control of the church, (which means the whole Mormon population of the territory,) as well as the right to acquire by purchase or otherwise real and personal property, and to sell or dispose of it at pleasure. Such are some of the powers conferred upon this church corporation by this remarkable act. To such a charter it is claimed the church has acquired a vested right. If this proposition is sound the corporate body known as the "Church of Jesus Christ of Latter-Day Saints" may endure under this charter to distant ages. But we are of the opinion that a vested right could not be acquired in such a charter.

Further, congress possesses the power to enact laws for the government of the territories. It may make provision for territorial governments, and extend the authority of territorial legislatures to all rightful subjects of legislation. Such territorial governments occupy towards congress something of the same relation as municipalities—such as city governments—fill towards the state legislatures. A state legislature can repeal the charter of a municipal government, and the ordinances passed under it; so congress can repeal the organic act of a territory, and all territorial enactments, in pursuance of the organic act. Congress is the sovereign power to legislate for the territories, and all charters from territorial legislatures must be held to have been accepted with the knowledge that congress possessed the authority to change or repeal the law creating them. In the case of *Bank v. Yankton*, 101 U. S. 129, the court said: "The territories are but political subdivisions of the outlying dominion of the United States, * * * and congress may legislate for them as a state does for its municipal organizations. * * * In the organic act of Dakota there was not an express reservation of power in congress to amend the acts of the territorial legislature, nor was it necessary. Such a power is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the territorial legislature, but it may it-

self legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the territories, and all the departments of the territorial governments. It may do for the territories what the people, under the constitution of the United States, may do for the states." This we conceive to be the law upon the subject.

In the case under discussion the territory was organized under the organic act approved September 9, 1850. Among other provisions is the following: "That the legislative power of said territory shall extend to all rightful subjects of legislation consistent with the constitution of the United States and the provisions of this act. * * * All the laws passed by the legislative assembly and governor shall be submitted to the congress of the United States, and, if disapproved, shall be null and of no effect. The charter in question was a law passed by the legislative assembly, and the right to disapprove of it was expressly reserved, and the church must be held to have accepted it with the knowledge of the reserved right of disapproval. That being so, the church will not be heard to say that it was accepted without conditions. In order to maintain that the charter, when accepted, became a contract binding on congress, it is necessary to assume that the acceptance was unconditional; otherwise it is simply an act of the legislature giving to the corporation the use of the authority contained in it during the pleasure of congress. The acceptance of the charter subject to disapproval could make the charter no more than a license to the corporation to use the authority granted during the pleasure of congress.

We are of the opinion, therefore, from a view of the whole subject, both from the nature of the powers granted by the charter itself, and from the form of the grant and of the acceptance, that the acceptance did not give the corporation a vested right in it.

But, assuming that the acceptance of the charter did not give a vested right in it, the claim is made that the second section of an act of congress approved July 1, 1862, made the charter, as thereby limited, a law of the United States, and not subject thereafter to disapproval or repeal. The section is this:

"Sec. 2. And be it further enacted, that the following ordinance of the provisional government of the state of Deseret, so-called, namely: 'An ordinance incorporating the Church of Jesus Christ of Latter-Day Saints,' passed February 8, 1851, and adopted, re-enacted, and made valid by the governor and legislative assembly of the territory of Utah by an act passed January 19, 1855, entitled 'An act in relation to the compilation and revision of the laws and resolutions in force in Utah territory, their publication and distribution,' and all other acts and parts of acts heretofore passed by the said legislative assembly of the territory of Utah, which establish, support, maintain, shield, or countenance polygamy, be, and the same hereby are, disapproved and annulled: provided, that this act shall be so limited and construed as not to affect or interfere with the right of property legally acquired under the ordinance, heretofore mentioned, nor with the right 'to worship God according to the dictates of conscience,' but only to annul all acts and laws which establish, maintain, protect, or countenance the practice of polygamy, evasively called 'spiritual marriage,' however disguised by legal or ecclesiastical solemnities, sacraments, ceremonies, consecrations, or other contrivances."

In the enacting clause of this section the charter in question, termed "An ordinance incorporating the Church of Jesus Christ of Latter-Day Saints," is repealed in express terms; but the proviso limits the effect of the entire act in these respects: *First*, so that it shall not affect the right to property legally acquired under the charter; *second*, so as not to interfere with the right to worship God according to the dictates of conscience; *third*, so as to annul only all acts and laws which establish, maintain, protect, or countenance the

practice of polygamy, evasively called "spiritual marriage," however disguised by legal or ecclesiastical solemnities, sacraments, ceremonies, consecrations, or other contrivances. The enacting clause was not limited by the proviso in the two respects first mentioned, because that clause simply repealed the charter without interfering with the rights of property which had been acquired under it, nor did it interfere with the right to worship God according to the dictates of conscience. And it is not clear that the third limitation mentioned left standing any portion of the charter; for it is expressly stated that the intention of the law was to annul all laws countenancing polygamy or spiritual marriage, though appearing in the law disguised by the name of a solemnity, a sacrament, a ceremony, a consecration, or under any other contrivance; and under just such marks as these, we think, polygamy does appear in the charter of the Church of Jesus Christ of Latter-Day Saints. With all such disguises and contrivances stripped from this charter, little, comparatively speaking, is left of it.

But assuming that the expressed intent to annul all acts countenancing polygamy left other provisions in force, was the remainder of the charter made an act of congress? Such an intention is not expressed. It must have been so made by implication. From the provisions of the act of 1862 it is clear that congress did not regard the charter as a contract, otherwise it would not have changed its provisions. We may assume that congress changed the charter according to its conceptions of duty at the time, with the understanding that it might be changed further, or altogether disapproved, whenever in the opinion of congress the good of society required such change or disapproval. We do not think that the act of congress of 1862 affords the inference that so much of the charter as remained in force was in effect a law of the United States. This view seems to be in accordance with the opinion of the supreme court of the United States in the case of *Bank v. Iowa*, 12 How. 1. The territorial legislature of Wisconsin chartered the Miners' Bank. Afterwards an act of congress annulled the charter in certain particulars, but left other of its provisions in force. Thereafter the territory was divided by act of congress, and the territory of Iowa was erected over that part of the former territory of Wisconsin in which the bank was situated. Later, the territorial legislature of Iowa repealed the charter, and directed the settlement of the affairs of the corporation by trustees under the supervision of the court. A *quo warranto* proceeding was instituted against the bank. In deciding the case on appeal the court used this language: "It has been argued in this case that as congress, in creating the territorial government of Wisconsin and Iowa, reserved to themselves the power of disapproving and thereby annulling the acts of those governments, and had, in the exercise of that power, stricken out several of the provisions of the charter of the Bank of Dubuque, enacted by the legislature of Wisconsin, assenting to the residue, that therefore the charter of this bank should be regarded as an act of congress rather than of the territorial government. * * * Congress, in creating the territorial governments, and in conferring upon them powers of general legislation, did not, from obvious principles of policy and necessity, ordain a suspension of all acts proceeding from those powers, until expressly sanctioned by themselves, while, for considerations equally strong, they reserved the power of disapproving or annulling such acts of territorial legislation as might be deemed detrimental. * * * The charter of the Bank of Dubuque, enacted in all its details and powers ever possessed by it, (and according to which it was in fact organized,) by the legislature of Wisconsin, must be looked upon as the creature of that legislature."

The seventeenth section of the act of March 3, 1887, under which this bill is filed, is as follows:

"Sec. 17. That the acts of the legislative assembly of the territory of Utah incorporating, continuing, or providing for the corporation known as the "Church of Jesus Christ of Latter-Day Saints," and the ordinance of the so-

called general assembly of the state of Deseret, incorporating the Church of Jesus Christ of Latter-Day Saints, so far as the same may now have legal force and validity, are hereby disapproved and annulled, and the said corporation, in so far as it may now have, or pretend to have, any legal existence, is hereby dissolved; that it shall be the duty of the attorney general of the United States to cause such proceedings to be taken in the supreme court of the territory of Utah as shall be proper to execute the foregoing provisions of this section, and to wind up the affairs of said corporation conformably to law; and in such proceedings the court shall have power, and it shall be its duty, to make such decree or decrees as shall be proper to effectuate the transfer of the title to real property now held and used by said corporation for places of worship, and parsonages connected therewith, and burial grounds, and of the description mentioned in the proviso to section thirteen of this act, and in section twenty-six of this act, to the respective trustees mentioned in section twenty-six of this act; and for the purposes of this section said court shall have all the powers of a court of equity."

The power of congress to dissolve the corporation styled the "Church of Jesus Christ of Latter-Day Saints" necessarily follows the right to annul its charter, which we have held could be done. This disposes of the question raised upon the first clause of the seventeenth section of the act.

The last clause of that section should be considered in connection with sections 13 and 26 of the same act. They are as follows:

"Sec. 13. That it shall be the duty of the attorney general of the United States to institute and prosecute proceedings to forfeit and escheat to the United States the property of corporations obtained or held in violation of section three of the act of congress approved the first day of July, 1862, entitled 'An act to punish and prevent the practice of polygamy in the territories of the United States and other places, and disapproving and annulling certain acts of the legislative assembly of the territory of Utah,' or in violation of section eighteen hundred and ninety of the Revised Statutes of the United States; and all such property so forfeited and escheated to the United States shall be disposed of by the secretary of the interior, and the proceeds thereof applied to the use and benefit of the common schools in the territory in which such property may be: provided, that no building, or the grounds appurtenant thereto, which is held and occupied exclusively for purposes of the worship of God, or parsonage connected therewith, or burial ground, shall be forfeited."

"Sec. 26. That all religious societies, sects, and congregations shall have the right to have and to hold, through trustees appointed by any court exercising probate powers in a territory, only on the nomination of the authorities of such society, sect, or congregation, so much real property for the erection or use of houses of worship, and for such parsonages and burial grounds as shall be necessary for the convenience and use of the several congregations of such religious society, sect, or congregation."

The second clause of the seventeenth section quoted makes it the duty of the attorney general of the United States to institute proceedings in this court to wind up the affairs of the corporation dissolved by the first clause of the same section, and gives the court power to make such decree as may be proper to transfer the title to real property held and used by the corporation for places of worship and parsonages connected therewith, and burial grounds, as mentioned in the proviso to section 13, and in section 26 of the same act. For the purpose of such proceeding the court is given all the powers of a court of equity. The proviso of section 13 exempts just such property as last described from forfeiture, with no limitation on value as in the act of 1862; and section 26 gives to all religious societies, sects, and congregations the right to hold, through trustees nominated and appointed as therein provided, so much real property for the use of houses of worship, parsonages, and burial grounds as shall be necessary; nor is the value in this section limited. By the first part

of section 13 it is made the duty of the attorney general to institute proceedings to forfeit and escheat to the United States the property of the corporation obtained or held in violation of section 3 of the act of 1862, or of section 1890 of the Revised Statutes of the United States, (which two sections are substantially the same,) the property so forfeited and escheated to the United States, and the proceeds thereof, are to be applied to the use and benefit of the common schools in the territory in which such property may be.

Section 3 of the act of 1862 is as follows:

"Sec. 3. And be it further enacted that it shall not be lawful for any corporation or association for religious or charitable purposes to acquire or hold real estate in any territory of the United States during the existence of the territorial government of a greater value than \$50,000; and all real estate acquired or held by any such corporation or association contrary to the provisions of this act shall be forfeited and escheat to the United States; provided, that existing vested rights in real estate shall not be impaired by the provisions of this section."

It will be seen that section 13 of the act of March 3, 1887, authorizes the forfeiture only of the property obtained or held in violation of section 3 of the act which took effect July 1, 1862; that is to say, property acquired after the act took effect and in violation of it. And we may here remark that the policy of limiting the amount of land which religious corporations may hold is not new, but it is a practice that has obtained for ages. It was announced in *magna charta* more than 600 years ago, and continued by many enactments of parliament designed to meet the evasions and contrivances of the church for escaping the laws. It has been the settled policy in this country, as shown by the statutes of various states, and a quarter of a century ago congress limited the amount of real estate that any church might hold in any of the territories. It has been the settled design of such statutes to confine church holdings to the amount that is necessary simply for church purposes, and the observance of such laws has been secured by forfeiture, which seems the most appropriate and effectual method.

We are unable to discover that any of the provisions of the act of congress of March 3, 1887, relating to the corporation of the Church of Jesus Christ of Latter-Day Saints, interferes with vested rights, or is in conflict with any provision of the constitution of the United States.

This brings us to the question whether the allegations of the bill are sufficient to authorize the appointment of a receiver. The following facts, with others, are alleged in the bill: That the Church of Jesus Christ of Latter-Day Saints was incorporated under the act of the territorial legislature quoted, and did buy and hold large amounts of real estate and personal property of great value in the territory of Utah, after the first day of July, 1862. The precise amount, value, or description thereof the plaintiff was unable to state, but asked leave to prove, and on information and belief alleged the value of the real estate to be about \$2,000,000, and the personal property to be about \$1,000,000; "that the corporation of the Church of Jesus Christ of Latter-Day Saints and the successor of John Taylor (whose name is to this plaintiff unknown) as trustee in trust, and Wilford Woodruff, Lorenzo Snow, Erastus Snow, Franklin D. Richards, Brigham Young, Moses Thatcher, Francis M. Lyman, John Henry Smith, George Teasdale, Heber J. Grant, and John W. Taylor, assistant trustees, the defendants, wrongfully, and in violation of the laws of the United States, still claim to hold and do exercise the powers which were held and exercised by the said corporation of the Church of Jesus Christ of Latter-Day Saints, and are unlawfully possessing and using the real estate mentioned above, and are receiving and unlawfully applying to its and their own use the rents, issues, and profits thereof, and falsely and wrongfully claim the right to sell, use, and dispose of the same. Tenth. That since the nineteenth day of February, 1887, there has been and is no person lawfully authorized to take

charge of, manage, preserve, or control the property, real and personal, which on or before the day and year last aforesaid was held, owned, possessed, and used by the corporation of the Church of Jesus Christ of Latter-Day Saints, and by reason thereof all the said property, as referred to in the third paragraph of this bill, is subject to irreparable and irremediable loss and destruction."

The reason for the statement of facts in terms so general is sufficiently apparent. When the corporation was dissolved its officers and agents no longer had any legal right to the possession of its property, to its use, to the rents and profits thereof. It further appears from the allegations of the bill that the respondents are receiving and applying to their own use the rents and profits of the property, and claiming the right to sell, use, and dispose of it. Assuming the facts to be as alleged in the bill, a portion of the property must be forfeited, and must escheat to the United States, to be applied to the use and benefit of the common schools of the territory of Utah.

"The modern English practice allowing the appointment of a receiver before answer, in cases of emergency, was adopted by the English court of chancery, and has been generally followed in this country. And it may now be regarded as the uniform and well-established practice to entertain the application and to grant the relief before answer, where plaintiff can satisfy the court that he has an equitable claim to the property in controversy, and that a receiver is necessary to preserve it from loss, or where a clear case is shown of fraud and imminent danger, unless the relief is granted." High, Rec. (2d Ed.) § 105. "In all such cases a court of equity necessarily exercises a large discretion as to whether it will or will not take possession of the property by its receiver, and this discretion is governed by a consideration of all the circumstances of the case. It is therefore difficult to establish any fixed rule in such cases, although it may be said generally that if the case as presented upon the application for a receiver is clearly in favor of plaintiff, indicating that he will probably be entitled to a final recovery, the risk of injury to defendant is very small, and the court does not hesitate to interfere. If there be more doubt as to plaintiff's right, there is of course more difficulty in passing upon the application, the question being one of degree, as to which it is impossible to lay down any precise rule." Id. § 19; also note 1, under this section. "Where, indeed, the property is as it were *in medio*, in the enjoyment of no one, the court can hardly do wrong in taking possession. It is the common interest of all parties that the court should prevent a scramble." As in the general doctrine to the same effect, is Kerr, Rec. 1-5. We are of the opinion that the facts alleged in the bill are sufficient to authorize the appointment of a receiver according to the prayer.

A further question arises upon the stipulation of facts upon which the motion is submitted,—whether these facts are sufficient to authorize the appointment of a receiver.

Among the facts contained in the stipulation on which this motion is submitted are the following:

"On the twenty-eighth day of February, 1887, John Taylor, who was then trustee in trust for the Church of Jesus Christ of Latter-Day Saints, held in trust certain personal property, goods, and chattels of the aggregate value of \$268,982.39½, which it is claimed by the defendants and denied by the plaintiff had theretofore been contributed by the individual members of said church for the purpose of building temples, and for other charitable and religious purposes. On said last-named date the said John Taylor, as trustee in trust, executed an instrument in writing, a copy of which is hereto attached and made part hereof, marked Exhibit A. That, in pursuance of the provisions of the instrument aforesaid, certain property of the value approximately as set out below was delivered to the following-named ecclesiastical church corporations created and existing under the laws of the territory of Utah:

To the Church Association of Cache Stake of Zion,	\$45,086 09
To the Church Association of Box Elder Stake of Zion,	16,745 18
To the Church Association of Weber Stake of Zion,	11,480 06
To the Church Association of Morgan Stake of Zion,	2,716 57
To the Church Association of Summit Stake of Zion,	3,153 20
To the Church Association of Wasatch Stake of Zion,	6,044 90
To the Church Association of Salt Lake Stake of Zion,	32,702 70
To the Church Association of Tooele Stake of Zion,	4,591 10½
To the Church Association of Juab's Stake of Zion,	3,049 03
To the Church Association of Utah Stake of Zion,	25,000 00
To the Church Association of Sanpete Stake of Zion,	6,992 13
To the Church Association of Sevier Stake of Zion,	15,445 50
To the Church Association of Millard Stake of Zion,	14,083 89
To the Church Association of Beaver Stake of Zion,	6,980 36
To the Church Association of Panguitch Stake of Zion,	8,137 50
To the Church Association of St. George Stake of Zion,	28,638 41
To the Church Association of Kanab Stake of Zion,	38,185 77

Total \$268,982 39½

"The members of the said stake corporations are members of the Church of Jesus Christ of Latter-Day Saints, and it is claimed by the defendants and denied by plaintiffs that they were substantially the original donors of said property in their respective stakes. The Church of Jesus Christ of Latter-Day Saints was a corporation for the purposes set out in the act incorporating said church at the time the act of congress of 1887, hereinbefore set out, took effect, and has claimed to exist as a corporation ever since that time.

"The tithing-house and grounds, as hereinbefore set out, are not, and have never been, used as a place of worship or parsonage connected therewith, or as burial ground, nor are they appurtenant to any thereof. The portion of the third tract of land set out in the first part of this agreement as the 'Gardo-House and Grounds,' and the historian's office and grounds, which is known as the 'Historian's Office and Grounds,' comprises a tract about 8 by 10 rods. The building thereon is a three-story *adobe* building, about 35 feet by 45 feet. The grounds of the gardo-house and the grounds of the historian's office are separated by a terrace, and for a part of the way by an evergreen hedge. The historian's office and tract has been used as the office and residence of the historian of said church, and as a depository for the records of said church, and for library purposes, and has been so used since prior to 1862. For the purpose of this motion the probable value of the real estate herein described is estimated as follows: (1) The Temple and Tabernacle block, one hundred and fifty thousand dollars; (2) the tithing-house and grounds, twenty-five thousand dollars; (3) the portion of tract three, known as the 'Gardo-House and Grounds,' fifty thousand dollars; (4) the portion of tract three, known as the 'Historian's Office and Grounds,' ten thousand dollars."

From these facts it sufficiently appears that the defunct corporation has in its possession real property in value far exceeding \$50,000, the limit fixed by the act of congress of 1862, and that a portion of it is not a building or the grounds appurtenant thereto held for the purpose of the worship of God, or parsonages connected therewith, or burial ground, and that the title to a large portion of the same property was acquired subsequently to the time the act of 1862 took effect.

In deciding this motion we are not called upon to finally determine the rights of the parties with respect to the property involved in this case. Such rights will be decided as they ultimately appear. And if the receiver appointed shall claim a right to the possession of any property as receiver, to which third parties also claim a right, the issue will then be determined. We are of the opinion that the complainant's motion for the appointment of a re-

ceiver should be allowed. An order will be made to that effect, in accordance with the prayer of the bill.

BOREMAN and HENDERSON, JJ., concur.

(37 Kan. 591)

ATCHISON, T. & S. F. R. Co. v. MCKEE.

(Supreme Court of Kansas. November 5, 1887.)

1. MASTER AND SERVANT—DEFECTIVE APPLIANCES.

It is the duty of a company engaged in manufacturing by machinery, to provide its employes with machines and appliances suitable for the service required; and if it fails in that respect, it is liable to its servants for injuries sustained by reason of unsuitable machinery.

2. SAME—EXTENT OF MASTER'S DUTY—REASONABLY SAFE.

A master's duty is performed when he furnishes for his servants machines that are reasonably and adequately safe; and it is error for a court to instruct the jury that it is his duty to provide safe machinery; but when the correct rule is clearly and plainly stated in the same instruction, and in almost the immediate connection, and it appears from the findings of fact that the machine inquired about was defective and out of repair, it is not such error as would necessitate a reversal and retrial of the action, when it further appears that it was tried upon the theory that such machine was not perfectly safe.

3. SAME—FELLOW-SERVANTS—MACHINE INSPECTOR.

Where a company so engaged employs a person to inspect, repair, and provide machinery for others to operate who are employed by the same company, he stands in the place of master to those who operate such machinery, rather than that of a fellow-servant.¹

4. SAME—EMPLOYEE USING MACHINE AFTER NOTICE OF REPAIR.

Where a person operating a machine complains to the superintendent of machinery that it is defective and unsafe, and such superintendent repairs it, and tells the operative he has done so, it is not negligence for such operative to continue at work at the machine, although it afterwards appears that the repairs were not substantial.

5. SAME—EVIDENCE—REPAIRS AFTER ACCIDENT.

Where repairs are made upon a machine shortly after an accident has occurred at the machine, evidence of such repairs is competent, as tending to establish that it was not safe at the time of the accident.

(Syllabus by Holt, C.)

Commissioners' decision. Error from superior court, Shawnee county; W. C. WEBB, Judge.

This cause was tried in the superior court of Shawnee county, in June, 1885. The defendant in error, as plaintiff, recovered a judgment for \$2,000. He had been employed in the car-shops of the defendant; at Topeka, Kansas, and, while sawing truss-rod blocks, had his right hand cut off at the wrist. He complains in his petition of three distinct grounds of negligence on the part of the defendant: *First*, that the timber furnished him for sawing was shattered and riven; *second*, that the saw furnished him was cracked, with broken teeth, and unsafe; *third*, that the table or frame that held the saw was insecure, not holding the saw firmly, so that when it was used in sawing it would vibrate or wobble. It appears that, while sawing a block, a wedge-shaped sliver or splinter was sawed off inside the block, and, falling down beside the saw, wedged it. The block was thrown out, or kicked, as it was termed in the evidence, and the wrist of his right arm fell upon the saw, and was severed.

The saw in question was claimed to be defective in this; that one tooth was out, and, from the place where it was broken, a crack in the blade of the saw

¹It is the duty of an employer to furnish sufficient and safe materials, machinery, or other means with which the servant is to perform his duties, and to keep them in repair and order; and he cannot delegate this duty to a servant so as to exempt himself from liability for injuries caused to another servant by defective appliances. *Railroad Co. v. Herbert*, 6 Sup. Ct. Rep. 590; *Thompson v. Drymala*, (Minn.) 1 N. W. Rep. 255; *Kelly v. Telephone Co.*, (Minn.) 25 N. W. Rep. 708, and note.

extended about four inches. On the opposite part of the saw was another crack, extending about two or three inches, and there is some testimony of still another smaller crack in the saw-blade at another place. This saw was hung up on a post back of the table which held the saws used by the plaintiff. Each table was furnished with several saws, which could be taken off and put on when needed, and for this table six or eight were given to plaintiff. He had noticed that this saw was defective, and had put it upon a peg next to the post, and hung other saws over it. The morning that this accident occurred, he had been at work at his bench, using another saw for the purpose of sawing lighter material than truss-rod blocks. He had been called away to another part of the shop on business, and, while absent, some person went to his frame, took off the saw he had been using, and fixed the saw in question thereon. He, returning, noticed the pile of timber to be sawed into truss-rod blocks lying beside the frame, and, seeing another and larger saw than the one he left on the table, lowered it, as he could by means of machinery, and proceeded to saw the block in question. He was injured in sawing the first block.

In regard to the table upon which this saw was placed, there was evidence introduced tending to establish these facts: It was of a pattern unlike any other frame or machine in the shops of the defendant, but one of the witnesses testified that he had seen such a one in car-shops in the east. The mandrel that held the saw, where it went into the arbor, had worn a little, and had been loose before. The person who had used this machine before the plaintiff had allowed it to heat and become worn, and it had been repaired by putting in babbiting metal. The plaintiff had often complained of this table or frame, and the vibration or wobbling of the saw, and it had been fixed by Mr. Young, who was an assistant of a Mr. Cook, who was the man who looked after the machinery in the shops.

On the Friday or Saturday prior to the Monday upon which this accident occurred, plaintiff had complained to Mr. Young of the vibration of the saw, and Mr. Young on Saturday night tightened the screws and fixed the machine, as he told the plaintiff Monday morning before commencing work. The plaintiff did not notice the vibration of the saw when he first went to work Monday morning at the light stuff; but when he returned and commenced to saw the heavier material, he discovered it upon sawing the first half of the first block. After the accident, this frame was continued in use, but after some time there was a wooden screw fixed to the side, and slats added to the frame to make it firm.

The following are the questions submitted at the suggestion of the defendant, and answered by the jury:

"(1) Was not the plaintiff injured by having his hand cut on a circular saw, which he was engaged in operating, at the car-shops of the defendant, in Topeka, on or about the twenty-sixth day of February, 1883? *Answer.* Yes.

"(2) Had not said plaintiff been engaged in the operation of said machine for about two years to the day on which he was injured? *A.* About one year.

"(3) At the time of the injury to plaintiff, were there not a number of saws hanging on a peg at said sawing machine, any of which the plaintiff could have used if he thought proper? *A.* Yes.

"(4) Did not the plaintiff, at several times while he was working the said machine, complain to Mr. Young, and ask that said machine be repaired? *A.* Yes.

"(5) Did not Mr. Young, at each time that the plaintiff complained of said machine, go to the same and repair it by fixing the journals or tightening the bolts, or both? *A.* Yes, but not substantial.

"(6) Did not the plaintiff, on Friday or Saturday before the accident, complain to Mr. Young of said machine, and ask that it be repaired? *A.* Yes.

"(7) Did not Mr. Young tell plaintiff that he would repair the machine before Monday? A. Yes.

"(8) Did not Mr. Young, before Monday, February 26, 1883, repair the machine on which plaintiff was working, by fixing the journals and bearings and by tightening the bolts at the end of the frame in which the saw was set? A. Yes.

"(9) Had not the kind of repairs which Mr. Young put on the machine just prior to the accident been sufficient to remedy the vibrating and other defects previously complained of by plaintiff, at every time it was repaired by him prior to the last repairs before the accident? A. No.

"(10) On Monday morning, February 26, 1883, did not the plaintiff go to said machine, and use the same until about 10 o'clock, sawing out material to be used in the manufacture of cars? A. Yes; on light material.

"(11) After the plaintiff had completed the work which he was on the morning of the accident, and the board had been carried away, did he not leave said machine for about thirty minutes, and go into the yard? A. Yes.

"(12) While plaintiff was absent from said machine for about thirty minutes, did not some one go to said machine and take off the saw which plaintiff had been using, and put on a larger saw? A. Yes.

"(13) When plaintiff returned to said machine after his temporary absence, did he or did he not know that some one had taken off the saw which he had been using, and replaced the same with a larger saw? A. Yes.

"(14) Did plaintiff, before commencing work again on said machine, stop the saw for the purpose of seeing what saw had been placed on said machine during his absence, and whether the same was in good or bad condition? A. No.

"(15) Did the plaintiff, prior to commencing work with said machine, after his temporary absence, examine the rest of the saws hanging on the peg to ascertain whether a defective saw had been placed on said machine or not? A. No.

"(16) Did the plaintiff, in working with said machine on said Monday morning, notice any defect in said machine prior to his temporary absence from the same and the changing of the saws thereon? A. No.

"(17) Who put the saw which injured the plaintiff on the machine? A. Some one acting under general orders of defendant.

"(18) About how many saws were there at the table at the time plaintiff was injured? A. From 6 to 10.

"(19) Had plaintiff, prior to the time of his injury, been engaged in sawing the same kind of blocks which he was then commencing to saw? A. Yes; but not that day.

"(20) Were any saws furnished said machine suitable for the class of work which plaintiff was engaged in at the time of his injury, other than the saw which he claims he was then using, and, if so, state about how many? A. Yes; two.

"(21) Had the plaintiff the right, in selecting the blocks which he was about to saw up, to discard and throw away those which he considered unsuitable for the purpose, or dangerous to use? A. He had the right to discard.

"(22) Did plaintiff examine the piece of wood, which he was engaged in sawing at the time of the accident, before commencing to saw the same? A. Yes.

"(23) Had not said plaintiff, just prior to the accident, passed the block of wood, which he was sawing at the time of the accident, twice through the machine, thus cutting off one side of the same? A. Yes.

"(24) When did plaintiff first notice, on Monday, that the machine was defective or not working properly, if at all? A. On sawing first block.

"(25) Did the plaintiff at any time, on Monday, February 26th, complain

of the condition of said machine; and, if so, to whom did he make said complaint on said day? A. No.

"(26) Had not the plaintiff the right to refuse to work with, and to discard and lay aside, any one of the saws furnished to his table, whenever he considered them unsuitable or unsafe to be used on the work which he was engaged at? A. Yes.

"(27) What was the condition of the saw which plaintiff was using at the time he was hurt? Please describe the same fully. A. A saw from 14 to 16 inches in diameter, one tooth out, and two or more cracks.

"(28) Did the condition of the saw which plaintiff was using at the time of the accident contribute in any manner to his injury? A. It might, or it might not.

"(29) If you answer the last question in the affirmative, please state fully how it so contributed. A. ———.

"(30) Would the plaintiff have used the saw which was on the machine at the time he was hurt if he had known that that saw was on? A. No.

"(31) Did not the saw at the time of the accident, in cutting through the piece of wood, cut off and loosen, next to the top of the table, a wedge-shaped sliver from a season crack in said wood? A. Yes.

"(32) Did said wedge-shaped piece of wood cut off from said piece of wood which plaintiff was sawing in any manner contribute to the injury of said plaintiff? A. Yes.

"(33) If you answer the last question in the affirmative, please state fully how it so contributed to said injury. A. By throwing block out, and allowing his hand to fall on saw.

"(34) Would not the sawing off of a wedge-shaped sliver from a block of wood, similar to the one which was sawed off at the time of plaintiff's injury, probably throw said block from the saw, by driving said wedge-shaped sliver between the saw and the block, even if the saw was in perfect condition or new? A. Probably it would.

"(35) Is not the operation of circular saws and the kind of work in which plaintiff was employed at the time of the accident, common to a great variety of wood-working shops or establishments other than those connected with railroad corporations? A. Yes.

"(36) Did any portion of the duties of plaintiff in the employment in which he was engaged require him to perform labor upon or in connection with moving trains, cars, or locomotives over the line of defendant's railroad? A. No.

"(37) Did the duties of plaintiff's calling and occupation, at the time he was injured, in any manner expose him to the hazards peculiar to the operation of a railroad, or different from the hazards which he would have been exposed to had he been engaged in operating the same kind of machinery in building cars for a private manufacturing company, or car manufacturing company, other than a railroad? A. No.

"(38) If you answer the last question in the affirmative, please state fully what hazards plaintiff was exposed to peculiar to railroading, and which he would not have been exposed to engaged in operating the same class of machinery in a car factory owned by an individual or car company. A. ———

"(39) At the time the plaintiff complained to Mr. Young, on the Friday or Saturday preceding the accident, as to the condition of said sawing table at which plaintiff was hurt, did not Mr. Young go to said table before the Monday on which plaintiff was hurt, and make thereon all the repairs which he deemed necessary, and the same kind of repairs which upon previous complaints he had made, and which at previous times had remedied the defects complained of? A. Yes; but did not remedy all defects.

"(40) Was not Mr. Young a competent and experienced machinist? A. Yes.

"(41) How long had Mr. Young been employed in the business of operating and repairing and working with wood machinery? A. About 20 years.

"(42) At the time of plaintiff's injury did he not attempt to pass the stick which he was sawing through with his hands, without using a forked stick to push the same through with? A. Yes.

"(43) Was there not a forked stick at said table, at the time of the accident, which the plaintiff could have used to push said stick of wood through, and which was made and kept there for that purpose? A. Yes.

"(44) Was it not the duty of the plaintiff to refuse to work with and to lay aside any saw, among the number furnished to said machine, which he considered dangerous? A. Yes.

"(45) How much per day was plaintiff earning at the time he was injured? A. \$2.15.

"(46) Did not the plaintiff, after he recovered from the effects of his injury so as to be able to work, go back to the defendant's shops and work for the defendant, and continue to work there until a few days before the commencement of this suit, nearly two years after said accident? A. Yes.

"(47) Did not plaintiff quit the service of the company immediately before the commencement of this suit, voluntarily? A. Yes.

"(48) What wages was plaintiff earning at the time he voluntarily quit the service of the defendant company, just before commencing this suit? A. \$2.15.

"(49) Did not the plaintiff, at the time of the accident complained of, and long prior thereto, have knowledge of the form or pattern or plan of construction of the table on which he was engaged to work? A. Yes.

"(50) Could not the plaintiff, by the reasonable exercise of his faculties, during the period of about two years that he worked at the table at which he was injured, have known of the pattern or plan on which the same was constructed? A. Yes; but he only worked on table about one year.

"(51) Was there a wood screw placed upon said table, at the end of the swinging frame supporting the saw, after the accident to plaintiff? A. Yes.

"(52) If you answer the last question in the affirmative, state about how long after said accident said wood screw was placed upon said table. A. From one to three months.

"(53) Was the placing of said wood screw upon said table a repair of the table, or was it the addition of a new invention or device? A. Repair.

"(54) Had the plaintiff ever thought of or suggested the addition of a wood screw at the end of the swinging frame supporting the saw, for the purpose of steadying the saw and lessening its vibration; and, if so, state when and to whom he suggested it? A. No.

"(55) At whose suggestion was the wood screw placed on the end of the swinging frame supporting the saw? A. Jas. L. Wilcox.

"(56) Did the plaintiff at any time demand that he be furnished with a new table to operate the saw on which he was injured, or that he be furnished with a table constructed on a different pattern from the one which he was working on? A. No.

"(57) If you answer the last question in the affirmative, state when he made such demand and to whom he made the same. A. ———"

Geo. R. Peck, A. A. Hurd, and W. C. Campbell, for plaintiff in error. Waters & Chase and Vance & Campbell, for defendant in error.

HOLT, C. The defendant makes a number of assignments of error, and they are all properly raised by the demurrer to the plaintiff's evidence, objections to the instructions given, exceptions to the instructions asked and refused, and by motion for judgment on the findings for defendant, and motion for a new trial. Before we proceed to examine them in detail, we will state that the first ground of negligence alleged by plaintiff has no support what-

ever under the evidence introduced. It appears that the "odds and ends" of the timber cut at other saws in the shop were brought to plaintiff's form or bench, and he was to pick out therefrom such pieces as he thought could be worked to advantage. It was his duty to select such pieces as he thought fit, and reject those pieces that he thought unfit, for use. This duty was given to him alone. He testified, and it is undisputed, that he examined the block, and supposed it to be suitable for use in making truss-rod blocks, and that the splinter or sliver that became dislodged from the block in sawing could not have been seen by an examination of the block. Certainly, under this statement of facts, there was no negligence of the company nor of plaintiff. The findings were in keeping with the evidence.

The second ground of negligence,—that the saw was defective,—is partially supported by the testimony, but it is fairly established by the evidence that such defect did not contribute to the injury of the plaintiff. In this connection we call attention to the following: "(28) Did the condition of the saw which plaintiff was using at the time of the accident contribute in any manner to his injury? A. It might, or it might not. (29) If you answer the last question in the affirmative, please state fully how it so contributed. A. ———." "(34) Would not the sawing off of a wedge-shaped sliver from a block of wood, similar to the one which was sawed off at the time of plaintiff's injury, probably throw said block from the saw, by driving said wedge-shaped sliver between the saw and the block, even if the saw was in perfect condition or new? A. Probably it would." Under the evidence and answers to the questions, and failure to answer, we are safe to say, for the purposes of this case, that the alleged negligence of the defendant in regard to this saw did not contribute to the injuries of the plaintiff.

This leaves us now to examine the third ground of negligence, that is, the defects in the machine or table in which the saw was placed. The defendant urges with great force that the railroad law of 1874, relating to damages to employes of the railroad company, caused by the negligence of co-employes, is not applicable in this case. They claim that the rule applies only to the hazardous work of railroading; that it does not apply to that part of the work of the defendant which was carried on in their car-shops; claiming, further, that the fourteenth amendment to the constitution of the United States forbids any distinction as to liability in the same kind of employment; that there should be no greater liability on the part of a railroad company for injuries to an employe, caused by the negligence of his co-employes, while manufacturing cars, than there should be in the same business if it was carried on by a company not engaged in railroading, and cities. *Deppe v. Railway Co.*, 36 Iowa, 52; *Santa Clara Co. v. Railway Co.*, 118 U. S. 394, 6 Sup. Ct. Rep. 1132; *Fire Ass'n v. New York*, 119 U. S. 120, 7 Sup. Ct. Rep. 108. We think it is unnecessary to discuss this matter under the evidence in this case. If there is any negligence shown in this case upon which the plaintiff may recover, it is about the form or machine in which the saw was placed that cut off the hand of plaintiff. It was the duty of the defendant to provide its employes with machinery and appliances for the service required suitable for its efficient and reasonably safe performance, and if it failed in that respect, it was liable to its servants as it would be to a stranger. This defendant had assigned the duty of inspecting the machinery and providing new, when necessary, and seeing to it that such machinery was kept in a suitable condition, to Mr. Cook and his assistant, Mr. Young. We believe they were, while so engaged about the furnishing and repairing the tools and machines in the car-shop, standing in the place of principal to this plaintiff, rather than his fellow-servant. *Railway Co. v. Weaver*, 35 Kan. 412, 11 Pac. Rep. 408; *Railroad Co. v. Moore*, 29 Kan. 632; *Railway Co. v. Little*, 19 Kan. 267; *Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184; *Brabbits v. Railway Co.*, 38 Wis. 289.

As shown by the testimony, Mr. Young had known of the defects of this machine or table for some time. He had repeatedly repaired or fixed it. The plaintiff had complained of the defects only a day or two before the accident occurred, and he had attempted to repair it, but had not done so substantially as shown by the findings of the jury. It is claimed by defendant, however, that the plaintiff knew as much about this machine as the defendant, especially as Mr. Young, the agent of the defendant, and, because he kept on at work at the machine after he knew of such defects, he was guilty of contributory negligence, and therefore could not recover. We think that the testimony does not support this contention. Mr. Young promised the plaintiff Saturday night that he would repair it; he did repair it partially, and told plaintiff Monday morning that it was repaired and all right. Plaintiff had the right to rely upon the statement of Mr. Young, and to proceed with his work under such statement. It did work all right with a small saw in light timber at first, Monday morning, under plaintiff's hands. The first notice that plaintiff had of its vibrations or wobbling Monday morning was when he commenced sawing the block upon which his hand was injured. Some party whom the evidence fails to disclose went to the machine and did some sawing in the plaintiff's absence. Whether during the sawing by this unknown party the mandrel became loosened or the machine unsteady, we can only surmise. When plaintiff left it, it seemed to be steady and firm, and, as soon as he returned and commenced to saw with it, it vibrated. But this conclusion can be safely drawn from all the testimony, and the findings of fact of the jury; that the repairs made by Mr. Young on Saturday night were either not thorough or substantial, or the machine was in such a condition that, if the tightening of the screws had been thoroughly done, such repairs did not materially remedy the defects complained of by plaintiff.

It further appears in evidence that, some time after the plaintiff had left the shop, something was attached or affixed to the machine to make it steady. It is in evidence that Mr. Wilcox, who took the machine or table some time after plaintiff was injured, complained that the saw "sawed all over the timber," and these additions or repairs, as the jury found, were made at the suggestion of Mr. Wilcox. The defendant claims that the admission of such testimony was error, and in this connection complains of the instructions given by the court in reference to such repairs. We will here state that, if the evidence was properly admitted, the form of an instruction given by the court covering this testimony was certainly correct. We will not here discuss the question of whether evidence showing that repairs have been made upon a machine at which an accident has happened, shortly after it occurred, is competent to show that such machine was unsafe at the time of the accident. This court has examined and discussed this matter, and it appears to be the settled law of the state to admit such evidence. *Railway Co. v. Retford*, 18 Kan. 245; *City of Emporia v. Schmidling*, 33 Kan. 485, 6 Pac. Rep. 893; *Railway Co. v. Weaver*, 35 Kan. 412, 11 Pac. Rep. 408; *City of Abilene v. Hendricks*, 36 Kan. 196, 13 Pac. Rep. 131. We believe, therefore, the testimony was admissible to establish the fact of the defect in the machine at the time of the injury.

The further question now arises, and one of considerable difficulty in determining, whether this defective machine was the cause of the injury to the plaintiff. We call attention to the findings, and to the general verdict for the plaintiff. It will be remembered that all these special findings were submitted at the request of the defendant, and none of them were in conflict with the general verdict, and many of them tend to sustain and uphold it; and, further, whether this injury of the plaintiff was an accident, or the result of the defective condition of a machine of the defendant's, was submitted to the jury. By their verdict we may safely infer that they found it was caused by the negligence of the defendant, rather than by an accident. There is testimony

to sustain the verdict, and we do not feel at liberty to disturb it. From the evidence, we believe the jury were authorized to find that this injury was the result of the negligence of the defendant in failing to furnish a proper machine for plaintiff to work upon.

The defendant also complains of a part of the court's instruction No. 5, which reads as follows: "* * * And it is the master's or employer's duty to maintain such supervision and care respecting all tools, machinery, and appliances used by his servants or employes as may be necessary to continue them in safe condition for use; and if he fails to do so, he is liable for injuries arising from his neglect." It contends that the word "safe" in the instruction should have been qualified by "reasonably," or some word or phrase showing that it was defendant's duty to have its tools and machinery in an adequately safe condition, and says that, when the word "safe" was used in the connection it is in this instruction, without any limitation or qualification, it would make the defendant an absolute guarantor of the safety of its machinery. It is admitted that the rule is correctly laid down in other parts of the instructions of the court, and, in passing, we wish to say that it is very fully, plainly, and clearly stated, with the exception of this one portion of the instruction. The proper qualifying word was evidently inadvertently omitted by the court. The sentence immediately preceding this instruction is: "* * * And the master or employer must exercise reasonable and proper vigilance to see that the machinery employed is in proper condition for the purposes for which it is being used; and it is the master's and employer's duty," etc., etc. And in the seventh instruction: "You are to determine from the evidence the facts respecting the condition of the saw and table and appliances constituting the machine at which the plaintiff was engaged when hurt; whether the same or either was in good condition and reasonably safe, or whether either was out of repair, defective, or dangerous." The defendant contends, however, and with reason, that where the law is given properly in an instruction, and in another place improperly, it may fairly be presumed that the jury were misled by that portion of the instruction which erroneously stated the law. While such is the rule, yet we would hesitate to carry it to the extent to apply it to the instructions of the court, when the instructions requested by the parties are all refused, and the charge to the jury is given as a whole, connectedly, and almost in the immediate connection, and within the same subdivision of the instruction, the court lays down the rule plainly and correctly. The duty of the defendant is so plainly given elsewhere, that we should hesitate to decide the omission of the qualifying word in this instance would be error sufficient to require a reversal and a retrial of the case. In this action, under the findings, such instruction could not have materially prejudiced the defendant, as the jury found this machine defective and out of repair. This action was evidently not tried on the theory that this machine was safe and perfect. Finding No. 16, submitted at the request of defendant, asks whether the plaintiff noticed any defect in the machine prior to the time of his temporary absence from the same, and immediately following: "When did plaintiff first notice, on Monday, that the machine was defective or not working properly, if at all?" The main contention in this case was, not whether the machine was safe, but, being defective, whether the plaintiff was guilty of contributory negligence in using it, and especially whether its defects caused the injuries plaintiff sustained. It is reasonable to infer from the testimony and findings that the machine was defective, out of repair, and unsafe.

The defendant asked and the court refused to instruct the jury: "Where the danger of using defective machinery is so great that a man of ordinary prudence would not continue to use it, if a servant continues to use such machinery or instrument, even after an express promise of the master, he would still be guilty of contributory negligence, and could not recover." This in-

struction could not apply to the defective machine or form that held the saw. Plaintiff did not continue to use the same because of any promise of the master to repair it, but did go to work at it upon the day of the accident because he was told that it had been repaired since he last used it. He then had a right to assume all repairs necessary to remedy the defects complained of had been made. We believe no material error was committed in the trial of this action, and therefore recommend that the judgment of the court below be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

(27 Kan. 540)

EDDY and others v. WEAVER and others.

(*Supreme Court of Kansas. November 5, 1887.*)

1. APPEAL—CASE MADE—STATEMENT THAT CASE CONTAINS THE EVIDENCE.

Where a case is made and settled for the supreme court, and the party making it desires that it shall be shown that the case contains all the evidence that was introduced on the trial, a statement to that effect should be inserted in the case itself, and not in the certificate of the judge who settles the case.

2. ATTACHMENT—PRIORITY OF WRITS—LIABILITY OF EXECUTION CREDITORS FOR WRONGFUL SALE.

Where attachments and executions are levied upon the same property, by the same officer, and the attachments are levied first, and have priority, and the execution creditors cause the officer to sell the property on their executions to several hundred different persons, and in small lots, and to pay the proceeds of the sale to themselves, *held*, that they are liable to the attaching creditors for so much of the proceeds as will satisfy the judgments rendered in favor of the attaching creditors.

(*Syllabus by the Court.*)

Error from district court, Harvey county; L. HOUK, Judge.

This action was tried by the court below, without a jury, and the court made the following findings of fact and conclusions of law, and rendered the following judgment, to-wit:

"FINDINGS OF FACT.

"That prior and up to December 4, 1877, one William Hall Mitchell was engaged in the business of retailing drugs, and so forth, at Larned, Kansas, and was largely in debt and wholly insolvent. That on the eighteenth day of October, 1877, Stiefel & Nye recovered a judgment against said Mitchell for \$56, and costs of suit. That on December 4, 1877, John A. Moore commenced a civil action in attachment against said Mitchell for \$105, before F. A. A. NEALS, a justice of the peace of Larned township, Pawnee county, Kansas, and at the same time Weaver & Bill, plaintiffs herein, commenced two actions before the same justice of the peace for \$235, and one for \$205, and caused orders of attachment in said actions to be issued; all of which said attachments in said three suits were placed in the hands of L. P. Elliott, a constable of Larned township, in said county and state, and was by said constable each and all levied upon the stock of drugs and medicines of said Mitchell. That said John A. Moore and Weaver & Bill at said time were each and all non-residents of Pawnee county, Kansas, and were each and all residents of Lyon county, Kansas, and that each and all of them failed to give a cost-bond in said cases, except the bonds given for attachments until December 8, 1877, at which time they filed a cost-bond in each of said cases. That each and all of said attachments so issued were levied upon said stock of drugs and medicines on December 4, 1877. That each of said cases was set for trial, and said attachments made returnable on December 7, 1877, at which time said Mitchell appeared before said justice of the peace, and filed an affidavit in due form under section 4300, c. 81, Comp. Laws Kan., for a change of venue, which said application was by said J. P. overruled. Said causes were continued for trial until December 8, 1877, at 10 A. M., at which

time the same was, on the application of said Mitchell, continued for trial until January 10, 1878. That on January 8, 1878, said Bill, one of said plaintiffs, paid said Mitchell about \$25, to confess judgment in all said cases for the amounts claimed therein, and waive all errors and irregularities in said suits, which said Mitchell did in writing, having consented before said justice that said continuance should be set aside, and each of said cases called for trial. That the said Mitchell had no defense to the merits of either of said causes of action, and was justly indebted to Weaver & Bill and J. A. Moore in these several amounts for which he confessed judgment, and that the said Bill paid said amount to save the expenses the parties would necessarily be at if said suits were tried. That on the eighth day of December, 1877, said Mitchell, with George A. Eddy, Jerry Toles, T. H. Edwards, and Nelson Adams as sureties, entered into a forthcoming bond to said John A. Moore and Weaver & Bill in the sum of \$2,400, conditioned that the property so attached in said actions, or the sum of \$1,100, its appraised value thereof, should be forthcoming to answer the judgments in said actions; which said bond was taken and approved by said L. P. Elliott, constable, on December 8, 1877, a true copy of which said bond is attached to the petition herein, and said constable made the following return on each of said orders of attachment:

"Surrendered the property attached in this case on the execution and delivery to me of bond, a copy of which is herein attached, and marked "Exhibit A," February 8, 1878.

L. P. ELLIOTT, Constable.

"Which said bond was taken and approved by said constable on December 8, 1878.

L. P. ELLIOTT, Constable.

"That said bond was procured to be issued by George A. Eddy, in order that the execution issued in his favor, as hereinafter set forth, might be levied upon said attached property, and that, while said bond purported to be made by said Mitchell, as principal, and the others, as sureties, it was as a matter of fact procured and executed by the said George A. Eddy for the purpose aforesaid, of which the plaintiff, at the time, had no information or knowledge. That on December 4, 1877, an execution was issued upon the judgment of Steifel & Neye to the said Elliott. That on December 4, 1877, George A. Eddy commenced, before a justice of the peace at Larned, three actions against the said William Hall Mitchell,—one to recover the sum of \$81, one to recover the sum of \$219.50, and one to recover the sum of \$88.50; and that on the same day Gillett & Co. commenced an action against said Mitchell for the sum of \$163, and Gillett, Armstrong & Kelly commenced an action against the said Mitchell for the sum of \$155, and Myers & Myers commenced an action against said Mitchell for the sum of \$165; and also, on the same day, Adam Brenner commenced an action for \$77.50; and also, on the same day, J. A. Blackburn commenced an action against the said Mitchell for the sum of \$84.52. That in each of said actions an order of attachment was issued and delivered to said constable, Elliott, who levied each of them upon a stock of goods, wares, and merchandise belonging to the said Mitchell, then and at that time in his possession, under the levies made upon the orders of attachment issued in the cases of Weaver & Bill and John A. Moore, against said Mitchell; and that all orders of attachment received by said constable, Elliott, other than those in favor of Weaver & Bill and John A. Moore, were levied upon such property subsequent to and subject to the orders of attachment levied thereon in favor of Weaver & Bill and John A. Moore. That all of the orders of attachment above referred to, other than those in favor of Weaver & Bill and John A. Moore, were returnable, and were returned on December 8, 1877, at which time each of the actions in which they were issued were set for trial, and said orders of attachment were then released and discharged.

"That on the eighth day of December, 1877, judgments were rendered in each of the actions commenced against Mitchell, as herein stated, for the amounts claimed, and costs, except in the two actions commenced by Weaver

& Bill, and in the action commenced by John A. Moore. And that, upon said day, an ordinary execution was issued upon each judgment so rendered, and placed in the hands of Constable Elliott, prior to the delivering to him the said forthcoming bond. That after the execution and delivery and approval of said forthcoming bond, and the return made by said constable upon said orders of attachment in favor of Weaver & Bill and John A. Moore, as aforesaid, the said William Hall Mitchell demanded of said constable, Elliott, the delivery to him of the property which had been attached, and for the delivery of which said forthcoming bond had been executed, which demand the said constable, Elliott, at the instance and request of the defendants Nelson Adams and George A. Eddy, refused and failed to comply with, and that he, the said constable, Elliott, at the special instance and request of the defendants Nelson Adams and George A. Eddy, as soon as he had approved the forthcoming bond and made said return on said orders of attachment in favor of Weaver & Bill and John A. Moore, levied upon the property of Mitchell, which he had taken under the orders of attachments last named, and to release which, said forthcoming bond had been given on execution in favor of said George A. Eddy for the sum of \$90; and also levied thereon, subject to such first levy, an execution in favor of George A. Eddy, for the sum of \$91; and also levied thereon, subject to said first two executions, another execution in favor of the said George A. Eddy for the sum of \$225; and also levied thereon, subject to said three other executions, an execution in favor of Gillett & Co., for the sum of \$175; and also levied thereon subject to said four executions, an execution in favor of Armstrong & Kelly, for the sum of \$165; and also levied thereon, subject to the levies of said five executions mentioned, all other executions in his hands, amounting to about the sum of \$327.

"That the levies of said executions were made in the order stated about one-half hour after the execution of said forthcoming bond, and after the said return of said orders of attachment in favor of Weaver & Bill. That afterwards, and on the twenty-third and twenty-fourth days of December, 1877, at the special instance and request of the defendants George A. Eddy and Nelson Adams, the said constable, Elliott, having duly advertised the same, sold at public auction the goods so advertised for the sum of ten hundred and fifty dollars, on the executions so levied thereon, as aforesaid, in the order in which they were levied as aforesaid, and applied the proceeds, at the special instance and request of the defendants George A. Eddy and Nelson Adams, as follows, to-wit: He, the said constable, Elliott, paid of said proceeds to the defendant George A. Eddy seven hundred and eight dollars on the claim that he, the said George A. Eddy, claimed to represent, to-wit, three claims of his own and the claim of Gillett & Co., and the claim of Gillett, Armstrong & Kelly; and he paid to the said Nelson Adams, on the claims of Myers & Myers, Adam Brenner, and J. A. Blackman, one hundred and fifty dollars, and the balance he kept for his own fees and the fees of the justice of the peace. That the said defendant George A. Eddy was present at said sale, and assisted said constable as his clerk, and received the money when paid in at said sale.

"That Nelson Adams paid of the proceeds received by him all he received, except forty dollars, to the parties for whom he received it. That Eddy, Toles, Edwards, and Adams signed said forthcoming bond, under the belief that the attachments of Weaver & Bill and John A. Moore were void, on account of their being non-residents of Pawnee county, and no costs-bond having been given when their actions were commenced, and that said parties, believing said attachments to be void, believed that, by giving such bond, they could get the attachments returned, and, having their attachments ready in the hands of the constable, could have the property attached sold to satisfy their executions, and thus obtain a preference over Weaver & Bill and John A. Moore in the collection of their debts against Mitchell.

"That on the ninth day of February, 1878, the justice of the peace before

whom said judgments were rendered issued upon each of the judgments rendered in favor of Weaver & Bill and John A. Moore an order of sale, directed to said constable, Elliott, commanding him to sell the property attached in said action, or so much thereof as was necessary to satisfy each of said judgments and costs, and apply the proceeds to the satisfaction of said judgments and costs. That the said constable returned said orders of sale, with an indorsement upon each one of them to the effect that he had sold said attached property under the executions under which it is herein stated that he sold the same. That on the eleventh day of February, 1878, and after the return of said orders of sale, ordinary executions were issued upon each of said judgments in favor of Weaver & Bill and John A. Moore to said constable, Elliott, who afterwards returned each of said executions, with an indorsement thereon of, 'No property found in my county whereon to levy this execution.' That thereafter Weaver & Bill commenced an action against the defendants herein upon said forthcoming bond. John A. Moore, having been made defendant, filed a cross-petition in said action. That said action was finally dismissed, and a judgment for costs therein rendered against Weaver & Bill and John A. Moore, and that the matters and things determined in said action are shown fully by the opinion of the supreme court of the state of Kansas in the case of *Eddy v. Moore*, reported in 23 Kan. 114.

"That on the tenth day of December, 1879, demand was duly made in writing upon each of the defendants herein to return said goods so sold on execution, or to pay the proceeds of such sale to the successor in office of F. A. A. NEALS, justice of the peace, to have said goods sold to satisfy the judgments of Weaver & Bill and John A. Moore, or to have the proceeds applied to the payment of said judgments; which demand the defendants, and each of them, wholly failed and neglected and refused to comply with, in whole or in part. That William Hall Mitchell is, and ever since the rendition of said judgment has been, wholly insolvent. That said constable, Elliott, has been ever since the rendition of said judgment wholly insolvent, and is and has been, ever since the sale of said goods as herein stated, a non-resident of the state of Kansas, and that the bond executed by him to qualify as constable is and has been wholly insufficient to protect the plaintiffs. That the goods of William Hall Mitchell sold at such sale as herein stated were sold to several hundred different persons, in small lots. That each and all proceedings, had subsequent to the execution of said forthcoming bond, were had by the said defendants George A. Eddy, Nelson Adams, and Constable Elliott, for the purpose and with the intent of defeating the prior attachment lien of plaintiffs, so that the said Eddy and the other parties might secure a preference over Weaver & Bill and John A. Moore in the appropriation of the goods of Mitchell to the payment of their claims; and to this end said parties worked together. That neither Weaver & Bill nor John A. Moore had any knowledge or information of the fact that said attached property had not been returned to said William Hall Mitchell, on the execution of said forthcoming bond, until the trial of the action brought on said forthcoming bond, at the October, 1878, term of the Pawnee county district court, when they for the first time learned that said attached property had not been returned to Mitchell on the approval of said bond. That the defendant George A. Eddy took the proceeds of said sale received by him, and visited Weaver & Bill and John A. Moore, and offered to pay them forty cents on the dollar of their claims out of such proceeds, which they refused to accept.

"The court further finds that each of the exhibits attached to plaintiffs' petition are true, and that the justice of the peace before whom said actions were pending did, on the eighth day of January, 1878, render a judgment in favor of Weaver & Bill,—in one of said actions, for the sum of \$205 damages, and \$10 costs; and for the sum of \$235 damages, and \$10 costs, in the other of said actions,—and that each of said judgments was declared to be, by the terms

thereof, a lien upon the property shown to have been attached in said action by the return on the order of attachment issued therein, and said attached property was ordered to be sold to satisfy such judgment. That each of the said attachments issued in the cases commenced by the plaintiffs as aforesaid continued to be a lien upon the property levied upon thereunder until the same was sold under said execution, and, upon such sale, said attachments became a lien upon all the proceeds of such sale which came into the hands of the defendants George A. Eddy and Nelson Adams, until such judgments were rendered in favor of the plaintiffs, when such attachment liens became judgment liens upon such proceeds; and that the plaintiffs had the right to have such proceeds in the hands of the defendants George A. Eddy and Nelson Adams applied upon such judgments to the satisfaction thereof, to the amount necessary to satisfy the same. That on the tenth day of December, 1879, when demand was made as aforesaid, there was due to the plaintiffs upon said judgments, in the aggregate, the sum of \$521.68. That at said time of said demand, the defendants, by their refusal to accede to said demand, converted said funds to their own use, and destroyed the lien of the said judgments of said plaintiffs thereon, to the damage of said plaintiffs at said time in the sum of \$521.68.

"As a conclusion of law upon the facts stated, I find that the plaintiffs are entitled to recover from the defendants George A. Eddy and Nelson Adams the sum of \$521.68, with interest thereon from December 20, 1879. It is therefore considered, ordered, and adjudged by the court that the plaintiffs do have and recover of the said defendants the sum of \$714.87, and hereof let execution issue."

Lucien Baker, Wm. C. Hook, and Nelson Adams, for plaintiffs in error.
C. N. Sterry, for defendants in error.

VALENTINE, J. This was an action brought in the district court of Pawnee county by N. E. Weaver and D. S. Bill, partners as Weaver & Bill, against George A. Eddy, Nelson Adams, William A. Brigham, and John T. Moore. Afterwards the case was removed to Harvey county, where it was tried before the court, without a jury; and the court made special findings of fact and conclusions of law, and, upon such findings and conclusions, rendered judgment in favor of the plaintiffs and against Eddy and Adams for \$714.87, and costs; and Eddy, Adams, and Brigham, as plaintiffs in error, brought the case to this court, making Weaver & Bill defendants in error.

The first point made by the plaintiffs in error is that the findings of fact are not sustained or authorized by the evidence. This seems to be true with respect to some of the findings; but the defendants in error claim that the case, as brought to this court, does not purport to contain all the evidence introduced on the trial below, and therefore that it cannot now be known whether the findings of fact are sustained by sufficient evidence or not. It is true that the case proper does not purport to contain all the evidence, but the judge of the court below, at the time of settling and signing the case, certified that the case "contains all the testimony offered or received on the trial." This brings us to the question whether the trial court, when settling a case for the supreme court, can properly insert in a certificate thereto other facts and statements than those already inserted in the case, and such facts and statements as are not necessary for the purpose of merely showing that the case has been properly settled. We can answer readily that such a thing could not be done in the absence and without the knowledge and consent of the parties not making the case.

In the case of *Bartlett v. Feeney*, 11 Kan. 594, 602, it was held that, under the circumstances of that case, the statement of a fact which was not inserted in the case made, nor entered in the proceedings of the court, but which was merely certified to by the judge at the time of settling and signing the case,

would not be considered by the supreme court. In the case of *Brown v. Johnson*, 14 Kan. 377, it was held that "the signature of the judge to a case made or a bill of exceptions imports the truthfulness of the preceding statements in such case or bill,—nothing more; and we must look to those statements to see whether all the testimony is preserved or not." And in the nature of things, this must as a rule be so. Where a case, when it is served upon the adverse party, does not purport to contain all the evidence, he has no further interest in the matter than to know that what the case does contain is correct. Usually, in such cases, it is a matter of entire indifference to him as to how much or how little of the evidence is contained in the case; and if what is contained in the case is correct, he has no need to suggest any amendments to the case with regard to the evidence, although the case may not contain one-half, or indeed any, of the evidence. Usually, when a party making a case for the supreme court desires that it shall be shown that the case contains all the evidence, the case itself, as served upon the adverse party, should contain a statement to that effect, so as to give the adverse party an opportunity to suggest amendments, if he think the statement untrue, either by striking out the statement, or by inserting such other evidence as he may believe has been omitted, and thereby make the case speak the truth. It is the case itself, and not the certificate of the judge, which should show whether all the evidence introduced on the trial is contained in the case or not. All that the judge, in settling a case for the supreme court, can properly do, in the absence of the parties, and all that he need to do in any case, is to examine both the case as it has been made and served, and the amendments thereto as suggested by the adverse party, and then to allow all of each, so far as the same are correct, and so far as the amendments have relation to the case as made and served; and also to correct any erroneous statements made in either the case or the amendments, so that the case when settled shall speak the truth. And when the case is thus settled, all that the judge need further to do is to indicate the same in some manner upon the case, and sign his name thereto. Generally, however, it would be better for the judge to make a formal showing of the settlement of the case, as, by a formal certificate of the same, giving the date of the hearing and of the settlement, the names of the parties appearing, a statement as to whether those of the parties not appearing had sufficient notice of the time and place of the settlement; and the judge might, also, in-dorse upon the case an order for the clerk to properly attest the same with his signature and the seal of the court. Nothing else is necessary to be done.

But suppose that both parties are present, and the court does in fact insert, either in the case itself or in his certificate thereto, new propositions not necessary, merely to make the case, as it was originally made and served, or the amendments thereto as originally suggested, speak the truth, then are the parties bound by such new propositions so inserted? This probably depends upon the further question whether the case is settled prior or subsequently to the time fixed for making and serving the case, and for the suggestion of amendments. If settled before that time, the new propositions might very properly be inserted; but, if afterwards, then they could not properly be inserted, for to insert them at that time would be equivalent to making a new case for the supreme court, after the time for making the same had elapsed, which cannot be done. *Insurance Co. v. Koons*, 26 Kan. 215; *Dodd v. Abram*, 27 Kan. 69. This case was settled long after the time had elapsed for making and serving the case, and for suggesting amendments; hence the statement contained in the certificate of the judge, that the case "contains all the testimony offered and received," is improper.

As this case comes to this court, we think we must decide the same upon the theory that it is not sufficiently shown that all the evidence has been brought to this court, and, therefore, upon the theory that the findings of fact as made by the trial court are absolutely correct, although some of them seem

from the evidence brought to this court not to be sustained by sufficient evidence. We would say, however, that we think this works no injustice, for we think that not only the findings, but also the evidence, will sustain the judgment that was actually rendered by the court below.

The material facts of the case seem to be substantially as follows: In two suits before a justice of the peace of Pawnee county, Weaver & Bill, as plaintiffs, obtained attachments, which were levied upon the property of William H. Mitchell, who was the defendant in these two suits. Weaver & Bill were non-residents of the county, and gave no security for costs, but it is not claimed in this court that this renders the attachments void. Afterwards, Mitchell, Jerry Toles, George A. Eddy, T. H. Edwards, and Nelson Adams, for the purpose of procuring the possession of the attached property, gave to the constable, L. P. Elliott, a forthcoming bond; but the property was never delivered to them, nor to any one else, under the bond, but was retained by the constable. Hence the bond was void for want of consideration. *Eddy v Moore*, 23 Kan. 113. At the same time Eddy and Adams held judgments against Mitchell, and they procured executions to be issued upon these judgments, and to be levied upon the same property by the same constable; and the property was afterwards sold by the constable under these executions to several hundred different persons, in small lots, for the aggregate sum of \$1,050; and the proceeds of the sale, after paying costs, were paid to Eddy and Adams, and none of the proceeds were paid to Weaver & Bill. Afterwards, Weaver & Bill procured judgments in their suits, and also procured orders to be made by the court that the attached property be sold to satisfy their judgments; but as the property had already been sold to satisfy the executions of Eddy and Adams, the property could not again be sold.

The question now arises, are Eddy and Adams liable to Weaver & Bill for the proceeds of the sale of the said property, up to the amount of Weaver & Bill's judgments, to-wit, \$521.68? We think this question must be answered in the affirmative. Eddy and Adams, with a full knowledge of all the facts, cause their executions to be levied upon the property, the property to be sold under the executions and scattered among hundreds of people, and the proceeds of the sale to be paid to themselves. It is true, they believed at the time that the attachments were void, and that Weaver & Bill had no lien upon the property; but in this they were mistaken, and the mistake was one of law, and not one of fact, and it cannot excuse them. They had a full and complete knowledge of all the facts, and ought to have known that Weaver & Bill had a prior lien upon the property, and that, if they interfered with such lien, or impaired its efficacy in any respect, they did so at their peril. They claim, however, that by the suit of John A. Moore against Eddy, Adams, and others, upon the forthcoming bond, (reported in 23 Kan. 113,) the matter of this suit has become *res adjudicata*, and that, by such suit, Weaver & Bill are estopped from claiming anything in this suit. It is impossible to see why this should be so. That suit was prosecuted upon the bond, and nothing else. It was an action against the obligors of the bond for a breach thereof, and nothing else; and the parties in that suit, as well as the issues, were different from the parties and issues in this suit, and that suit can have nothing to do with this. It is also claimed as a defense that the present action is barred by the statute of limitations, (Civil Code, § 18, subd. 3,) which provides that "an action for taking, detaining, or injuring personal property" shall be brought within two years, and not afterwards. This is no such action; and this action is not barred by said statute, or by any other statute of limitations. The only statute of limitations that could operate in cases of this kind would be subdivision 2 of section 18 of the Civil Code; but that statute has not so operated as to bar this action.

The judgment of the court below will be affirmed.

(All the justices concurring.)

(37 Kan. 567)

ATCHISON, T. & S. F. R. CO. v. CONE.

(Supreme Court of Kansas. November 5, 1887.)

1. TRIAL—SPECIAL QUESTIONS FOR JURY—FAILURE TO ANSWER—NEW TRIAL.

Where a case is tried before the court and a jury, and it is doubtful upon the evidence whether any verdict should be rendered in favor of the plaintiff, and the court submits special questions of fact to the jury, for their consideration and answers, but, at the same time, tells the jury that, where the evidence is not sufficient, they may answer the questions by saying, "Don't know," or "Cannot answer on the evidence," and the jury answer a large proportion of the questions by simply saying, "Don't know," when in fact ample evidence was introduced upon which many of such questions might have been properly answered; and the questions were material; and the jury answered other questions against the evidence, and found a general verdict against the defendant for a vastly excessive amount of damages, and the court refused to require the jury to answer the foregoing questions properly, and discharged the jury: *held* error, and that a new trial ought to have been granted upon the application of the defendant.

2. APPEAL—CASE MADE—JUDGE'S CERTIFICATE.

Where the certificate of the trial judge and the attestation of the clerk show that a case brought to the supreme court was properly settled, signed, attested, and filed, except that the judge in his certificate used the word "allowance," instead of the word "settlement," or some cognate word, *held*, that the case will be considered as properly settled.

(Syllabus by the Court.)

Error from district court, Wyandotte county; W. R. WAGSTAFF, Judge.

Geo. R. Peck, A. A. Hurd, C. N. Sterry, and J. B. Scroggs, for plaintiff in error. T. P. Fenlon, Waters & Chase, and J. S. Ensminger, for defendant in error.

VALENTINE, J. This was an action brought by Jared Cone against the Atchison, Topeka & Santa Fe Railroad Company, for alleged personal injuries. The alleged injuries were received on December 5, 1883. The action was commenced on September 26, 1884. The case was tried on July 31, 1885, and was brought to this court on January 16, 1886. The defendant in error, plaintiff below, moves to dismiss the action from this court, upon the ground that it has been brought to this court only upon a supposed case made for the supreme court, and that such case has not been properly settled nor properly authenticated. The settlement of the case is shown by the certificate and attestation of the judge and the clerk of the court below, which reads as follows:

"The above and foregoing case made contains a full and complete transcript of all the evidence, papers, motions, and proceedings in the above-entitled cause, is now presented to the judge of said court for his allowance and signature, which is accordingly done this sixth day of January, 1886, and the clerk of said court is hereby ordered to attest the same, and attach the seal of said court.

[Signed]

"W. R. WAGSTAFF,

[Seal.]

"Judge Tenth Judicial Dist. for the State of Kansas.

[Signed] "Attest: L. C. TRICKEY.

"Clerk Dist. Court, Wyandotte County, Kansas.

"Filed, January 6, 1886.

[Signed] "L. C. TRICKEY, Clerk."

The principal objection urged against the foregoing case is that, in the certificate of the judge, the word "allowance" is used, instead of the word "settlement," or some cognate word, like "settle," "settling," "settled," etc. Section 548 of the Civil Code, however, uses both the words "settle" and "allowed," and uses them in a way to indicate that, with reference to settling cases for the supreme court, they are nearly synonymous. The time for mak

ing a case for the supreme court, and for settling the same, may be extended by the court or judge, even beyond the term of the court; and after the case has been made, and such amendments suggested as are desired by the adverse party, then it is provided by said section that "the case and amendments shall be submitted to the judge, who shall *settle* and sign the same, and cause it to be attested by the clerk, and the seal of the court to be thereto attached;" and "the exceptions stated in a case made shall have the same effect as if they had been reduced to writing, *allowed*, and signed by the judge at the time they were taken." Civil Code, § 548.

We think that the case is properly authenticated, and we think that it is sufficiently shown by the certificate of the judge and the attestation of the clerk that the case was properly settled. Whether much or little of the pleadings, much or little of the evidence, or much or little of the instructions, are contained in the case, is not a matter for dismissal. If the case has been properly settled, signed, attested, filed, authenticated, and brought to this court, this court must consider it upon its merits, and cannot dismiss it. "Where a case for the supreme court is made and served upon the defendant within proper time, and is settled and signed by the judge of the district court, and properly attested and filed by the clerk, it will be presumed, in the absence of anything to the contrary, that the case was settled in accordance with the requirements of the law." *Douglass v. Parker*, 32 Kan. 593, 5 Pac. Rep. 178. See, also, *Fearns v. Railroad Co.*, 33 Kan. 275, 6 Pac. Rep. 237. We cannot dismiss the case from this court because of the alleged irregularities, but will have to determine the case upon its merits.

The plaintiff's home was and is at Burton, in Harvey county, Kansas. The injuries were received at Newton in the same county; the plaintiff's attorneys reside in Shawnee and Leavenworth counties; and this action was commenced and tried in the district court of Wyandotte county. Before any trial was had, however, the defendant asked for a change of venue, claiming, and filing an affidavit in support of the claim, that the defendant could not have a fair and impartial trial in that county; but the plaintiff resisted, and the court below overruled the application. The injuries complained of resulted from a fall from one of the defendant's railroad trains; but how the fall happened,—whether from the negligence of the plaintiff, or the defendant, or both, or from pure accident,—is a disputed question, and a doubtful one. This train was a passenger train, operated between Kansas City and Nickerson, and was called train "No. 4," when it was going eastwardly, and train "No. 3," when it was going westwardly. James E. Corcoran was the conductor of this train, Charles W. Chapin and the plaintiff were the brakemen, Edmund Reynard was the locomotive engineer, and Thomas O. Jones was the fireman. The plaintiff had worked for the defendant as brakeman on this train, or these trains, Nos. 3 and 4, and under this conductor, for more than nine months before the accident occurred.

On the evening of the accident, the train No. 4 arrived from the west at Newton, at 8:05 o'clock in the evening, and left on the same evening at 8:38 o'clock or later. At Newton, as was usual, another car, which had arrived from Wichita, was put into this train, near the rear end, and between the sleeping car and the other cars. There were nine cars in all in this train. Just as the train left, or shortly afterwards, the plaintiff fell from the train, and received the injuries of which he now complains. The alleged negligence was the alleged starting of the train before the bell-cord was tested, without notice or signal to the plaintiff, and with a sudden jerk. It was the duty of the plaintiff to couple the bell-cord before the train was started, and it was the duty of the conductor to know from some source that the same was done before starting the train. In the present case the train was not started for about a quarter of an hour, and perhaps a half an hour, after the regular time for it to be started. The train was at Newton more than a half hour, and

perhaps nearly an hour. The plaintiff claims that, just before the train was started, he went between the Wichita car and the sleeping car, and stood upon the guard-rails with a lantern in his right hand or on his right arm, and coupled the bell-rope, and was then stooping to get down, when the train started with a sudden jerk, which caused him to fall; and, in falling, he was caught somewhere by some portion of the cars, and was carried or dragged about 1,000 feet from where he fell, when he was released from the cars, and left lying on the ground. Both the facts and the law with regard to all these matters, and as contended for by the plaintiff, are disputed by the railroad company.

The plaintiff was a large man, weighing at the time of the accident about 240 pounds. He weighed still more at the time of the trial. After the accident, the plaintiff was found lying on the ground within about 1,000 feet from the place where the train was started, and the lantern was found within about 10 or 15 feet from him. These trains, Nos. 3 and 4, were usually started from Newton without the conductor or any other of the train-men, except the plaintiff, knowing whether the bell-cord was coupled or not, and generally before the bell-cord was coupled; and the plaintiff, although he knew this, never complained of this to any one, or suggested that the same was unsafe. The injuries received were the tearing of the plaintiff's clothes, the laceration of his skin on his left side, injuries to his right hand and wrist, requiring the amputation of his little finger, injuries to his right leg so that it had to be amputated about four inches below the knee, and the fracture of his skull on the right side, and also loss of time and wages. His wages at the time of the accident were \$55 per month. It does not appear that he was at any expense for medical aid or assistance, or for nursing. The plaintiff in his petition claimed \$50,000 damages. The jury rendered a verdict for that amount in his favor, and this, as they stated, was for "actual damages" only. The court below gave the plaintiff the option of taking a judgment for \$25,000 or a new trial, and the plaintiff took the former, and judgment was rendered accordingly in his favor for \$25,000, and costs. The other passenger trains of the defendant, operated between Kansas City and Nickerson, were numbered 1 and 2. No. 1 came into Newton from the east, just before No. 4 departed.

Numerous errors are assigned by the plaintiff in error, among which are the giving of the following instruction, and the ruling of the trial court with regard to the following special questions of fact submitted to the jury, and their answers thereto. The instruction is as follows:

"The jury are not required to answer any special question, unless they can make such answer upon the testimony they have heard, and if any question is submitted, and no sufficient evidence appears upon which to answer, the jury can say, 'Don't know,' or 'Cannot answer on the evidence.'"

One hundred and thirty-six special questions of fact were submitted to the jury for their consideration and findings thereon, and under, the foregoing instruction, the jury answer the following portion of the same in the following manner:

"(14) Immediately prior to train No. 4 starting for the east on December 5, 1883, how far was the east end of the sleeper on that train from the east end of the platform which lay between the two tracks? *Answer.* Don't know."

"(18) What are the depth and width of the platforms on passenger cars on defendant's road? *A.* Don't know."

"(19) What are the depth and width of the platforms of the Pullman sleepers? *A.* Don't know."

"(20) When two passenger cars, or a passenger and a Pullman, with Miller couplings and platforms, are coupled together, how far apart are the two platforms from each other at the closest point, and how far apart are they at the widest point, when the slack is taken up? *A.* Don't know."

"(24) When plaintiff fell, if he did fall, at the time of his injury, how far was he dragged by the cars before reaching the point where he was found? A. Don't know."

"(26) How could plaintiff have been caught by either of the cars on train No. 4, at the time of his injury, so as to have been dragged from the point where the east end of the sleeper started to the point where plaintiff was found? A. Cannot say.

"(27) As the sleeper on train No. 4, on the night of plaintiff's injury, stood by the platform between the two tracks at Newton, was there room between the north side of it and the south side of such platform to have permitted plaintiff, in falling from such sleeper, or the car ahead of it, to have rolled from said platform under such sleeper? A. Don't know.

"(28) At the time of plaintiff's injury, could he have fallen from any car on train No. 4, while the same was running along the platform between the two tracks, so as to have fallen under such car? A. Don't know.

"(29) At the time of plaintiff's injury, could he have been dragged by any car on train No. 4 so as to have been dragged along the platform between the two tracks? A. Don't know.

"(30) At the time of plaintiff's injury, could he have fallen so as to have been dragged along between any of the cars on train No. 4 and the platform between the two tracks? A. Don't know."

"(37) On the night of plaintiff's injury, and prior thereto, did not the plaintiff have from ten to twenty minutes in which to do that which he was required to do, more than he usually had at that station? A. He may have had."

"(39) Was not train No. 4, on the night of plaintiff's injury, and prior thereto, moved west across Main street, at Newton, and then pulled onto the old main track, so that the sleeper, or a portion of it, was in the street? A. Don't know."

"(43) If the jury answer the last question [No. 42] in the affirmative, they may state if the fireman did not, upon receiving such signal, ring the engine bell, in compliance with rule No. 17 of the company's rules, before the engine started. A. Don't know.

"(44) Did not the fireman communicate the signal to start to the engineer, and did he not start the engine after the bell was rung from the engine? A. He did communicate the signals. Don't know whether he rang the bell before the train started or not."

"(65) At the time of the plaintiff's injury, and immediately prior thereto, and prior to the starting of No. 4 on its journey east, was not the usual and customary warning signal that the train was about to start given before it was actually started? A. Don't know.

"(66) If the jury answer the last question in the negative, they may state what signal was not given which it is usual and customary to give at that station before starting such train. A. Don't know."

"(68) Did not the plaintiff, at the time of, and for four months prior to his injury, know that the conductor of his train, and under whom he was working, frequently left Newton station with his train before he (said conductor) knew that the bell-cord of such train was coupled? A. Don't know.

"(69) About how long did it take plaintiff, on the arrival of train No. 4 at Newton, on December 5, 1883, to do that part of his duty which consisted in helping passengers off from the train? A. Don't know.

"(70) Upon the evening of December 5, 1883, after the arrival of train No. 4 at Newton, how long did it take plaintiff to help load and unload baggage, if he did help load and unload baggage? A. Don't know."

"(72) If the jury answer the preceding question [No. 71] in the affirmative, they may state how long it took plaintiff to eat his supper at Newton on that evening. A. Don't know."

"(75) Previous to the plaintiff's injury, and during the time plaintiff was working under Conductor Corcoran, had not Conductor Corcoran frequently started his train from Newton without first ascertaining from the plaintiff as to whether or not the bell-cord was coupled? A. He may have.

"(76) During the time plaintiff was working as brakeman under Conductor Corcoran, had not Conductor Corcoran frequently started his train from Newton without first ascertaining from plaintiff whether the train was ready to go or not? A. He may have."

"(79) If the jury answer the last question [No. 78] in the affirmative, they may state if the plaintiff did not, previous to his injury, know that the conductor had frequently violated such rule in the way in which he had violated it. A. Don't know."

"(82) If the jury answer the last question [No. 81] in the affirmative, they may state which foot was on the guard-rail of the Wichita car, and which foot was on the guard-rail of the sleeper. A. Cannot say."

"(87) If the jury answer the last question [86] in the affirmative, they may state whether a jerk towards the east of the cars upon the guard-rails of which the plaintiff was standing, while he was standing there, or while he was stooping to get down, would have thrown plaintiff's head towards the east or towards the west? A. Don't know."

"(93) What reason, if any, was there for not putting the Wichita car in train No. 4 at least ten minutes before train No. 4 left Newton on the evening of plaintiff's injury, if it was not placed in said train such length of time before the train left. A. Don't know."

"(95) What was there to prevent train No. 4 from being all ready to leave Newton within twenty minutes after it had arrived there on the evening of plaintiff's injury? State fully. A. Don't know."

"(97) If the jury answer the last question [96] in the affirmative, they may state what fact, if any, prevented the Wichita car from being set into the train No. 4 while it stood on the new track within the usual time and in the usual manner that it had been coupled into that train theretofore. A. Don't know."

"(99) Wasn't the Wichita car coupled into train No. 4, on the evening of plaintiff's injury, before Mr. McAdams and his son got upon that train? A. Don't know."

"(100) Just at the time of, and immediately prior to, Mr. McAdams' leaving the car, at Newton, upon which he and his son were on the evening of plaintiff's injury, didn't Mr. McAdams know that the train was starting, or was just about to start, by feeling the movement of the car, or by hearing the bell ring on the engine? A. Don't know."

"(102) Previous to plaintiff's injury, had he ever complained to Conductor Corcoran, or to any person about Conductor Corcoran's leaving Newton station without first ascertaining from him the fact whether the bell-cord was coupled or not, or the train in readiness to go? A. Don't know."

"(103) Previous to plaintiff's injury, had he made any protest to Conductor Corcoran, or to the defendant company, or any of its officers, against Conductor Corcoran's violating any duty that he may have violated in leaving Newton station at times previous thereto? A. Don't know."

"(104) Prior to the night of the accident, was it not a frequent and usual occurrence for the train No. 4 to leave Newton without the signal bell on the engine being rung from the rear coach of the train? A. Don't know."

"(105) Was it not the custom at the time plaintiff was injured, and had it not been the custom for a long time prior thereto, for the trainmen to omit to ring the engine signal bell from the rear end of the train before leaving Newton station? A. Don't know."

"(106) If the jury answer the last question in the negative, they may state how often the signal bell on the engine was rung from the rear end of the

train before leaving Newton, and by whom it was so rung? A. Don't know."

"(112) How long would it ordinarily take for the rear brakeman on train No. 4 to perform the duty of coupling the bell-cord between the cars at Newton? A. Don't know."

"(114) After the Wichita coach was placed in the train No. 4, how long would it ordinarily take the rear brakeman to get the train in readiness to proceed on its journey? A. Don't know."

"(118) Isn't it a fact that previous to plaintiff's injury, and during the time he was acting as brakeman under Conductor Corcoran in the year 1883, that Conductor Corcoran sometimes started train No. 4 from Newton east before the bell-cord of the train was coupled, after the Wichita car had been set into the train? A. Don't know."

"(119) If the jury answer the last question in the affirmative, they may state if, prior to plaintiff's injury, he did not know that Conductor Corcoran sometimes started No. 4 from Newton east before the bell-cord was coupled, after the Wichita car had been taken into the train. A. Don't know."

"(122) If the jury answer the last question [No. 121] in the negative, they may state from the evidence what conductor running a passenger train on defendant's road ever complied with the requirements of rule No. 16 at Newton station? A. Don't know."

"(132) About how long did it take train No. 1, on entering the Newton yards, to reach the station at Newton on December 5, 1883? A. Don't know."

"(133) About how far did No. 1, on the evening of December 5, 1883, have to run, after it entered the east end of Newton yards, before it reached the depot? A. Don't know."

"(134) When Cone first went into the Wichita car, after it was coupled into train No. 4, was not the bell-cord of the Wichita car hanging out of the west end of the Wichita car several feet? A. Don't know."

"(135) At the time mentioned in the preceding question, was not the bell-cord of the sleeper, on the east end of it, just pulled through over the door, and tied there? A. Don't know."

When the jury returned their verdict, and their answers to the special questions of fact, the defendant requested the court to require the jury to return to their room for the further consideration of those questions which the jury had not answered properly, and also requested the court to require the jury to answer such questions properly; which requests the court refused, and discharged the jury. Of course, the court committed error in instructing the jury that they might answer the special questions by simply saying "Don't know," or "Cannot answer." *Railway Co. v. Peavey*, 34 Kan. 474, 486, 8 Pac. Rep. 780; *Railway Co. v. Fray*, 35 Kan. 700, 708, 12 Pac. Rep. 98. See, also, *Clark v. Weir*, 37 Kan. —, 14 Pac. Rep. 534.

Many of the foregoing questions were, and are, material in the case, and, with respect to many of them, there was ample evidence upon which the jury might have made proper findings. Under the foregoing instruction, the jury evidently considered that they were at liberty to answer the questions or not, as they chose; and while the jury did not answer the foregoing questions properly, there were several other questions to which they gave answers, where their answers were clearly against the evidence. Evidently the jury acted, either under a misconception of their duties, or under the influence of passion or prejudice, and probably under both. As to many questions, they did not give proper answers; as to many others, they made findings against the evidence; and they rendered a general verdict for a vastly excessive amount, and in a case where it is at least doubtful whether they should have found in favor of the plaintiff at all. Evidently, when the court below required the plaintiff either to remit \$25,000 of the damages found in his favor, or to take a new trial, the court must have found that the verdict of the jury was ren-

dered under the influence of passion or prejudice. And, certainly, if one-half of the verdict was rendered under the influence of passion or prejudice, the other half must also have been rendered under the influence of passion or prejudice; and, as it is doubtful whether the jury should have rendered any verdict in favor of the plaintiff, it may be that this passion or prejudice affected the entire verdict, and also the special findings, and caused the jury to find in favor of the plaintiff, where, except for the passion or prejudice, they would not have found in his favor at all. For the foregoing errors of the court and the jury, we think a new trial should have been granted to the defendant upon its application.

The judgment of the court below will be reversed, and cause remanded for a new trial.

(All the justices concurring.)

(37 Kan. 558)

CHELLIS v. COBLE.

(*Supreme Court of Kansas. November 5, 1887.*)

1. EVIDENCE—ADVERSE POSSESSION—NATURE OF IMPROVEMENTS.

Where the title to real estate is claimed by virtue of 15 years' possession under a claim of title, testimony thereunder is competent to show the nature and value of the improvements made thereon during said possession.

2. APPEAL—FAILURE TO LAY FOUNDATION FOR EVIDENCE.

Where evidence, otherwise competent, has been admitted over the objection of a party, without first laying a proper foundation for its admission, and where it further appears from the whole record that said evidence admitted did not materially prejudice the party objecting thereto, *held*, the admission was not sufficient error to require a reversal of the action.

3. LIMITATION OF ACTIONS—STATUTE MUST BE SPECIALLY PLEADED.

Where the pleadings do not on their face show that the cause of action, or relief sought, is barred by the statutes of limitation, said statutes must be specially pleaded.¹

4. BANKRUPTCY—CONFIRMATION OF ASSIGNEE'S CONVEYANCE—EFFECT.

Where a petition is filed in bankruptcy, and the bankrupts schedule certain real estate as a part of their assets, and said real estate is conveyed to the assignee of said bankrupts, and afterwards said assignee conveys said real estate in settlement of a claim against said bankrupt estate, and said settlement and conveyance is confirmed by the bankrupt court, *held*, that such settlement, sale, and confirmation is not an adjudication that the property so conveyed was the property of the bankrupt estate when scheduled as assets by the bankrupts, but only that whatever title said bankrupts had to said real estate legally passed to the purchaser by said sale and conveyance.

5. ESTOPPEL—EQUITABLE—CONCERNING TITLE TO LAND.

In order to constitute an equitable estoppel with reference to the title of property, it must appear that the party to be estopped has made admissions or declarations, or done acts with the intention of deceiving the other party with regard to the title, or with such carelessness or culpable negligence as to amount to a constructive fraud, and that at the time of making the admissions or declarations, or of doing the acts, he was apprised of the true state of his title, and that the other party was not only destitute of all knowledge of the true state of the title, but also of all convenient or ready means of acquiring such knowledge.

6. PRINCIPAL AND AGENT—DECLARATIONS OF AGENT, WHEN BINDING.

Before the declarations of an agent can bind the principal, it must be shown that said declarations were made in and about a matter over which the agent had authority from the principal to act, and that said agent was acting under and by virtue of his authority as such agent.

(*Syllabus by Clogston, C.*)

Commissioners' decision. Error from district court, Dickinson county; NICHOLSON, Judge.

¹As to how the statute of limitations may be made available as a defense to an action, see *Merriam v. Miller*, (Neb.) 34 N. W. Rep. 625, and note; *Hayt v. Hunt*, (Colo.) *ante*, 410.

This action was commenced in the district court of Dickinson county by George W. Coble, plaintiff, against John P. Chellis, defendant, now plaintiff in error, and the facts as presented by the record are as follows: In 1860, William W. Stickney and Elliott T. Merrick were the joint owners of the land in controversy. On December 20, 1860, Merrick and Stickney sold and conveyed to plaintiff in error an undivided three-fifths interest in all the lands described in plaintiff's petition, and the deed of conveyance was placed of record in Dickinson county, on the twenty-fifth of September, 1861. On December 10, 1873, Merrick and Stickney mortgaged this land, with a large amount of other lands, to one Amos Tuck; and afterwards Tuck sold and assigned said mortgage to one Augustus Sumner. On the ninth day of December, 1874, Merrick and Stickney were duly decreed and adjudged bankrupts in the United States district court for the Eastern district of Missouri, and in a schedule of their assets they incorporated the land in controversy. At the time they were decreed bankrupts, Sumner was the owner of the Tuck mortgage, and no part of it had been paid. On the fourteenth day of July, 1874, Sumner proved his claim in the said district court, and it was adjudged a lien upon the land in controversy, together with a large amount of other lands. On the twentieth day of October, 1875, by an order of the said district court, and in settlement of a part of Sumner's claim, the assignee conveyed the land described in the mortgage to Sumner. Afterwards Sumner entered into a contract of sale of the land with one Stevens. The land until 1877 was wild and unimproved and unoccupied, at which time Stevens, by his contract with Sumner, went into possession of the land, and put about 100 acres in cultivation. Afterwards Stevens assigned his contract with Sumner to Coble, defendant in error, who went into possession of the land and continued in possession up to the commencement of this action. In 1881, Sumner conveyed the land by deed to Coble. This deed was placed of record on the seventeenth day of November, 1881. At the time Merrick and Stickney were adjudged bankrupts, they were indebted to the plaintiff in error on certain promissory notes, a part of which notes were secured; and on September 23, 1874, and November 16, 1874, Chellis made proof of his claim against Merrick and Stickney, at his home in New Hampshire, and filed the same in said district court. Afterwards, on the nineteenth day of July, 1875, Chellis duly appointed William W. Stickney, one of the said bankrupts, as his attorney in fact to collect, settle, or compromise his claim and demands against Merrick and Stickney; and afterwards said Stickney accepted the securities held by said Chellis in full satisfaction of his claim against the bankrupts. Both plaintiff and defendant claim title through Merrick and Stickney. Trial by the court. Findings and judgment for the plaintiff below, defendant in error, and the defendant brings the case here.

Stambaugh, Hurd & Dewey, J. R. Burton, and Chas. A. Dohl, for plaintiff in error John H. Mahan and C. F. Mead, for defendant in error.

CLOGSTON, C. The record in this case presents but few disputed questions of fact, and those of but minor importance. But two errors are presented as occurring at the trial, and these are, first, in the introduction and admission of evidence on behalf of the plaintiff as to the amount of improvements made upon the land in controversy after its purchase and possession by the plaintiff. In the admission of this evidence we see no error. One of the allegations in the plaintiff's petition was that he was in possession of the premises, and had been for more than 15 years, and claiming title thereto. This evidence was competent to show this possession; and in showing this he might show what things he had done, what improvements he had made, to establish his claim of ownership and his possession. The second error alleged is in the introduction by plaintiff below of the deposition of defendant, plaintiff in error, taken in an action in which plaintiff was plaintiff and one Ste-

vens was defendant. This deposition was doubtless offered as the declaration of Chellis as to the facts connected with this land. The facts sought to be established, or the admissions made, were that Chellis, long before the commencement of this action, knew that some one was in possession of this land, and was paying the taxes thereon. The admission of this deposition was error. The record shows that there was no foundation laid for the testimony; and, while it was offered as the declarations of Chellis, or his admissions, it was nowhere shown that Chellis made these declarations, or that the deposition was written by him or signed by him. This preliminary proof was necessary before the deposition could be offered in evidence. But supposing this to be true, the next inquiry is, was this evidence of such a character as to prejudice the interests of Chellis? Chellis claimed to be the owner of this land, and his claim was founded upon his purchase from Merrick and Stickney, and if he had any interest therein it was by virtue of that conveyance. If he had not been divested of that title, then it could make no difference that some one, without authority and right, had gone upon the land and made improvements and paid the taxes. That could not divest Chellis of his title, except by the statute of limitations; and even had there been a sufficient foundation laid for it, it would not have been competent or material testimony tending to establish any of the allegations in the plaintiff's petition.

The only remaining question then is, was the judgment sustained by sufficient evidence and is it according to law? The motion for a new trial alleged the negative of this proposition as a reason why a new trial should be granted. Upon what theory the court rendered judgment in this action we are unable to say. The findings of the court were that the allegations of the plaintiff's petition and reply were true, and that the defendant had no title to the land by reason of his deed from Merrick and Stickney, and upon these findings rendered judgment for the plaintiff below. The plaintiff's petition alleged title to the property by reason of his purchase and deed from Sumner, and Sumner's title through the bankrupt proceedings. The defendant answered thereto—*First*, by a general denial; and, *second*, alleged title in himself to a three-fifths interest by virtue of a deed from Merrick and Stickney of 1860. To this answer plaintiff replied—*First*, by general denial; *second*, that the deed of defendant was void, and never was of any effect or force, and was without consideration; *third*, that the defendant's title and claim to the land was barred by the possession of the plaintiff under color of title for 15 years; *fourth*, that the defendant's claim of title and interest in the land was barred, and that he was estopped from setting up or claiming any title thereto, by reason of the mortgage of Merrick and Stickney to Tuck; the assignment of the same to Sumner; the adjudging of Merrick and Stickney bankrupts; the settlement by the assignee with Sumner, and the conveyance of the land in controversy to Sumner by the assignee; the confirmation of said proceedings by the bankrupt court; the acceptance of said conveyance by Sumner in full satisfaction of \$8,573 of said indebtedness in said Tuck mortgage; the recording of said deed of assignment by said assignee to Sumner in 1875, in Dickinson county; that said defendant was a creditor of said Merrick and Stickney, and duly proved his claim against said bankrupt estate in said district court, and thereby became a party to the record and proceedings in bankruptcy, and as such party well knew of the proceedings therein, and the sale and transfer of the land in question to Sumner, in settlement of his claim; that said land had been scheduled as assets by said bankrupts, and that said defendant, with a full knowledge of all of said proceedings, made no objection thereto and allowed and permitted said Sumner to take said land as the property of said bankrupts in satisfaction of his mortgage debt, in good faith; and that said defendant is estopped and debarred from setting up his said deed and claiming any title or interest in said land by reason of said proceedings. The defendant in error now insists that the allegations of his

petition and reply were sustained so far as the same relate to the mortgage to Tuck by Merrick and Stickney, the assignment of the same to Sumner, and Sumner's settlement and deed of conveyance from the assignee in bankruptcy, and his title from said Sumner by deed, and possession thereunder. It will be seen by this claim that the 15-years statute of limitations is abandoned; in fact, the evidence failed to establish adverse possession for 15 years.

The next question presented is the legal effect of the schedule made by Merrick and Stickney as bankrupts, including this land as part of the assets, and the settlement by the assignee with Sumner, and his transfer of the land in settlement of the Tuck mortgage. Defendant in error insists that this was an adjudication, and as such it is entitled to the same protection as that of all other courts of competent jurisdiction. If this is true, then Chellis' title was wiped out by that judgment. Defendant insists that Chellis was a party thereto; that by reason of his filing a claim against the bankrupts, and his settlement of said claim with said bankrupts, he was bound to take notice of the entire proceedings in bankruptcy, and whatever of those proceedings affected his interest he must take notice of and defend against, or be forever estopped from claiming title to the property. There is no pretense that Chellis had actual notice of these proceedings; but it is claimed—*First*, that he had constructive notice of what the record shows by being a party to said proceedings; and, *second*, by his having appointed Stickney his agent or attorney in fact to settle, compromise, and adjust his claims, that whatever knowledge Stickney had was notice to Chellis. If this claim is true, then Chellis had actual knowledge; for whatever was knowledge to the agent was knowledge to the principal, if within the line and scope of his authority.

In addition to the foregoing, the defendant insists that if plaintiff in error was not estopped by these proceedings from claiming title, then he is barred by the two-years statute of limitations provided for in the bankrupt law, which is, in substance, as follows: "No suit at law or in equity shall in any case be maintainable by or against any person claiming an adverse interest touching the property and rights in property of the bankrupt, transferable to or vested in such assignee, in any court whatsoever, unless the same shall be brought within two years of the time the cause of action accrued." The first question to be considered is, was the defendant barred by this statute of limitations? If he was, that disposes of the action. The plaintiff in error insists that if this statute was in force then it was not pleaded by the defendant, and therefore he cannot take advantage of it. By a careful examination of the plaintiff's reply, we find no allegation of this kind; nowhere does he directly point out or claim that by reason of this statute of limitations the defendant is barred. He pleads the 15-years statute of limitations, and alleges it as a separate defense; in reply he pleads *res adjudicata* and estoppel, and alleges that by reason of the decision of the bankrupt court, setting aside this land to Sumner in satisfaction of his claim, that this was such an adjudication as would bind the defendant, who was a party to that action. Second, that the defendant was estopped from claiming title to the land even though he was not barred by this decree or judgment, for the reason that he had full knowledge of the transaction and of the good faith of Sumner, and with this knowledge kept silent, and is therefore barred from claiming title thereto; but nowhere in this reply does he suggest that he claimed by reason of the lapse of two years from the sale by the assignee to Sumner, and that by reason of such lapse of time the defendant is barred from claiming title by said two-years statute. To avail himself of this statute, he must specifically plead it; and, not having done so, he cannot now claim the benefit of it. Then it is not material for us to inquire whether or not this statute would have protected the plaintiff if properly pleaded.

We will now pass to the remaining questions: Was this schedule of the property to the assignee, and the sale and transfer by the assignee to Sumner,

and the confirmation thereof by the court, an adjudication of the claim of the defendant in error? It is not claimed by the plaintiff in error that, if the matter had been properly presented to the bankrupt court, all the questions in relation to the title might not have been settled by that court; and, when so presented to the court, that the judgment would not have been as binding as if rendered in any other proceeding; but in this case, as far as shown by the record, no such presentation of the facts was made, by which the court could or would have passed upon the question of title. The bare fact that both Sumner and Chellis held claims against the bankrupts; that both filed their claims and both claims were compromised, not apparently conflicting with each other; no controversy between the parties; no common claim upon any of the property in controversy; no question as to which of the claimants should have this or that property; no question presented to the court as to what interests the bankrupts had in any of the property; and yet under this presentation it is claimed that this was an adjudication of the rights of the parties. This question has been passed upon by this court in *Wilkins v. Tourtellott*, 28 Kan. 825, in which it was said: "But the mere fact that the assignee of his own volition scheduled it, and upon his own application obtained an order for its sale, does not conclude the bankrupt. All that the order of the court determined is the fact of bankruptcy, the regularity of the proceedings, and that whatever title the bankrupt had at the time of filing the petition in bankruptcy has been transferred to the purchaser. There is no warranty of title in a sale by the assignee in bankruptcy, any more than in any other judicial sale." *In re Goodfellow*, 1 Low. Dec. 510; *Hynson v. Burton*, 5 Ark. 492; *Mays v. Bank*, 64 Pa. 74. From these authorities, under the facts of this case, there was no such adjudication as will bind the plaintiff in error from claiming title.

We now pass to the last question: Is the plaintiff in error estopped by reason of his being a party to the proceedings, or by the knowledge possessed by Stickney, his agent? We think not. It is a well-settled rule that to constitute estoppel of this character with respect to the title of property, such as will prevent a party from asserting his legal rights, and the effect of which would be to transfer the enjoyment of property to another, the intention to deceive and mislead, or negligence so gross as to be culpable, should be clearly established. Judge STORY says: "In all this class of cases the doctrine proceeds upon the ground of constructive fraud, or of gross negligence which, in effect, implied fraud." The evidence in this case shows that Chellis had no actual knowledge that Merrick and Stickney had mortgaged that property to Tuck, and no knowledge that they had included this land in a list of their assets, and that the same was turned over to Sumner in satisfaction of his secured claim or mortgage on the land by the assignee. True, Stickney had full knowledge of these facts. He had this knowledge independent of his connection with the bankrupt proceedings as the agent of Chellis. None of this information came to him by reason of such agency, or by any act to be performed by him for Chellis. It was a knowledge he had independent of the settlement of the Chellis claim,—knowledge that he possessed because of the business transacted by himself. Then how can it be said that this knowledge must bind the plaintiff in error? He had given no power of attorney to transact or bind in any manner, save and except to compromise and settle his claim with the assignee. What fraud is brought home to him? He made proof of his claim at his home in New Hampshire; was not present at the transaction of any of the business connected with the bankrupt estate. But counsel insist that the law implies a knowledge of whatever took place in the bankrupt proceedings. That is true so far as the matters connected with the transactions in which he was interested or was bound to be interested by virtue of his claim against the estate, and no further. *Davis v. Davis*, 26 Cal. 23; *Palmer v. Meiners*, 17 Kan. 483; *Brant v. Coal & Iron Co.*, 93 U. S. 326.

Again, Sumner did not accept this land in his settlement by virtue of any declaration or act or omission on the part of Chellis, nor in fact upon the declarations or acts of Stickney, but he did it because it was included in his mortgage. He was resting secure, believing that Merrick and Stickney had a title to the land. He perhaps believed that from the fact that Merrick and Stickney had executed this mortgage to Tuck; but had he investigated the facts and taken the ordinary precaution to look up the records of Dickinson county, he would have been informed that Chellis had a clear title to a three-fifths interest in the land. Now he asks that he be protected, when he exercised no diligence to protect himself. As we said in the start, the facts in this case are not in dispute; and as disclosed by the record they show an entire want of testimony in support of the judgment pronounced by the court. It is therefore recommended that the judgment of the court below be reversed.

By THE COURT. It is so ordered; all the justices concurring.

(37 Kan. 536)

FEDRICK v. BIRKETT.

(Supreme Court of Kansas. November 5, 1887.)

VENDOR AND VENDEE—FAILURE OF TITLE—ACTION TO RECOVER PAYMENTS.

Where a purchaser of land refuses to accept a warranty deed for the land purchased when tendered by the vendor, solely on the ground that the vendor has not a good title, or that the deed is not in proper form, and subsequently brings an action to recover back a payment made by him upon the land, but makes no reference therein to any lien or incumbrance for taxes, if the defects alleged do not exist, he ought not to recover because a small amount of taxes were not paid upon the land at the time the deed was tendered, when it appears that, prior to the commencement of his action for the recovery of the payment, the taxes had been discharged.

(Syllabus by the Court.)

Error from district court, Greenwood county; CHARLES B. GRAVES, Judge. *D. B. Fuller* and *C. N. Sterry*, for plaintiff in error. *T. L. Davis*, for defendant in error.

HORTON, C. J. The facts in this case are substantially as follows: On March 25, 1882, J. M. Fedrick and wife executed and delivered to Skelton Birkett a bond for a deed of 351 acres of land in Greenwood county, in this state. The bond was of the penal sum of \$8,500, and was conditioned that Fedrick and wife should execute and deliver to Birkett on or before March 1, 1883, "a good and sufficient warranty deed conveying an absolute and indefeasible estate in fee-simple, with the usual covenants, in and to said tract and parcel of land." The consideration expressed in the bond was \$1,500 in cash to be paid upon its execution, and \$8,500 to be paid on March 1, 1883. By the agreement of the parties, the deed was to be deposited in the Eureka Bank, at Eureka, in this state, to be delivered to Birkett upon his payment of the balance of the purchase money. In February, 1883, Fedrick and wife executed a warranty deed for the conveyance of the premises to Birkett, and deposited the same in the Eureka Bank, together with the note of Birkett for the balance of the purchase money, with instructions to deliver the deed upon the payment of the note. On March 5, 1883, Birkett and his attorney met Fedrick and his attorney, and there was some talk between them about the balance of the purchase money. At this time Fedrick offered to accept the money and deliver the deed he had executed. Birkett refused to do this; claiming the deed was not good, and that Fedrick did not have a good title. Subsequently, Birkett brought his action in the district court of Greenwood county, to recover \$1,500 as damages, and alleged in his petition that at the execution of the written bond the defendants did not have an absolute and indefeasible estate in fee-simple to the lands therein described, and that they

had not since that time acquired such estate and title. Trial was had before the court with a jury, which resulted in a judgment in favor of Birkett for the sum of \$1,500 interest, and costs. Complaint is made of the rendition of this judgment.

Upon the trial, it was shown on the part of Birkett that, after the execution of the bond, taxes to the amount of about \$70 had been levied upon the premises. These taxes were alleged to be an incumbrance upon the land, and therefore that Birkett was not required to accept the conveyance tendered him. The court instructed the jury as follows: "Taxes assessed against real estate for any year become a lien on said real estate on the first day of November of that year. If one-half ($\frac{1}{2}$) of the taxes due and payable in any year are paid on or before December 20 of that year, then the other one-half ($\frac{1}{2}$) is not due and payable until the following June. But if the first one-half ($\frac{1}{2}$) is not paid on or before December 20th, then the whole amount becomes due and payable, with five (5) per cent. added as penalty, and the whole amount becomes a lien on said land. If there was a tax lien on the lands in controversy at the time plaintiff demanded a deed from the defendant, then the plaintiff was not bound to accept a deed while said lien remained on the land; and in such case you will find for the plaintiff." We think these instructions, under the circumstances of this case, erroneous and misleading. Birkett was not put in possession of the land after the execution of the bond, and as that instrument required Fedrick to execute a good and sufficient warranty deed, conveying the premises to Birkett in fee-simple, with the usual covenants of title, on March 1, 1883, all taxes levied prior to that date must fall upon Fedrick, and not upon Birkett. But it appears, by the findings of the jury, that Birkett never tendered nor paid to the defendants, on or before March 1, 1883, the balance of the purchase money; and that he did not, on or before that day, demand or request a conveyance of the land under the terms of the bond. Further, that when Fedrick deposited his deed, and offered to deliver the same upon the payment of the balance of the purchase money, nothing whatever was said by Birkett concerning the unpaid taxes, and no objection was made to the acceptance of the deed therefor. The refusal was based upon the ground that the deed was not good, and that Fedrick did not have a good title. If Birkett had objected to the deed because of the tax incumbrance, Fedrick would have undoubtedly paid the same, and released the lien.

Subsequently, and on June 16, 1883, all the taxes and the penalties were paid. This action was not brought until after that date. The petition did not refer to the unpaid taxes, nor make any reference whatever to the alleged incumbrance therefor. This incumbrance was removed before this action was commenced, and long before the trial. At the time the action was commenced there was no tax lien or incumbrance against the land; and, upon the facts disclosed upon the trial, the taxes should have been wholly omitted from the instructions, and also from the consideration of the jury. Indeed, a careful perusal of the whole record convinces us that the objection to the deed on account of the failure of Fedrick to pay the taxes of 1882 was an after-thought, not contemplated when Birkett talked about making a tender of the balance of the purchase money, nor even considered at the time he commenced this action to recover damages. If Birkett declined to complete his purchase upon the ground that Fedrick did not have any title, or that his deed was not in proper form, and if these alleged defects did not exist, in an action to recover back a payment made, he ought not to succeed because certain taxes were not paid, when it appears that prior to the commencement of his action these taxes had been discharged. *Bell v. Wright*, 31 Kan. 236, 1 Pac. Rep. 595; *Welch v. Dutton*, 79 Ill. 465; *Ashbaugh v. Murphy*, 90 Ill. 182.

It is a rule of equity to decree a specific execution of a contract for the sale of land on the application of the vendor, if the latter is able to make a good

title at any time before the decree is pronounced; therefore, if Fedrick, within a reasonable time after March 1, 1883, had sued Birkett for a specific performance of the contract, he could have recovered if he had established his own title, and showed that he had discharged the taxes alleged to have been an incumbrance.

Again, it appears that the third finding of fact of the jury is not only contrary to the evidence, but not sustained by any testimony. Fedrick deposited with the Eureka Bank a warranty deed, with the usual covenants, for the land in controversy, before March 1, 1883, according to the terms of the bond, and was ready to deliver it to Birkett at any time, upon the payment of the balance of the purchase money. There is considerable discussion in the briefs of the omission of the court to charge the jury that Fedrick had obtained title by adverse possession under the statute of limitations; but no instruction embracing this point was requested, so we shall make no comment thereon.

The judgment of the district court will be reversed, and the cause will be remanded for a new trial.

(All the justices concurring.)

(37 Kan. 579)

TENNEY and another v. SIMPSON.

(*Supreme Court of Kansas. November 5, 1887.*)

1. PARTNERSHIP—ACCOUNTING—DIVISION OF LAND.

Where a tract of land was purchased jointly by two persons, to be subdivided and sold for profit, and not as a permanent investment, it being agreed that the legal title to the same should be taken in the name of one of the partners, who should execute conveyances for such portions of the real estate as were sold, and the terms of purchase, method of payment, and of the sale and disposition of the land, as well as the respective interest which each was to receive, were also agreed on, and all were embodied in a writing signed by both; and where, after the purchase, and after some sales had been made, and before the enterprise was fully carried out, the party in whom the legal title was placed refused to further recognize the rights of his partner, or to execute conveyances when sales were made: *held*, that the other partner may maintain an action for an accounting, and to determine the interest of each in the land remaining unsold, and to set off to each his respective share thereof; and any judgment rendered for a balance found due on the accounting from one partner may be declared a lien upon the share of land set off to him.

2. TRUSTS—EXPRESS—HOW CREATED—SEVERAL PAPERS.

No particular form of expression is required to create an express trust, nor need all the terms and conditions of the trust be declared in a single writing. They may be embraced in several papers, provided they are so referred to and connected as to clearly show that they relate to the same transaction, and together clearly point out the nature and purposes of the trust.

(*Syllabus by the Court.*)

Error from district court, Wyandotte county; W. R. WAGSTAFF, Judge.

This was an action to determine the rights and interest of the parties thereto to certain real estate, situated in Wyandotte county, alleged to have been purchased on joint account, and for an accounting between them for the proceeds of the sale of a portion of the real estate, and to set off in severalty to each his respective share of that which remained unsold. The action was begun on January 17, 1884, and on July 6, 1885, the cause was referred to W. T. Johnston, Esq., of Paola, Kansas, for trial, and to determine all issues, both of fact and law, his report to be filed on the first day of the succeeding term. A trial was had before the referee, and in December, 1885, he made and filed his report as follows, to-wit:

"IN DISTRICT COURT, COUNTY OF WYANDOTTE, TENTH JUDICIAL DISTRICT,
STATE OF KANSAS.

"*S. N. Simpson, Plaintiff, vs. Wm. C. Tenney and John F. Moors, Def'ts*
—*Report of Referee.*

"On the thirty-first day of January, 1879, Jerome B. Thomas was the owner of the following described land, situated in the county of Wyandotte, State of

Kansas, to-wit: The north half of the north half of the north-east quarter of the north-west quarter of section 15, township 11 south, range 25 east. On that day plaintiff, S. N. Simpson, and defendant William C. Tenney purchased said land from said Jerome B. Thomas, through his agents Armstrong & Moyer, at \$250 per acre, aggregating \$2,500, payments to be made one-half in cash and balance in one year or less, at option of purchasers, with interest at ten per cent. On that day it was agreed between said S. N. Simpson and William C. Tenney, that said land should be purchased in the name of William C. Tenney, who paid \$100 as part payment thereon, and took a receipt therefor as follows, to-wit:

“\$100.

WYANDOTTE, KANSAS, January 31, 1879.

“Received of William C. Tenney one hundred dollars, as part payment of ten acres of land, viz., the north half of the north half of the north-east quarter of the north-west quarter of section 15, town 11, range 25, county of Wyandotte, state of Kansas; price \$250 per acre; half cash; balance in one year or less, at the option of payor, at 10 per cent. interest.

“J. B. THOMAS.

“By ARMSTRONG & MOYER, Agents.

“In presence of S. N. SIMPSON.”

“Afterwards, on the seventh day of February, 1879, plaintiff entered into a written contract with said William C. Tenney in reference to said purchase, which is in the following language, to-wit:

“Agreement between Wm. C. Tenney and S. N. Simpson as follows: On January 31, 1879, we purchased ten acres of land of Dr. Jerome B. Thomas, through Armstrong & Moyer, land agents in Wyandotte, Wm. C. Tenney advancing one hundred dollars therefor, and to receive the deed as per conditions of agreement in receipt of that date. The profits from the sale of these ten acres to be divided as follows: Eastern parties furnishing capital are to receive their money back from sales, and, in addition, twenty-five hundred dollars from the first eight thousand three hundred and thirty-three and a third dollars profit, Wm. C. Tenney receiving also twenty-five hundred dollars, and S. N. Simpson thirty-three hundred and thirty-three and a third dollars. After that, Wm. C. Tenney is to receive three-tenths, and S. N. Simpson seven-tenths, of the net receipts of the sales of the land till S. N. Simpson shall have received one-half of all the net profits of sales of the land from the beginning of sales up to that date; and after that profits shall be equally divided between Wm. C. Tenney and S. N. Simpson. Representatives of the eastern parties furnishing the money shall receive the deed of the land from Wm. C. Tenney, acting for himself and for S. N. Simpson, and continue to hold it until they shall have received back their investment, and twenty-five hundred dollars as profit in addition, when it shall be deeded back to Wm. C. Tenney or his assigns, for benefit of himself and Simpson, as per above agreement.

“Kansas City, Mo., February 7, 1879.

WM. C. TENNEY.

[Signed in duplicate]

“S. N. SIMPSON.

“State of Kansas, County of Wyandotte—ss.: Be it remembered that on this twenty-ninth day of October, A. D. 1883, before me, the undersigned, a notary public in and for the county and state aforesaid, came Wm. C. Tenney, who is personally known to me to be the same person who executed the within instrument of writing, and also came S. N. Simpson, to me well known to be the same person who executed the within instrument of writing, and both of said parties duly acknowledged the execution of the same. In witness whereof I have hereto set my hand and affixed my official seal the day and year last above written.

[Seal.]

“WM. A. SIMPSON, Notary Public, Wyandotte Co., Kan

“Com. expires 6-6-'85.”

“Said contract was duly recorded in the office of register of deeds of Wyandotte county, Kansas. On the fifth day of February, 1879, said Jerome B.

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Thomas and Harriett N. B. Thomas, his wife, executed to said Wm. C. Tenney a good and sufficient warranty deed for said land, and said deed was delivered to said Tenney February 11, 1879. Afterwards said Wm. C. Tenney entered into negotiations with defendant John F. Moors, which resulted in said Tenney receiving from said Moors \$2,500 with which to pay the purchase price of said land, under an agreement that said Moors should have returned to him said purchase money, and \$2,500 profits, amounting to \$5,000, by the first day of January, 1881, from sales of said land, and if any part of said sum should remain unpaid on the first day of January, 1881, that the same should draw interest at the rate of ten per cent. per annum until paid. To secure the payment of said sum of \$5,000, as aforesaid, Wm. C. Tenney and wife executed and delivered to said John F. Moors, on the fifteenth day of March, 1879, a deed to said land, which was duly recorded by the register of deeds of Wyandotte county, Kansas.

"On the fourteenth day of May, 1879, John F. Moors and Eunice W. Moors, his wife, executed a power of attorney to Wm. C. Tenney, giving him certain powers over said land therein set forth, which was duly recorded in the records of Wyandotte county, Kansas, May 20, 1879. The following is a copy of said power of attorney, to-wit:

"Know all men by these presents, that John F. Moors and Eunice W. Moors, his wife, of Greenfield, Mass., have made, constituted, and appointed, and by these presents do make, constitute, and appoint, William C. Tenney, of Lawrence, Douglas county, Kansas, their true and lawful attorney for them, and in their name, place, and stead to lease or bargain, sell and convey, on such terms and for such price or prices as he may accept, payable in cash or on credit, or partly in cash and partly on credit,—and if on credit, or partly in cash and partly on credit, and if on credit, in whole or in part, payable at such time or times as he may deem advisable,—all or any part or parts of the following described lands, situate in the county of Wyandotte, in the state of Kansas, to-wit: The north half ($\frac{1}{2}$) of the north half ($\frac{1}{4}$) of the north-east quarter of the north-west quarter of section 15, township 11, range 25 east, containing ten acres, more or less. In case of leasing, said Tenney may execute the proper written lease for and in the names of John F. and Eunice Moors, and, in case of sale and conveyance, he may for them and in their names execute, acknowledge, and deliver the proper contracts of sale and deeds of conveyance, inserting in the latter full covenants of warranty, and the usual covenants contained in conveyances made in Kansas of lands therein. It being expected that said Tenney will, from time to time, sell and convey parcels of said land, and he being hereby empowered to do everything in the premises necessary thereto, said John F. and Eunice Moors hereby ratify and confirm everything their said attorney may or shall lawfully do by virtue hereof. And whereas, on the nineteenth day of April, A. D. 1879, there was filed in the office of the register of deeds of Wyandotte county, Kansas, a plat of certain lands, including that hereinbefore particularly described, which plat lays off on said land lots, blocks, streets, alleys, and subdivisions, and whereas, said Tenney signed the name of John F. Moors to said plat, and acknowledged the same to be his act and deed, and for him filed the same, to be his act and deed, now, therefore, said John F. Moors hereby ratifies and confirms what said Tenney has so done, and hereby declares that said plat, and the signing and acknowledgment and filing thereof as aforesaid, shall for all purposes have the same force and effect as if said John F. Moors had in person made, signed, acknowledged, and filed the said plat.

"Witness the hands and seals of said John F. Moors and Eunice W. Moors, his wife, this fourteenth day of May, A. D. 1879.

"JOHN F. MOORS. [Seal.]

"EUNICE W. MOORS. [Seal.]

"State of Massachusetts, County of Franklin—ss.: Be it known, that on the fourteenth day of May, A. D. 1879, before the undersigned, a notary

public in and for said county and state, came the above named John F. Moors and Eunice W. Moors, his wife, to the undersigned personally known to be the same persons who executed the above and foregoing instrument, as parties thereto, and duly acknowledged the execution of the same, and that it is their act and deed.

"In testimony whereof I have hereunto set my name, and affixed my notarial seal, the day and year first above written, at my office in said county. [Seal.]

"GORHAM D. WILLIAMS, Notary Public."

"In harmony with the rights granted to them through the conveyances referred to, the contract of February, 7, 1879, and the power of attorney from John F. Moors and wife to Tenney, Simpson and Tenney caused said land to be platted into streets, alleys, lots, and blocks; Simpson giving special attention to the platting of the land and sales of property; Tenney executing deeds for property, receiving payment therefor, and paying expenses until December, 1883, when he refused to make any further settlement with Simpson, or to permit any further portion of said real estate to be sold.

"To understand my method of determining the financial *status* of relations existing between Tenney, Simpson, and Moors, it will be necessary to refer to my conclusions of law as to the relation existing between these parties. Following these conclusions, I find that on the first day of January, 1881, there was due Moors \$4,465.91, which was to draw interest at ten per cent. until paid. From that time until March 7, 1883, I charge Tenney with interest at ten per cent. on all proceeds of sales received by him. I allow him the same rate of interest on all expenses paid by him, and I charge Simpson with the same rate of interest on what he received. March 7, 1883, I find that Tenney had sufficient proceeds to pay Moors' claim, which, up to that time, amounted to \$5,382.23, and had a balance in his hands of \$27.25. The total amount of proceeds of sales, including interest, is \$11,042.72; total amount of expense, including interest, is \$577.68. One-half of the amount to which Moors is entitled, which is \$2,691.11, is properly purchase price, with interest; the other half is profits, with interest. If we add to the purchase price and interest, the expense and interest, and deduct the same from proceeds of sales and interest, the balance, \$7,773.93, will be the net profits. One-half of this, \$3,886.96, belongs to Simpson. Moors is entitled to \$2,691.11 profits, which, being deducted from the other half of the profits, leaves \$1,195.85, which is Tenney's portion of the profits. Simpson has received, including interest charged to him, and notes from Mead and Hedman made to Moors, \$3,829.65, which is \$57.31 less than his share of the profits. After paying expenses, with interest, Moors' claim and amount, and what Simpson has received, Tenney has in his hand \$1,253.16, which is \$57.31 more than his portion of said profits. From these facts the conclusion is that Wm C. Tenney is indebted to S. N. Simpson, the plaintiff, in the sum of \$57.31.

"CONCLUSIONS OF LAW.

"*First*, that all evidence offered and heard, under objection, on the trial of this action, as to fraud on the part of Simpson, is inadmissible under the issues as joined herein, and all objections to the same are hereby sustained; *second*, that, under the deed of said real estate from Thomas and wife to Tenney, Tenney received the title of the same in trust for the benefit of himself and Simpson, and that the same is an express trust, as shown by written agreement of February 7, 1879; *third*, that the deed from Tenney and wife to Moors operates as a mortgage to him to secure to him the payment of \$5,000, with interest as agreed upon; *fourth*, that, under the power of attorney from Moors and wife to Tenney, all proceeds of sales of said lands received by Tenney, and not paid out by him for expense, as to Simpson should be treated as if paid to Moors; *fifth*, that the sum of \$2,500, which Moors was to receive as profit on the investment of \$2,500, purchase price, is not usurious inter-

cst, but is a profit to which he is entitled by reason of success of the enterprise; *sixth*, that Moors should receive interest at ten per cent. until paid on all that portion of said \$5,000 not paid by January 1, 1881; *seventh*, that one-half of all said premises remaining unsold belongs to S. N. Simpson, and the other half belongs to W. C. Tenney, and the same should be set off to them in severalty; *eighth*, that defendant John F. Moors should be required to enter satisfaction upon the records of note of Susan Mead, dated October 10, 1883, for \$600, bearing interest at eight per cent., and of note of E. Hedman and Ella Hedman for \$375, of same date, and bearing same interest, upon payment of same to S. N. Simpson, said notes being payable to said Moors, and the same being in the possession of said S. N. Simpson, and being charged to him as cash in determining amount paid him by Tenney; *ninth*, that said John F. Moors should reconvey all his right, title, and interest in and to said real estate to said W. C. Tenney; *tenth*, that W. C. Tenney is indebted to S. N. Simpson in the sum of \$57.31.

"December 19, 1885.

W. T. JOHNSTON, Referee."

And said referee further made and filed, at the request of said defendants, (plaintiffs in error,) answer to special questions of fact therein as follows:

"IN THE DISTRICT COURT, WYANDOTTE COUNTY, KANSAS.

"*S. N. Simpson vs. William C. Tenney and John F. Moors—Requests to Find Facts.*

"The defendants in the above-entitled cause request of Hon. W. T. Johnston, sole referee in said cause, to find in his findings of facts and conclusions of law upon the following facts:

"*First.* Do the facts, as shown by the evidence in this cause, show or establish a 'resulting trust' in favor of the plaintiff? No.

"W. T. JOHNSTON, Referee.

"*Second.* If no 'resulting trust' is established in favor of the plaintiffs by the evidence, then is there any 'express trust' so established in his behalf? Yes.

W. T. JOHNSTON, Referee.

"*Third.* If the evidence shows the fact that an 'express trust' was created in favor of the plaintiff, then was such created by parol agreement or in writing? And if such written agreement created such 'express trust,' what is the date of such agreement, or, if more than one such, then what are the dates of such agreements, and by whom were they signed? Express trust created in writing, dated February 7, 1879.

W. T. JOHNSTON, Referee.

"*Fourth.* If any one or more of the defendants signed any written agreement or agreements creating any 'express trust' in favor of the plaintiff, had such person, at the time of so signing such written agreement, the legal title to the land in question? And if he did not own the legal title, but owned the equitable title, what act or agreement created such equitable title in him who so signed such written agreement creating such 'express trust?' The legal title to said real estate was executed to Wm. C. Tenney February 5, 1879, and delivered to him February 11, 1879.

W. T. JOHNSTON, Referee.

"*Fifth.* If an 'express trust' was created in favor of the plaintiff by any one of the defendants, which defendants? If all the defendants created such 'express trust,' then give the dates of the different written instruments so creating such 'express trust,' and by whom signed. Express trust created by Wm. C. Tenney; date of instrument creating the same, February 7, 1879.

"W. T. JOHNSTON, Referee.

"*Sixth.* If any 'express trust' was created in favor of the plaintiff, do you rely solely in your finding upon a written instrument so creating such 'express trust,' or do you rely partly upon parol evidence to establish the same? If upon a written instrument solely, then the date of the same, and by whom signed? I rely on written instrument above referred to.

"W. T. JOHNSTON, Referee.

"*Seventh.* If you find that an 'express trust' exists in favor of the plaintiff, and that the same so exists from a written instrument, did such written instrument create such trust, or is such trust only shown, evidenced, or manifested by such written instrument, and the date of it, and by whom signed? The written instrument heretofore referred to created said trust.

"W. T. JOHNSTON, Referee.

"*Eighth.* Did Simpson, the plaintiff, in agreeing to have the title to the property taken in the name of the defendants, Tenney or Moors, intend to hinder, delay, or defraud his creditors thereby? And if either to hinder, delay, or defraud, which? And if said Simpson did not so intend, then did such act, in so taking said title in the name of any defendant, result, or is it liable to result, in hindering, delaying, or defrauding such creditors? No.

"W. T. JOHNSTON, Referee.

"*Ninth.* Do you hold that, under the issue in this cause, as made by the petition and answer, that it is competent to show that the plaintiff intended to defraud, hinder, or delay his creditors, in agreeing to have the title to the land in question taken in the name of either of the defendants, Tenney or Moors? No.

W. T. JOHNSTON, Referee.

"*Tenth.* Do you find that, if such intent appears by the evidence heard, (no matter whether material to the issues so made or not,) that you can find in favor of a specific performance asked by the plaintiff? I find that no such intent appears, and make no finding as to what I would do if such intent did appear.

W. T. JOHNSTON, Referee."

Motions were made to confirm, as well as to set aside, the report and grant a new trial; but the court overruled the motion to set aside the report and grant a new trial, and sustained the motion to confirm the report. Judgment was given in accordance with the findings and report of the referee, in which it was decreed that the deed executed and delivered by William C. Tenney and wife to John F. Moors was intended and should be treated as a mortgage, and that, as the debt which was thereby secured to Moors has been fully paid, Moors and wife should reconvey the real estate to William C. Tenney. It was further adjudged and decreed that S. N. Simpson is the owner of the undivided one-half of the real estate remaining unsold, and that the same should be partitioned and set off in severalty to him, free and clear of any interest of the other parties; and, in addition, that there should be set off to him a portion, of the value of \$57.31,—the amount found due by the referee from William C. Tenney to S. N. Simpson,—of the proceeds of the real estate sold. Provision was made in the decree for the appointment of commissioners to partition and set off to the parties their respective interest in the real estate.

Exceptions were duly taken to the rulings and judgment of the district court by the defendants, who bring the case to this court for review.

Stevens & Stevens and *John Hutchings*, for plaintiff in error. *J. B. Scroggs* and *Alden & McGrew*, for defendant in error.

JOHNSTON, J. The evidence and findings brought up in the record make it clearly appear that the land in controversy was purchased jointly by S. N. Simpson and William C. Tenney. It was a partnership transaction engaged in for the profits to be derived from the sale of the land after it had been subdivided and platted into lots, blocks, streets, and alleys. The lucky opportunity to buy was discovered by Simpson, and negotiations for the purchase from the prior owner were carried on by him. The tract, which consisted of ten acres, was purchased on January 31, 1879, for \$250 per acre, the agreement being that one-half of the price should be paid in cash, and the balance in one year or less, at the option of the purchaser, with interest on the unpaid portion at 10 per cent. per annum. The money necessary for the purchase was to be procured from eastern parties, and, as an inducement for

them to furnish the money, they were to have a sum equal in amount to that furnished out of the first profits arising from the sale of the real estate. Tenney conducted the negotiations for the money, and procured from the defendant John F. Moors \$2,500, upon an agreement to return that amount and \$2,500 additional out of the profits of the enterprise. In accordance with the agreement, the title to the land was taken in the name of Tenney, and he conveyed it to Moors to secure the repayment of the money furnished for its purchase, and the payment of the additional \$2,500 of profit. Moors and wife, by power of attorney, authorized Tenney to lease, bargain, sell, or convey the land, in such portions and on such terms as he deemed advisable. Simpson devoted time and special attention to the platting and sale of the land, while Tenney executed deeds for that sold, attended to the financial details by receiving payment on sales made, and to discharging the expenses and debts incurred in carrying on the enterprise. The business of the partnership was conducted without interruption until December, 1883, when Tenney refused to further recognize the rights of Simpson in the land, or to convey the same when sold.

This case is very similar to the one recently determined in this court where Tenney and Simpson were the principal parties, (*Tenney v. Simpson*, 37 Kan. —, *ante*, 187,) and very little need be added to what was there said. It is contended here that no trust was created in behalf of Simpson by the written contract, or by the acts and agreements of the parties. We have no doubt that the writing signed by them, and set out at length in the report of the referee, created an express trust in favor of Simpson. The plan and purpose of the parties seem to have been clearly understood by them, and to have been explicitly stated in the written agreement which they executed. The writing of February 7, 1879, points out clearly the parties, the interest of each, and the nature and subject of the trust. It recites that the land was purchased by Tenney and Simpson, and not by Tenney alone, on January 31, 1879. It is claimed that the writing fails to describe the land with sufficient certainty to make it capable of ascertainment. This objection is untenable. In the written agreement, the 10-acre tract of land purchased by the parties from Thomas is referred to as being the same tract that was described in the receipt given for the first payment on the land, and which is dated at the time of the purchase made by Tenney and Simpson from Thomas. In that receipt, which is signed by Thomas, a definite description of the 10 acres is given, as well as the terms upon which it was sold. By this reference, the terms and conditions of the receipt became a part of the writing which the parties signed. No particular formality is required in the creation of a trust; nor need all the conditions of the trust be expressed in a single paper. The terms of the trust may be embraced in several papers, and it will be valid and operative if they are so referred to and connected as to clearly show that they related to the same transaction, and together clearly point out the nature and objects of the trust. The written agreement and the receipt must therefore be taken together, and treated as one instrument; and, so taken, they sufficiently express and define the trust. They show that, although the title to the land was taken in Tenney, it was actually purchased by Tenney and Simpson jointly, not for permanent use, but to be subdivided and sold for the profits to be gained therefrom. They disclose that the money was to be obtained on the security of the land itself, and the eastern capitalists furnishing it were to be repaid out of the profits arising from the sale, and, in addition to the amount furnished, they were to be paid \$2,500, out of the first profits arising from sales, for furnishing the money. Simpson was to receive one-half of the profits derived from the enterprise, while Tenney was to receive the other half, less the profits paid to the eastern parties for furnishing the purchase money. The land purchased was to be conveyed by Tenney, "acting for himself and for S. N. Simpson," to the eastern parties furnishing the money, who

were to hold it until they received back the amount furnished, and the \$2,500 of profits, when they were to reconvey it to Tenney, "for the benefit of himself and Simpson," in accordance with the written agreement. It is thus seen that the written contract fully identifies the land, the terms of its purchase and disposition, and that the persons interested, as well as the respective interests which each held and was to take, can be ascertained without difficulty or doubt. When Moors was paid, either directly, or through his agent, Tenney, the \$5,000, and any interest which accrued thereon, it was his duty to reconvey to Tenney. When so reconveyed, Tenney would hold the legal title in trust for the partnership, "for the benefit of himself and Simpson."

We fail to see how there can be any doubt with respect to the intention of the parties, or with the nature and purposes of the trust. A great deal has been said in argument about Simpson causing the legal title to be taken in the name of Tenney, for the purpose of defrauding existing creditors, and it is claimed that, under section 8 of the act concerning trusts, no trust could result in his favor unless it was made to appear that the title was placed in Tenney, "without any fraudulent intent." The statutory provision referred to applies, however, only where a resulting trust is claimed, and not where there is a written express trust, such as there is found to exist in the present case. And if it were a resulting trust which was sought to be established, we hardly see how the fraudulent intent to defraud creditors, if there were such, would avail the plaintiffs in error. They were not creditors of Simpson, had no interest in, and were not in any way affected by, the claims and judgments which they say were existing against Simpson. The referee, however, finds that no such fraudulent intent existed, and certainly there is nothing in the record showing that Simpson dealt otherwise than openly and fairly with Tenney throughout the entire transaction.

It is further contended that the trust stated in the written agreement should not, in any event, be enforced, because it is inequitable and unjust. It is said that the land which was purchased for \$2,500 is worth \$40,000, and that by the decree Simpson is given \$20,000 worth of real estate, without having furnished anything towards its purchase, and without at any time having held the legal title to the same. While the profits of the enterprise were enormous, we discover nothing in the contract of the parties, or in its results, that can be regarded as unjust or inequitable as between them. The fortunate chance of buying the land was found by Simpson, and the money with which to purchase the same was found by Tenney. The land was bought and owned by both; and the purchase money found by Tenney was obtained on the security of the land, and repaid out of the profits arising from its sale. Simpson gave time and special attention towards putting it in a salable condition by surveying and platting it, and he also devoted his time to selling and disposing of it. There was no fraud or deception practiced by Simpson, and we see nothing that may be deemed disproportionate or unjust between the shares taken by each in the enterprise, when considered in connection with what they each contributed. Although it is claimed by Tenney that the services rendered by Simpson in the transaction were inconsequential, it seems that a different estimate was placed on them when the transaction was entered into. In writing to the eastern parties, with a view of inducing them to loan the money for the purchase of the land, Tenney stated that the trade had been brought about by Simpson, and "that great wariness, skill, patience, secrecy, and perseverance were necessary." He stated that Simpson was to lay out and sell the land, and was to receive one-half the profits. He further said that he had earned that share, and that he was a very skillful manager, whose share of the work "was and is indispensable to my (and to your) profit." We think that Simpson was entitled to the remedy sought, that he was the real owner of an undivided one-half interest in the real estate, and, as the accounting made seems not to be questioned, the judgment and decree must be up-

held, except in one particular. In the accounting, it is found that Tenney is indebted to Simpson in the sum of \$57.31, and the court decrees that, in addition to the share of the one-half which is set off to Simpson, he shall be given such portion of the remaining half as will equal in value the amount found due to Simpson, viz., \$57.31. In this there was error, as a personal judgment should have been rendered against Tenney for the amount found due on the accounting, and the judgment so rendered should have been declared a lien on that portion of the real estate set off to Tenney. To this extent the judgment and decree of the court should be modified, and, when so modified, it will stand affirmed. For this purpose the cause will be remanded to the district court.

(All the justices concurring.)

(37 Kan. 516)

VENABLE v. DUTCH.

(Supreme Court of Kansas. November 5, 1887)

1. SET-OFF AND COUNTER-CLAIM—WHAT CONSTITUTES—AFFIRMATIVE RELIEF IN EJECTMENT.

Where a plaintiff files a petition in ejectment, and defendant in his answer, in addition to a general denial, states he is in possession of the same land, and claims to be the owner thereof by virtue of a tax deed, and asks that his title thereto may be quieted against plaintiff, that part of his answer claiming title in himself, and asking affirmative relief, is a counter-claim.

2. SAME—DISMISSAL BY PLAINTIFF—RIGHT OF DEFENDANT TO PROCEED.

In such an action, when the plaintiff dismisses his cause of action, the defendant has the right to proceed to the trial of his claim, for the purpose of determining his interest in the land, as against the plaintiff. He then assumes all the burdens of a plaintiff, and is entitled to his rights, so far as amending his pleadings is concerned.

3. JUDGMENT—BAR TO SUBSEQUENT ACTION—EJECTMENT.

A plaintiff in possession of land obtains a judgment against a defendant, a non-resident of the state, upon service by publication only, and without his appearance in court. Afterwards the defendant in such action brings another action, as plaintiff, against the former plaintiff, as defendant, in the courts of this state. *Held* that, in the trial of such subsequent action, the judgment in the first action is conclusive of the rights of said parties to the land in dispute.

(*Syllabus by Holt, C.*)

Commissioners' decision. Error from district court, Wilson county; L. STILLWELL, Judge.

A. J. Ulley, for plaintiff in error. S. S. Kirkpatrick, for defendant in error.

HOLT, C. This action was tried in the Wilson district court at the May term, 1885. Plaintiff in error, plaintiff below, filed a petition for ejectment in the ordinary form. The defendant answered by a general denial, and also claimed title under a tax deed. The first trial was had, and a second trial was granted under the statute. At the time of the second trial, plaintiff moved to strike out that part of defendant's answer setting up a title in himself by a tax deed, which motion was overruled by the court. Plaintiff then demurred to that portion of defendant's answer, which was overruled; whereupon he asked leave to dismiss his action without prejudice to a future action, which was allowed, but the court permitted the defendant to retain his answer for trial. Plaintiff then filed a general denial in reply, when the defendant asked leave to amend his answer by alleging that he had quieted his title to the land in question by a judgment duly obtained by publication in the district court against the plaintiff. To this new cause of action plaintiff demurred, which demurrer was by the court overruled. Jury being waived, the issue was tried by the court, which rendered judgment for the defendant, which plaintiff brings here for review.

Plaintiff assigns for error, first, that the second portion of defendant's answer should have been stricken out, for the reason that everything that might have been proven under it might have been proven under the general denial. Under that portion of the answer which plaintiff calls a cross-bill, the plaintiff asks for affirmative relief. Our statute provides that a defendant may set up in his answer, in addition to a general denial, any new matter setting forth a defense, a counter-claim, set-off, or right of relief concerning the subject of the action. But the plaintiff says that when he dismissed his cause of action, the defendant's cause of action should have followed it, because the second part of defendant's claim was not a counter-claim; and cites section 398, Civil Code, to show that the defendant has a right to proceed to the trial of his cause only when he has filed a set-off or counter-claim, after the plaintiff has dismissed his cause of action.

Plaintiff contends that the second portion of defendant's answer is not, under our statutes, a counter-claim. The ordinary meaning of counter-claim is a demand of something which of right belongs to the defendant in opposition to the right of the plaintiff. It is also defined as a claim, which, if established, will defeat or in some way qualify a judgment to which plaintiff is otherwise entitled. It is the claim of a defendant to recover from a plaintiff, by setting up and establishing any cross-demand that may exist in his favor as against plaintiff. But the plaintiff, in an argument ingenious rather than sound, claims that there is a limited meaning to the word "counter-claim" given by our statute. By section 95, Civil Code, a counter-claim must be one existing in favor of a defendant, and against a plaintiff, arising out of the contract or transaction set forth in the petition as the foundation of plaintiff's claim, or connected with the subject of the action. The subject of plaintiff's action is his title to the land, and the adverse possession of defendant. The defendant claims that he is in possession lawfully as the owner thereof, by virtue of a judgment quieting his title against plaintiff. We think that the claim in the answer is connected with the subject of plaintiff's action. *Jarvis v. Peck*, 19 Wis. 84; *Eastman v. Linn*, 20 Minn. 433, (Gil. 387.)

In actions similar to the one we are now considering, where a plaintiff brought an action against a defendant in ejectment, and claimed to be the owner in fee-simple, and that defendant wrongfully kept him out of possession, and such defendant alleged ownership in himself, and stated that the plaintiff made some claim to the land, and asked that his title be quieted against him, this court has repeatedly denominated such answer a counter-claim. *Allen v. Douglass*, 29 Kan. 412; *Sale v. Bugher*, 24 Kan. 432.

After plaintiff dismissed his cause of action, the defendant, under his answer seeking to quiet his title, is virtually plaintiff in all things save in name. The facts alleged in his answer must be sufficient to constitute a cause of action, and the relief to which he is entitled must be properly demanded. The burden of proof is upon him, and he must establish his cause of action by a preponderance of testimony before he is entitled to a judgment in his favor. Being in the place of a plaintiff, and subject to his burdens, he also possesses his rights, and therefore it is within the discretion of the court to allow him to amend his pleading by adding another count. In this case the court properly allowed such amendment. *Allen v. Douglass* and *Sale v. Bugher*, *supra*; Pom. Rem. § 738.

By far the gravest question arising in this case is whether a judgment in favor of one in possession of real property, obtained upon service by publication only, is sufficient to divest a defendant in such action of his interest therein. If we consult our statute alone, we find ample authority for such procedure. Section 595, Civil Code, provides that an action may be brought by any person in possession of real property, against any person who claims an interest or estate therein, adverse to him, for the purpose of determining such adverse estate or interest; and when the person who claims such adverse

interest resides out of the state, and the relief prayed for consists wholly or partly in excluding him from any interest therein, such determination may be had after a service by publication alone. Section 72, Civil Code. A sovereign state ought to have control over the real property within its limits, and its courts have the right to decide all questions relating to the titles to the same. By section 400, Code, it is provided that when a judgment is rendered for a conveyance, release, or acquittance, and the party against whom the judgment is rendered does not comply therewith by the time appointed, such judgment shall have the same operation and effect as though the defendant had complied with the judgment of the court. Generally, equity jurisdiction is exercised *in personam*; and upon that theory some of the states have provided, by statute, that if the defendant is not found within the state, or refuses to make or cancel a deed to land within the jurisdiction of the court, it could be done in his behalf by a trustee appointed by the court for that purpose. The last part of section 400 provides that the sheriff may perform such duties as such trustee; but the instrument so executed by him under the judgment of the court stands on no higher plane than a simple judgment, and is no more available as a conveyance, release, or acquittance than such judgment. The appointment by the court of a trustee to execute or cancel a deed for defendant, when he has not been brought within the jurisdiction of the court, differs only in form from a judgment that is intended to accomplish the same object of itself. One is done directly; the other indirectly. Our statute attempted to do away with such mere formal distinctions.

Ordinarily, it would be within the power of the state to substitute notice by publication or otherwise for personal service against non-residents. It will be noticed that it is provided in section 72, Civil Code, for a notice by publication when the relief sought consisted in excluding defendant from any interest in the land then in controversy. The notice does not specify that the defendant shall perform any act, execute any conveyance, acquittance, or release. It simply gives notice that a judgment will be rendered which shall exclude him from any interest in the land. Service by publication, in conformity to our statutes, has been held sufficient by this court, and judgment and sales thereon have now become a settled rule of property in this state. *Gillispie v. Thomas*, 23 Kan. 138; *Rowe v. Palmer*, 29 Kan. 337. In *Hart v. Sansom*, 110 U. S. 151, 3 Sup. Ct. Rep. 586, Mr. Justice GRAY, speaking for the court, says: "The courts of the state might perhaps feel bound to give effect to the service directed by its statutes."

In this action we not only have the direction of the statutes, but also long acquiesced in decisions, which we would be compelled to disregard if we should hold the notice of publication insufficient in the former action of Dutch to quiet his title against Venable. In this action plaintiff in error came into the courts of this state to seek relief, and he ought to be governed, and his claims to the land decided, by the established rules of property of the court whose aid he invoked. He asks that we overthrow the long-established line of decisions, and hold our statutes void, in order to render a judgment in his favor. We are unwilling to so decide.

We recommend that the judgment of the court below be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

(37 Kan. 496)

JENKINS v. SIMMONS and another.

(Supreme Court of Kansas. November 5, 1887.)

1. HOMESTEAD—MORTGAGE—CONSENT OF WIFE NECESSARY.

A mortgage lien on a homestead cannot be created, without the written consent of the wife. The husband alone, by his contract, cannot change the character or

priority of a mortgage lien on the homestead; neither can he alone restore it after loss, or re-create it without the consent of the wife, in the exact manner prescribed by law.¹

2. SAME.

A husband, whose homestead was incumbered by a mortgage lien, made an agreement with the mortgagee to execute another mortgage for the benefit of the creditor, who was to discharge his mortgage, so that the new mortgage might become the first lien on the homestead, the money derived from the new mortgage to be paid to the creditor, and, for the balance due the creditor, a second mortgage was to be executed by the husband and wife on the homestead. The new mortgage was executed, the money received, and paid to the creditor, whose mortgage was released, and discharged on the margin of the record thereof. The wife had no knowledge of the agreement until after the new mortgage was executed, and the discharge of the first was entered on the record. She refused to execute the mortgage for the balance due. The creditor brought his action to cancel the discharge and to foreclose the original mortgage, praying the court to declare it a second lien on the homestead. *Held*, that the court has not the power to declare the original mortgage a lien on the homestead. Such a lien can only be created by the written consent of the wife, in the manner prescribed by law.

3. SAME—COURTS CANNOT DECLARE A LIEN ON.

It is not within the equitable power of courts in this state to declare any indebtedness a lien on a homestead. The constitution of the state prescribes the manner of their creation, and this must be strictly followed.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Chase county; L. HOUK, Judge.

J. B. Johnson, for plaintiff in error. *Peyton, Sanders & Peyton*, and *F. P. Cochran*, for defendant in error.

SIMPSON, C. This is a peculiar case, and, in view of all the facts and circumstances proven at the trial, and found by the court below, the relieving hand of a court of equity ought to be extended to the plaintiff in error, if the court has power to manipulate it. Whether it has or not is the question.

The defendant in error Hiram V. Simmons was indebted to the plaintiff in error in a large sum of money. This indebtedness was evidenced by five promissory notes signed by Hiram V. Simmons alone. To secure their payment, a mortgage was executed on land occupied by Simmons, his wife, and children as a homestead. The mortgage was signed by Emiline Simmons, the wife of Hiram V. Simmons, as well as by the husband. The title to the homestead was in Hiram V. Simmons. The land was situated in Chase county, and the plaintiff in error is a resident of Jefferson county. In the month of October, 1878, at a time when two or more of the notes were due and unpaid, Hiram V. Simmons and the plaintiff in error met in Valley Falls, in Jefferson county, and made an agreement that Hiram V. Simmons was to borrow the sum of \$1,500 from the Kansas Loan & Trust Company, or from other persons, and pay the same to the plaintiff in error on amount due on said notes. In order to enable Hiram V. Simmons to make the loan, it was agreed by the plaintiff in error that he would release and discharge the mortgage held by him, so that the sum of \$1,500 should be and constitute a

¹No conveyance or mortgage will pass the title to premises occupied as a homestead, unless husband and wife both join in it, *Swift v. Dewey*, (Neb.) 29 N. W. Rep. 254; *Williams v. Moody*, (Minn.) 28 N. W. Rep. 510; *Aultman & Taylor Co. v. Jenkins*, (Neb.) 27 N. W. Rep. 117; *McHugh v. Smiley*, (Neb.) 24 N. W. Rep. 277, 20 N. W. Rep. 206; *Bruner v. Bateman*, (Iowa,) 24 N. W. Rep. 9; *Goodrich v. Brown*, (Iowa,) 13 N. W. Rep. 309; *Bonorden v. Dressen*, (Neb.) 12 N. W. Rep. 831; *Coles v. Yorks*, (Minn.) 10 N. W. Rep. 775; *Bird v. Logan*, (Kan.) 10 Pac. Rep. 564; *Graves v. Baker*, (Cal.) 8 Pac. Rep. 691; *Schermerhorn v. Mahaffie*, (Kan.) Id. 199; *Honaker v. Cecil*, (Ky.) 1 S. W. Rep. 392; *Kimmell v. Caruthers*, Id. 2; and a contract to convey such premises is invalid, unless jointly executed, *Cowgell v. Warrington*, (Iowa,) 24 N. W. Rep. 206; *Donner v. Redenbaugh*, (Iowa,) 16 N. W. Rep. 127; *Clay v. Richardson*, (Iowa,) 13 N. W. Rep. 644; *Anderson v. Culbert*, (Iowa,) 7 N. W. Rep. 508; *Thimes v. Stumpff*, (Kan.) 5 Pac. Rep. 431; *Hall v. Loomis*, (Mich.) 30 N. W. Rep. 374.

first lien on the land, and that the plaintiff in error would pay all the expense accruing by said loan; that the said Hiram V. Simmons was then to execute a note for the balance due the plaintiff in error, and secure the same by a second mortgage on said land, payable at such reasonable time as he might designate, Emiline Simmons not being present and not having any knowledge of the agreement. About the first day of October, 1878, the \$1,500 was procured, and a mortgage executed by Simmons and wife to secure it. That was duly recorded, and the money paid over to the plaintiff in error; he executing a release and discharge of his mortgage, and had the same entered on the margin of the record thereof. The only consideration for the release of said mortgage was the agreement above recited. He now seeks to have the release and discharge canceled, and his mortgage foreclosed.

It will be observed from the statement above that Emiline Simmons was not a party to that agreement. There is a special finding that she was not present, and had no knowledge of it. The court below further finds that Emiline Simmons did not in fact at any time consent to join in executing the second mortgage to the plaintiff in error, and did not know of the agreement between her husband and the plaintiff in error for a second mortgage until after the first was released by the plaintiff in error. The question then is, can she be bound by a contract respecting her homestead right, to which she is not a party, and to which she has never given her consent? There is no necessity for assigning reasons to justify a negative answer to the question; it is too plain for argument. But it is said that she has taken advantage of the agreement, and acted upon it, so far as it resulted to her own benefit, and that, in consequence of this participation in its benefits, equity requires that she should assume its liabilities and reciprocal obligations. There would be much more force, and greater equity, in the assertion, if the record had shown that, before she joined in the execution of the mortgage to the Kansas Loan & Trust Company, she had been made acquainted with all the terms and conditions of the agreement made between her husband and the plaintiff in error at Valley Falls, and the appeal would be still stronger if the plaintiff in error had exercised the most ordinary prudence respecting this transaction, had acquainted Emiline Simmons with the terms of the agreement, and had secured her assurances that a new mortgage would be executed before he had entered of record a release and discharge of the existing one. From the facts found by the court, the conclusion is irresistible that she did not execute the mortgage to the loan and trust company with the intent or design to reap the benefits of the Valley Falls agreement, and repudiate its obligations. She acted without knowledge of it, and, when she was informed of it, promptly refused to agree to it, for the reason that the land was her homestead, and she was not a party to the contract. In this view, it does seem that there is no equitable principle that can be invoked to aid the plaintiff in error. It might be different if the record disclosed that, with a full knowledge and a perfect understanding of all the terms and conditions of the contract made at Valley Falls, she had accepted its benefits, and arbitrarily refused to assume its obligations. Hence we find no excuse for equitable interference on behalf of the plaintiff in error, in this respect.

It is said that the plaintiff in error is entitled to the interposition of the equitable power of the court, because of mistake, surprise, accident, or fraud in the contract with Simmons at Valley Falls, and that the discharge and release of his mortgage ought to be canceled for that reason. Counsel for plaintiff in error, in his brief, says: "It may be difficult in this case to determine with absolute certainty under which of these precise heads the plaintiff is entitled to relief;" and at the bar he contended "that the circumstances of the case bordered on all of them." The difficulty with us is to make an application of the principles by which a court of equity grants relief, on the ground of fraud, accident, mistake, or surprise, to a party to a contract, to

one who was not a party, or had any knowledge of such contract. If we are to enter into an inquiry of that kind, it is well to define its limits in the beginning. This is the precise question.

When three persons have an interest in the subject-matter of a contract, and two of these interested, without the presence or knowledge of the third, make an agreement respecting it, by the terms of which some action is to be taken by the third, and the agreement is executed so far as the two are concerned, and the third refuses to perform the part assigned, can the part performance of the two be canceled by a court of equity, on the ground that the agreement between the two was result of mistake, accident, surprise, or fraud, when the sole and the only cause shown was the refusal of the third party to perform the part assigned? However binding such agreement between the two would be, it must be conceded that it could not be enforced against the third. It cannot be that, under any conceivable circumstances, a contract can be enforced against one who was not a party to it, or had no knowledge of it. If it had been alleged and shown that the two had no knowledge of the interest of the third, or had acted under a belief, created by the acts or declarations of the third, that the conditions of their agreement would be performed by such third party, the solution of the question would be easily determined. But the naked fact in the case is that the two proceeded to make their agreement, respecting the subject-matter of the contract, with a full knowledge of the rights of the third, and performed their respective obligations created by it, without reference to, or apparently without a thought or care for, the rights and interests of Emiline Simmons, notwithstanding they must have known, and did know as a matter of law, that no agreement of theirs could create a valid mortgage lien upon the homestead of Emiline Simmons, without her consent. It may be that they assumed without thought or expression, that, whatever Hiram V. Simmons determined to do with the land occupied by his wife and children as a homestead, the wife, as a matter of course, or as a matter of duty, would accede to without objection or protest. The court below finds that the plaintiff in error released his mortgage, believing, at the time he released, that Hiram V. Simmons and his wife, Emiline Simmons, would join in the execution of a second mortgage on the homestead to secure to him the payment of the balance due on said notes.

There must have been some evidence on which the court predicated a finding as to such a belief as that on the part of the plaintiff in error. The evidence is not here. We are to determine this case on the findings of fact and the conclusions of law, as found and declared by the court below. There is no finding of accident, surprise, or mistake on the part of the plaintiff in error by the court below; neither is there a word or syllable, or the recitation of a single fact, in all the findings of fact, that would authorize the most shadowy inference that fraud had been perpetrated. There is no pretense that Hiram V. Simmons was authorized to speak or act for his wife. In the nature of things, it cannot be that her acts, declarations, silence, or conduct occasioned surprise, contributed to a mistake, resulted in an accident, or perpetrated a fraud on the plaintiff in error, except it be that her subsequent refusal to be bound by a contract to which she was not a party, and of which she had no knowledge, can be tortured into some one or all of these causes for equitable relief. How can we say, when the evidence is not before us, and we are considering this case on the findings of fact by the court below, and there is no such finding, that there was accident, surprise, mistake, or fraud that ought to relieve the plaintiff in error from the result of a contract of his own making?

To authorize this court to exercise its equitable power, and declare a rescission of this contract, so far as the discharge and release of the mortgage of the plaintiff in error is concerned, it must appear that there was some misleading act of the defendant that induced the plaintiff in error to execute the release,

to afford relief. In this case, Hiram V. Simmons agreed to execute a second mortgage on the homestead to secure the balance due on the notes held by the plaintiff in error. They both knew the wife's consent was necessary to the validity of such a mortgage, because that is the law, and they are conclusively presumed to know the law; and they are presumed to contract with reference to the law, and the law is a part of their contract. Even if Simmons knew the law, and the plaintiff in error did not, and Simmons was aware of the ignorance of the plaintiff in error in this respect, it would not be sufficient to justify relief. *Laidlaw v. Organ*, 2 Wheat. 178. The mistake, to be an available one to the plaintiff in error, must be confined to the matter of the agreement, and not to the performance of its conditions, or to the inducements of the contract; and in case of misapprehension or ignorance about the matter of the agreement, interference can be invoked only when there has been fraud or misrepresentation in regard to it by the other side. What mistake did the plaintiff in error make, respecting the matter of the agreement with Hiram V. Simmons at Valley Falls? He agreed to release and discharge a mortgage that was a first lien on the homestead, and take a mortgage that would be a second lien on the homestead, and Simmons agreed to make, execute, and deliver such a mortgage. Relying on the promise of Simmons, he released his first lien. Simmons fails to carry out his part of the agreement, because the land proposed to be mortgaged is a homestead, and the wife refuses to consent to the creation of the lien. Where is the mistake of law or of fact? What induced the mistake? What is the misleading act of Simmons that operated on the mind of the plaintiff in error to produce the assent of minds? Each knew all the facts. Both knew the law. How can it be said that either acted under a mistake? Can the plaintiff in error be relieved on the ground of accident? To authorize the court to do so, it must appear that the plaintiff in error has a clear right, which cannot otherwise be enforced; or that he will be subject to an unjustifiable loss, without blame or misconduct on his part; or that he has a superior equity to the party from whom he seeks the relief.

The plaintiff in error has enforced his right in this case by judgment for the full balance due him against Hiram V. Simmons, and this furnishes a complete answer to the first cause for equitable interference in the case. We know it is alleged in the petition, and is among the findings of the court, that Simmons is insolvent; but all a court of law has to do to prevent equitable interference in this class of cases is to furnish a remedy. Its obligation does not go to the extent of a collection of the judgment. The plaintiff in error is not without blame or misconduct. He made the contract with Simmons deliberately, and it was of such a nature that it took time to complete it. He accepted the assurance of Simmons that a new mortgage would be executed, and rested and acted in view of that promise. Ample time and full opportunity was given him to see and consult Emiline Simmons before he discharged his first lien. This he neglected to do, because he trusted the husband. It is such an example of carelessness and want of attention to an ordinary duty as excludes all consideration of accident. "In matters of positive contract, it is no ground for interference of equity, that the party has been prevented by accident from deriving the full benefit of the contract on his side, and the reason is that he might have provided for such contingencies by his contract, if he had so chosen." Story, Eq. Jur. (13th Ed.) 104, and authorities cited in foot-note.

It is not necessary to discuss the principles upon which courts interfere in equity, on the grounds of surprise and fraud, now, because there is nothing developed in the record, or in the findings of the court, that would justify interference for either cause. The plaintiff in error did not contract with Simmons under such circumstances as that he was circumvented, mismanaged, or misled, but acted with an entire absence of any element of either surprise

or fraud; and the facts constituting accident or mistake are wanting, and there is absolutely no showing that requires a court of equity, as a matter of abstract justice, appealing to the conscience, to order the cancellation of the discharge and release of the mortgage of the plaintiff in error. However strong the appeal might be,—however clearly the circumstances might justify such interference,—the court would be powerless to act.

Section 9, art 15, of the constitution of the state, forbids the creation of a lien on the homestead, without the consent of the wife. It is sought to avoid the application of this provision, by saying that such a decree as is prayed for by the plaintiff in error would not be the creation of a lien; it would simply be the restoration of a lien already created with the consent of the wife. It must be admitted that, at the time of the commencement of this action by the plaintiff in error, he did not have in law a lien. He so alleges, and he prays that the court declare his mortgage a second lien on the homestead, and not a first, as it was originally. He does not seek to restore his lien; but he asks the court to declare his mortgage a lien, by virtue of its equitable jurisdiction. If the court had the power to do as requested, and exercised it, the lien so adjudged would not be the same that the wife originally consented to. To our mind, the talk about restoring the lien is a skirmish with words, rather than a fight for a substantial line of decision. To create a lien on a homestead, or re-create it, or to restore it after loss, or to change its character or priority, an indispensable necessity is the consent of the wife. It cannot be done without such consent. The constitution of the state says so in plain words; and that is the end of all argument. No matter how strong the equity may be, constitution is stronger. No matter how strong the appeal to the conscience of the chancellor, the organic law controls him. If the plaintiff in error had advanced Simmons the sum of \$4,000, under the promise of Simmons that a mortgage would be executed on the homestead to secure it, and his wife knew the facts, and, with the money in the possession of the husband, refused to join in the mortgage, no court in this state has power to declare that sum a lien on the homestead. The constitution forbids it. The wife's consent to the creation of the lien is an absolute prerequisite to its validity.

The strong arm of the law, and the relieving hand of equity, are both powerless to take from the wife the hearthstone and the shade-trees of the homestead, except by her free and voluntary consent, as prescribed in the fundamental law of the state of Kansas. We are not without authority to sustain this view; and while it is doubtful whether, in any other state, there is a constitutional provision as mandatory in its terms, and peremptory in its requirements, respecting alienation of, or the creation of liens against, the homestead, as in this state, the courts of all the states in which there are such laws hold strictly to the rule that nothing but the consent of the wife to the alienation or mortgage, in the exact manner prescribed by law, can bind her. In the case of *Spencer v. Fredendall*, 15 Wis. 666, Mr. Justice PAINE says: "It seems scarcely to admit a doubt that after a mortgage upon the homestead, given in the ordinary form, and signed by the wife, had been paid, it would be incompetent for the husband alone, by verbal agreement or otherwise, to revive the mortgage, and attach its security to other debts. To hold otherwise would defeat the clear intent of the statute; for, whenever the signature of the wife could be obtained to a mortgage upon the homestead, the prohibition would be substantially destroyed, as the husband could keep that mortgage in existence as security for new debts to an indefinite amount. It seems clear that this cannot be done." In *Campbell v. Babcock*, 27 Wis. 512, LYON, J., commenting on *Spencer v. Fredendall*, says: "It was held in that case that the husband could not, without the concurrence of the wife, by any act of his, give vitality to a mortgage on the homestead that had once been paid. In other words, the court held that the act of the husband alone

could not reinstate and give life to such mortgage after it had become *functus officio*."

In this case, by agreement between Simmons and the plaintiff in error, the mortgage of the plaintiff was discharged of record. The consideration of the discharge was partly paid, and the conditions upon which it was discharged were partly performed by Simmons. All this, too, was done without the knowledge or consent of his wife. This mortgage being discharged of record and partly paid, and all this done in accordance with the exactions and conditions of a contract, made by the mortgagee, to "hold that her husband, without her consent or knowledge, could transform an inoperative document into a valid and binding mortgage, seems to be a gross perversion of the law which was made for her protection. The restriction that the law imposes upon the alienation of the homestead by the husband is a most valuable right to the wife, and is doubtless founded in wise consideration of public policy. But that restriction would be practically removed and defeated were we to hold that Mrs. Babcock is estopped by the act of her husband from availing herself of the defense that the mortgage is void. We find no authority for pushing the doctrine of estoppel *in pais* to that extent." *Campbell v. Babcock, supra*.

The case of *Barber v. Babel*, 36 Cal. 11, is a very instructive one. The material facts are: Frederick Babel and his wife, Sophia, on the seventeenth of March, 1860, executed a mortgage to plaintiff, Julia A. Barber. Subsequently, on the twenty-second of April, 1861, they filed a declaration to hold the land mortgaged as a homestead, this declaration being required under the California statute. On the twenty-seventh February, 1865, Frederick Babel alone executed another note for the amount due the plaintiff, and a second mortgage to secure it on the land, which was accepted in place of the first, it being surrendered, and a discharge and release of it entered of record. To accomplish this, Frederick Babel made false and fraudulent representations to Julia A. Barber, stating to her that said land was not claimed as a homestead. Before taking the second note the plaintiff applied to his wife, Mrs. Babel, to execute a further mortgage, which she refused to do. The note not having been paid, this action was commenced, a statement of the whole facts made, and a foreclosure asked for. The defense relied upon the statutes of limitation, upon the discharge of the first mortgage, and that the second was void without the signature of the wife. Chief Justice SAWYER delivers the opinion of the court, and says: "The last mortgage was not executed by the wife, and is therefore void."

It is claimed, however, that the giving of the new note by the husband in place of the old, and for the same indebtedness, was an extension of the time of payment of the old indebtedness, and that this extension continued the old mortgage in life. That raises the question as to the power of the husband to affect the rights of the wife in the homestead in any manner by his acts alone. The land is impressed with the character of a homestead by executing, acknowledging, and recording, in the same manner as conveyances of real estate, a declaration to claim the same as a homestead. Under its provisions, we are of opinion that there is a joint interest in the homestead, vested in the children and wife, and that this interest can no more be affected without her concurrence in the mode prescribed than the ordinary estate in the lands of others without the concurrence of the parties holding them. The cases of *Lord v. Morris*, 18 Cal. 482; *Lent v. Morrill*, 25 Cal. 499; *Lent v. Shear*, 26 Cal. 370; *Low v. Allen*, Id. 141, and other cases to the same effect, establish the principle that after the conveyance of the mortgaged premises, or the transfer of any interest therein, the mortgagor has no power to create, revive, renew, or prolong a charge upon the premises, or an interest therein, so conveyed or transferred, while such interest remains in another party.

The principles established by these cases apply to the case under considera-

tion. The original note and mortgage were valid, but, subsequent to the making of this mortgage, the defendants duly recorded their declaration of homestead, and thereby became vested with new and important rights, which were inalienable except in the mode prescribed in the statute. The wife acquired a new, distinct, personal interest which she did not have before, and which she could not afterwards be deprived of by any act of the husband. The mortgage subsequently executed by the husband was not executed by the wife, and was therefore, if the statute means what it says, invalid and ineffectual for any purpose whatever. The giving of the new note, and extending the time for payment, were also the act of the husband alone, to which the wife was no party. Under the authorities cited, he could no more indirectly, in this mode, affect the same purpose, by continuing the old lien beyond the time when the action would be barred as to the wife, than by the direct mode of executing a new mortgage, and of discharging the old. If the lien was continued, it was by virtue of a new contract affecting this land. To continue the old mortgage in force after it had been barred, and sell it under a decree of the court foreclosing it, would be to effect an alienation through the aid of the court, and a new contract, as clearly and effectually as though the same result should be accomplished by making and foreclosing the new mortgage. The fraudulent representations of the husband cannot affect the question as to the statute of limitations, for the wife was no party to the fraud. She made no representations on the subject; she expressly refused to execute the new mortgage, and thereby put the mortgagees on their guard. They must have supposed it important to have obtained her signature, or they would not have sought it. The declaration of homestead was a public matter, and notice to all the world. The mortgagees had the means of knowledge; and as to the wife, at least, they were bound to take notice of the homestead estate. The fraudulent representations were the act of the husband alone; and he was no more authorized to prolong the statute of limitations, and thereby create a new right, and to destroy the homestead right, in this way, than in any other. He had no power alone to affect it in any manner.

If the mortgagee lost anything by trusting to the false representations of the husband, when the record afforded notice of the true state of the case, the wife is not in fault; and the plaintiff is, unfortunately for the credit of human nature and her own interests, not the first in the business world to find herself a "victim of misplaced confidence."

The case of *Rowe v. Palmer*, 29 Kan. 337, that of *Anderson v. Culbert*, 55 Iowa, 233, 7 N. W. Rep. 508, and that of *Tolman v. Leathers*, 1 McCrary, 329, all bear strongly on the proposition that, however strong the equity, the court is powerless to do it. The logic of all these cases is that no act of the husband alone can create, extend, postpone, or renew a lien upon a homestead, without the written consent of the wife in the exact manner prescribed. This case was tried by the court below, a jury being waived. In the original and amended petitions, in the findings of fact, in the entire record, there is no specific allegation or finding that the release and satisfaction of the mortgage was procured by fraud, or occasioned by mistake, accident, or surprise.

We recommend the affirmance of the judgment of the district court of Chase county.

BY THE COURT. It is so ordered; all the justices concurring.

(37 Kan. 628)

CITY OF WYANDOTTE v. AGAN.

(*Supreme Court of Kansas. November 5, 1887.*)

1. HUSBAND AND WIFE—EARNINGS OF MARRIED WOMAN—RIGHT OF ACTION FOR TORT.
Under the provisions of the act respecting the rights of married women, the earnings of a married woman from her own business, and from her labor or services
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performed on her sole and separate account, belong exclusively to her; and an injury which prevents her from carrying on her separate business, or disables her from performing such labor or service, accrues to her alone, for which she may maintain an action against the wrong-doer in her own name.

2. SAME—HOUSEHOLD SERVICES OF WIFE BELONG TO HUSBAND—RIGHT OF ACTION FOR TORT.

Although a married woman may recover for such injuries as are personal to herself, the services rendered by her in the household in discharging the ordinary duties of a wife belong to her husband, and the loss of such service occasioned by an injury to her is his loss, and for which he only can recover.

3. SAME—ACTION BY WIFE—INSTRUCTIONS.

In an action brought by a married woman to recover for a personal injury, where it appeared that a part of her time had been devoted to the discharge of the domestic duties in the household, an instruction which authorizes the jury to allow her for the loss of time sustained by reason of the injury is erroneous.

(*Syllabus by the Court.*)

Error from district court, Wyandotte county; W. R. WAGSTAFF, Judge.

Nathan Cree and *R. P. Clark*, for plaintiff in error. *J. O. Fife*, for defendant in error.

JOHNSTON, J. On August 20, 1884, and while passing along Barnett street, in the city of Wyandotte, Alice Agan sustained injuries from a fall caused by a defective sidewalk. The sidewalk was constructed of boards, some of which were loose and insecure, and, as she passed over the walk, a passer-by whom she met stepped on one end of a loose board, tipping it up against her, causing her to fall forward, and into the opening caused by the displacement of the board. She brought an action against the city, alleging that the injuries resulted from the negligence of the city in constructing and maintaining the sidewalk, and through no fault of her own, placing her damages at \$3,000. At the trial, she stated that she was a married woman, and at the time of the injury was dependent upon her husband for support. She did not devote her entire time, however, to the domestic duties of the household, as she stated that a part of the time she carried on the business of dress-making, but that after the injury she had been unable to continue in that business. About six months after the injury occurred, her husband got into trouble, and left her; since which time his whereabouts have been unknown to her, and he has contributed nothing towards the support of herself and children. In one of the instructions given, the court directed the jury that, if they found for the plaintiff, she would be entitled to recover, not only for the pain and suffering undergone, and the permanent injury sustained, but also that they might allow her such "an amount of damages as the jury believed from the evidence will compensate her for the personal injury so received, and for her loss of time in endeavoring to be cured, and her expenses necessarily incurred in respect thereto, if any such loss or expense has been proven." An exception was taken to the giving of this instruction, and it forms the principal ground relied on by the city for a reversal of the judgment which she recovered.

Counsel for the city makes the broad claim that, because she was a married woman, her time and services belonged alone to her husband, and that a liability for the same could only arise in his favor. The common-law rule that the husband and wife are one person, and that he has the exclusive right to the labor, service, and earnings of the wife, has been wisely and radically changed. A positive enactment of our legislature has removed many of the restraints and disabilities of coverture, and it contains a provision that "any married woman may carry on any trade or business, and perform any labor or service, on her sole and separate account; and the earnings of any married woman from her trade, business, labor, or service shall be her sole and separate property, and may be used and invested by her in her own name." It

also prescribes that she may sue to protect and enforce her rights in the same manner as if she were unmarried. Gen. St. c. 62, § 4.

It follows from this that the time and services of the wife do not necessarily belong to the husband, nor does an injury which causes the loss of such time and service necessarily accrue to him. At least a portion of her time may be given to the labor or business done on her sole and separate account. The profits or earnings of such business or labor are her sole and separate property, and cannot be appropriated or controlled by her husband without her consent. So far, then, as she is deprived of these, she suffers a loss which is personal to herself, for which she alone can recover. The fact that she is partially or wholly dependent upon the husband for support does not abridge her right of action, nor transfer to him that which accrued solely to her.

Notwithstanding this, we are compelled to hold that the instruction was prejudicially erroneous. The duty devolves upon the husband to take care of and provide for the wife, and he is entitled to her society, and to her services other than those performed on her sole and separate account. If he is deprived of these services in consequence of an injury inflicted, the loss is his, and the right of action therefor exists in him. The rule fixing the liability for the services of a married woman is fairly stated in a case which arose and was tried in New York, where a statute exists substantially like ours. It was held that "the services of the wife in the household, in the discharge of her domestic duties, still belong to the husband; and in rendering such service she still bears to him the common-law relation. So far as she is injured so as to be disabled to perform such services for her husband, the loss is his, and not hers; and for such loss of service he, and not she, can recover of the wrong-doer. But, when she labors for another, her service no longer belongs to her husband, and whatever she earns in such service belongs to her as if she were a *feme sole*; and so far as she is disabled to perform such service by any injury to her person, she can in her own name recover compensation against the wrong-doer for such disability as one of the consequences of the injury, * * * and the money recovered shall be her sole and separate property." *Brooks v. Schwerin*, 54 N. Y. 843; *Minick v. City of Troy*, 19 Hun, 253; *Railroad Co. v. Dunn*, 52 Ill. 260; *Townsdtn v. Nutt*, 19 Kan. 282; 3 Suth. Dam. 723.

In the present case, the court ignored this distinction, and in effect instructed the jury that the city was liable to Mrs. Agan for all the time which had been lost by reason of her injury, although it appeared that a large part of it had been devoted to the domestic duties of the household. If the instruction had limited her right of recovery to the injury which accrued to her, or had directed that she could not recover for the loss which her husband sustained by reason of her inability to discharge the ordinary duties of a wife, no prejudice would have resulted. The jury were directed to allow for the loss of time, regardless of whether she was engaged in a business of her own, or was performing labor or service on her sole and separate account. Under the testimony and circumstances of the case, the instruction was erroneous. *Thomas v. Town of Brooklyn*, 58 Iowa, 498, 10 N. W. Rep. 849.

We have examined the other objections urged against the judgment, and find them untenable, but the error in the instruction requires a new trial, and for that purpose the judgment will be reversed, and the cause remanded.

(All the justices concurring.)

(37 Kan. 419)

CAMPBELL and another v. STAGG.

(Supreme Court of Kansas. November 5, 1887.)

1. LIMITATION OF ACTIONS—RECOVERY OF PROPERTY UNDER TAX DEEDS.

In an action of ejectment, both parties claimed title under tax deeds. The action was commenced more than nine years after the last tax deed (defendant's) was recorded. Held, that the action was barred by the statute of limitations.

2. TAXATION—PRIORITY OF TAX DEEDS.

In an action of ejectment, both plaintiff and defendant claimed under tax deeds. Defendant's tax deed was later in time. *Held*, that her title was paramount.

Error from district court, Shawnee county; JOHN GUTHRIE, Judge.

J. W. Campbell and W. P. Douthitt, for plaintiff in error. *H. H. Harris*, for defendant in error.

PER CURIAM. This was an action in the nature of ejectment, brought in the district court of Shawnee county, by Emma B. Stagg, against Eugenia D. Campbell and J. W. Campbell, for the recovery of certain real estate. Both parties claimed title under tax deeds. Mrs. Campbell was in the actual possession of the property; and Mrs. Stagg brought this action to eject her therefrom. The plaintiff's tax deed was executed and recorded on June 28, 1875, and was executed, in pursuance of a tax sale made in May, 1872, for the taxes of 1871. Mrs. Campbell's tax deed was executed on May 8, 1876, and recorded on May 10, 1876, and was executed in pursuance of a tax sale made in May 1873, for the taxes of 1872; and the deed also included the taxes for the subsequent years of 1873, 1874, and 1875. Both tax deeds were regular and valid upon their face. As Mrs. Campbell's tax deed was the last one executed, and executed for the taxes of the latest year, it is paramount and superior to Mrs. Stagg's. *Board of Regents v. Linscott*, 30 Kan. 241, 1 Pac. Rep. 81; *Belz v. Bird*, 31 Kan. 141, 1 Pac. Rep. 246; *McFadden v. Goff*, 32 Kan. 415, 4 Pac. Rep. 841; *Harris v. Curran*, 32 Kan. 580, 584, 4 Pac. Rep. 1044. This action was not commenced until June 22, 1885, more than nine years after the last tax deed was recorded, and hence the action is barred by the statute of limitations, and Mrs. Campbell's title to the property has become complete and absolute. *Walker v. Boh*, 32 Kan. 354, 4 Pac. Rep. 272; *Harris v. Curran*, 32 Kan. 580, 4 Pac. Rep. 1044; *Doyle v. Doyle*, 33 Kan. 721, 725, 7 Pac. Rep. 615; *Beebe v. Doster*, 36 Kan. 666, 14 Pac. Rep. 150.

The judgment of the court below will be reversed, and cause remanded, with the order that judgment be rendered in favor of the defendants below, and against the plaintiff below, for costs.

(37 Kan. 532)

CITY OF EMPORIA v. GILCHRIST.

(*Supreme Court of Kansas*. November 5, 1887.)

1. MUNICIPAL CORPORATIONS—AUTHORITY TO REPAIR STREETS—INTERFERENCE BY COURT.

Where municipal officers or boards are authorized by law to exercise their discretion and judgment in repairing streets and sidewalks, the courts, in the absence of fraud, ought not to interfere with their action, while they continue within the scope of the powers conferred upon them by law.

2. SAME—INJUNCTION TO RESTRAIN.

A sidewalk had been condemned as unsafe by the duly-constituted authorities of a city, and the owner of the property abutting upon the sidewalk failed to remove and rebuild it in the time given him under an ordinance of the city, after due notice that, unless he did so remove and rebuild within the time named, the city would do so at his expense. *Held* that, after the expiration of such time, the city is authorized to remove and rebuild in its own way; and *further held*, that an injunction ought not to be allowed against the city when it begins to remove the old sidewalk, for the reason that the material for the new one is not upon the ground ready for use.

(*Syllabus by Holt, C.*)

Commissioners' decision. Error from district court, Lyon county; CHARLES B. GRAVES, Judge.

The defendant in error, plaintiff below, commenced his action against the city of Emporia, to obtain an injunction against said city, forbidding it from removing the sidewalk in front of his livery barn in said city. On this sidewalk were two raised platforms or approaches extending from his barn to the street. He obtained a temporary injunction upon the sixteenth day of March,

and on the twentieth, by agreement of the parties, a motion was heard to dissolve such temporary injunction, before the judge of the Lyon county district court at chambers. On the hearing of the motion, the plaintiff admitted that the street upon which the lot of plaintiff below abutted was the property of Lyon county, Kansas; that this sidewalk had been built along the entire length of plaintiff's property, and that the platforms in question had, for a long time prior to the commencement of this action, been built across the sidewalk and into said street; that said street was one of the principal streets of the city, and that a great deal of travel passed over it; that, in the fall of 1885, a committee of said city on streets and alleys, having full power to inspect streets, alleys, and sidewalks, and to condemn the unsafe portions thereof, did duly inspect and condemn all of the entire sidewalk along and adjoining plaintiff's property, and duly reported such condemnation to the mayor and council in writing; that, at the time of said condemnation and report thereof, the said city had an ordinance, theretofore duly and legally passed and in force, authorizing such condemnation, and, upon notice thereof to the mayor and council, and further notice to the owner of the lot, the sidewalk so condemned could be removed, and a new one built in its place; that notice was duly given in accordance with the ordinance of said city to said plaintiff on the fourteenth day of December, 1885, and also notifying him that such sidewalk must be removed within two days, and must be rebuilt within thirty days, and if it was not so rebuilt by him, that the city of Emporia would build the same, and tax the cost thereof to his said property.

In addition to the admissions of the parties in this action there was oral testimony introduced establishing fairly the fact that these approaches were above the level grade of the sidewalk about 12 inches at the outer portion or curb of the sidewalk, and about 24 inches at the inside of the sidewalk, and against the barn in one instance, and in the other about 6 inches above at the curb, and 17½ at the inside of the sidewalk; that they are connected by a raised platform on the sidewalk, not so wide as the sidewalk; that it was necessary to make one step up in order to get upon the approaches; that they were in bad condition for any one to pass over, and were not considered very safe; that, in going towards the west, travelers had always been compelled to get up on the approaches by steps,—some went around in preference, and women with baby-carriages generally did so. It is also in testimony, and undisputed, that the only means of ingress and egress out of the barn were over these raised approaches across the sidewalk, and that the plaintiff ran a number of hacks, omnibuses, and baggage wagons, besides keeping buggies and horses for hire, and also private horses, and it was necessary, in order to get up to the floor of the barn, to have these raised approaches. It is shown also that when the plaintiff received his notice to remove the sidewalk and rebuild it, he made a contract with one, whose business it was to lay down sidewalks, to furnish him with stone, and such party had prepared a large portion of the stone necessary for the new sidewalk, but owing to the weather, had not delivered them; nor had the city any material on the ground to rebuild the sidewalk. The prayer of the petition of the plaintiff was that a restraining order be allowed, forbidding the said city from "tearing up and removing either of said approaches and inclines until the material for the construction of the proposed new sidewalk should be upon the ground ready to be placed."

W. A. Randolph, for plaintiff in error. *Buck & Feighan*, for defendant in error.

HOLT, C. The judge refused to dissolve the temporary restraining order. In this we believe he erred. From the admissions made by plaintiff on the trial, and the evidence introduced, it appears to be well established that the raised platforms or advances to the barn of plaintiff were obstructions to a free and safe passage along the sidewalk. The plaintiff himself, in giving

his evidence, says: "In getting up to the inclines, you step to the top of the curb, and then one step to the top of the incline," and "there was danger of one stumbling and falling, if he did not keep his eyes open."

The business interest of an individual ought not to be set above that of the public. The sidewalk was for the comfort and convenience of the public, generally, not alone for the benefit of plaintiff. From the testimony, it is shown that the inclines might have been built within the barn of plaintiff, (perhaps at some additional expense,) and, when completed, might not have been so convenient for plaintiff's use as they would have been if allowed to remain, yet they would have furnished a reasonably safe means of ingress and egress from his barn. After the notice had been served, he had ample time to prepare for such change.

The city, in accordance to its ordinances, had notified plaintiff that he must tear up and rebuild the sidewalk in front of his property, more than three months before it commenced to remove it. It was a much longer time than the ordinance required, and it was not only the right of the city under the ordinance to rebuild, but it was its duty, to see to it that a sidewalk pronounced unsafe should be replaced by a safe one.

Ordinarily, where municipal officers or boards are authorized by law to exercise their discretion and judgment in establishing or repairing streets and sidewalks, the courts, in the absence of fraud, will not interfere with their action, while they continue within the scope of the powers conferred upon them by law. In this case it appears that ample authority was given the committee by the ordinances of the city, and that they had good reasons for pronouncing the old sidewalk unsafe, and to order a new one built; and, under the evidence introduced, the court should not have interfered with the city in removing the sidewalk. High, Inj. 1270. It is not an argument worthy of consideration that, because the inclines had been there for a long time, for that reason they should be allowed to remain.

But the plaintiff says that there could have been no harm done to the public under the order of the court; that plaintiff only asked that they be restrained until the city had its material upon the ground ready to build the new walk before they removed the old one. We think there is not much force in this objection. The city has the right to build its own sidewalks in its own way, after it has given the lot-owner ample opportunity to put in the sidewalk abutting upon his property. If he fails to avail himself of the privilege extended to him by the city, by putting in sidewalks in his own way, within the time provided by the ordinance, then he cannot be heard to complain, if the city puts down the sidewalk in front of his property in a reasonable time.

For the reasons given herein, we recommend that the order of the district judge refusing to dissolve the temporary restraining order be reversed.

BY THE COURT. It is so ordered; all the justices concurring.

(37 Kan. 556)

MCNEALLY v. KEPLINGER.

(*Supreme Court of Kansas*. November 5, 1887.)

APPEAL—REVIEW OF EVIDENCE—MOTION FOR NEW TRIAL.

An objection to a judgment of the district court that it is not supported by the evidence, cannot be considered or sustained by the supreme court unless a motion for a new trial, founded on that ground, has been made and overruled in the district court.

(*Syllabus by the Court.*)

Error from district court, Allen county; L. STILLWELL, Judge.

Knight & Foust and Johnson, Martin & Keeler, for plaintiff in error. *L. W. Keplinger*, for defendant in error.

JOHNSTON, J. By this proceeding, Bruce McNeally seeks to obtain a reversal of a judgment rendered in favor of L. W. Keplinger by the district court of Allen county at its June term, 1885. The action was for the recovery of the N. E. $\frac{1}{4}$ of section 6, in township 26, range 21, situate in Allen county, alleged to be in the wrongful possession of McNeally, as well as for \$250 as damages for the unlawful detention of possession; and Keplinger prevailed. McNeally asserts a single ground for a reversal, which, in effect, is that the evidence is insufficient to sustain the allegations of the petition, and the judgment that was given. We cannot consider the question raised, because the plaintiff in error has not placed himself in a position to be entitled to a review of the same. He has never made or filed a motion in the district court asking for a new trial for that or any other reason. It has long and frequently been held that, to reverse a judgment on the ground stated, a proper motion for a new trial, founded upon that ground, must have been made and overruled. *Nesbit v. Hines*, 17 Kan. 316; *Rice v. Harvey*, 19 Kan. 144; *Fowler v. Young*, Id. 150; *Lucas v. Sturr*, 21 Kan. 480; *City of Atchison v. Byrnes*, 22 Kan. 65; *Holland v. Mudenger*, Id. 731; *Gruble v. Ryus*, 23 Kan. 195; *Pratt v. Kelley*, 24 Kan. 111; *Clark v. Imbrie*, 25 Kan. 424; *Kerner v. Petigo*, Id. 652; *Mills v. Lumber Co.*, 26 Kan. 576; *Hover v. Tenney*, 27 Kan. 133; *Decker v. House*, 30 Kan. 614, 1 Pac. Rep. 584.

The judgment rendered is warranted under the pleadings, and, as no error appears, it must be affirmed.

(All the justices concurring.)

(37 Kan. 554)

FORD v. PEARSON.

(Supreme Court of Kansas. November 5, 1887.)

APPEAL—ERROR NOT PRESUMED.

The supreme court cannot presume error; but, to entitle a party to a reversal of a judgment of a district court, he must affirmatively show that material error was committed.

(Syllabus by the Court.)

Error from district court, Allen county; L. STILLWELL, Judge.

Knight & Foust and Johnson, Martin & Keeler, for plaintiff in error. *L. W. Keplinger*, for defendant in error.

JOHNSTON, J. This was an action of ejectment brought by S. Pearson, in the district court of Allen county, to recover from John Ford the E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 34, in township 25, range 20, in Allen county, Kansas; and also for damages for its unlawful detention. In the second trial, Pearson obtained a judgment for the recovery of the land, together with \$200 as damages for the wrongful detention of the same. John Ford complains here that he was not given a second trial such as is authorized by the statute in actions of this nature upon a mere demand. He asserts that after the first trial was had, and pending a second trial, Pearson applied for leave to amend his petition by striking out of the description "township thirty-five," and inserting in lieu thereof "township twenty-five," and that this application was granted, over the objection of the defendant. He claims that the tract which was the subject of controversy in the second trial was a different one, and was situated 60 miles distant from the one involved in the original trial; and hence the refusal of his demand for a third, or what he would term a second, trial, was error. The record does not justify his claim. The record discloses that the petition originally filed placed the land in controversy in township 25, and not in township 35. It is shown that, after the first trial was had, the plaintiff asked and obtained leave to amend his petition by correcting the description; but the record does not state the correction that was made. No amended petition is embraced in the record; and the court, in giving judgment on the

second trial, adjudges that Pearson shall "have and recover of the defendant the real property mentioned in the petition;" and the petition originally filed, as we have seen, described the land as a part of township twenty-five.

The testimony on the first trial is not here, nor is there any statement in the record from which we can say that the first trial was concerning a tract of land in township 35. We cannot presume error. Before the plaintiff in error is entitled to a reversal, he must affirmatively show that material error was committed. *Bartlett v. Feeney*, 11 Kan. 593; *Brown Co. v. Roberts*, 22 Kan. 762; *Humphrey v. Collins*, 23 Kan. 549. This he has not done, and, from the pleadings and course of trial, we think that the real controversy in both trials was concerning the same tract of land. The nature of the action was such that it must be brought in the county where the land is situated. Township 25 is situated in Allen county, where the action was brought, while township 35 is 60 miles further south,—far beyond the limits of Allen county, and over which the court trying the case had no jurisdiction. In his answer the plaintiff in error admits that he is in possession of the land in controversy, and he did not amend his answer after the petition was amended.

We think the plaintiff in error could not have been prejudiced by the amendment made, and, there being no error shown, the judgment of the district court will be affirmed.

(All the justices concurring.)

(37 Kan. 487)

HOLLIS and another v. BURGESS.

(Supreme Court of Kansas. November 5, 1887.)

1. FRAUDS, STATUTE OF—CONTRACT FOR SALE OF LAND—WRITTEN CORRESPONDENCE.

A valid contract for the sale of land may be embraced wholly in letters written concerning such land; and it is not absolutely essential that the letters should be addressed by one of the contracting parties to the other.¹

2. SAME—DESCRIPTION OF LAND—EXTRINSIC EVIDENCE.

To answer the requirements of the statute of frauds, the written contract should describe the land sold with certainty; but it is not essential that the description should be given with such particularity as to make a resort to extrinsic evidence unnecessary.

3. SAME.

Where the land sold is described in the written contract as the "Snow Farm," and is commonly designated in the neighborhood where situated, and by all the parties to the contract, by the same name, and the court can without doubt, by the aid of extrinsic evidence, apply the description to the very land intended to be sold, held, that such agreement, being otherwise sufficient, will be enforced.

4. SAME—CONTRACT CONSTRUED—SPECIFIC PERFORMANCE.

The written agreement for the sale of land relied on in the present case examined, and held to be sufficiently certain, and one which should be specifically enforced.

(Syllabus by the Court.)

Error from district court, Norton county; W. H. PRATT, Judge.

Action for specific performance of contract to convey real estate. Trial was had by the court at the October term, 1885, and findings of fact and conclusions of law were made as follows:

"(1) That on the twenty-sixth day of January, 1885, and for a long time prior thereto, the said Solomon M. Hollis was the owner of the foregoing

¹As to what is a sufficient memorandum of a contract to satisfy the statute of frauds, see *Love's Ex'rs v. Welch*, (N. C.) 2 S. E. Rep. 242; *Doherty v. Hill*, (Mass.) 11 N. E. Rep. 581; *Elliot v. Barrett*, (Mass.) 10 N. E. Rep. 820, and note; *Higham v. Harris*, (Ind.) 8 N. E. Rep. 255; *Hastings v. Weber*, (Mass.) 7 N. E. Rep. 846; *Falmouth & L. T. Co. v. Shawhan*, (Ind.) 5 N. E. Rep. 408; *Welch v. Darling*, (Vt.) 7 Atl. Rep. 547; *Dunn v. Rothermel*, (Pa.) 3 Atl. Rep. 800; *Banks v. Manufacturing Co.*, 20 Fed. Rep. 667; *Wardell v. Williams*, (Mich.) 28 N. W. Rep. 796; *Camp v. Moreman*, (Ky.) 2 S. W. Rep. 179; *Insurance Co. v. Oliver*, (Ala.) 2 South. Rep. 445; *Webster v. Brown*, (Mich.) 34 N. W. Rep. 676; *Sheley v. Whitman*, Id. 879.

described land, situate and being in the county of Norton and state of Kansas, to-wit: The south-west one-quarter ($\frac{1}{4}$) of section number twenty-one, (21,) in township number two (2) south, of range number twenty-two (22) west.

"(2) This tract of land was also called by and known as the 'Snow Farm' by both plaintiff and defendants at, prior, and subsequent to said last-mentioned date.

"(3) Said land was subject to a mortgage duly executed upon it on and prior to said date, and still is so subject, in the sum of six hundred dollars, (\$600,) which remains wholly unpaid.

"(4) That on said date, and for a long time prior thereto, said Hollis was desirous of selling the land above described, and other land which he owned in Norton county, Kansas, and had at different times requested one Solomon Marsh, a resident of Norton county, Kansas, and a relation of the said plaintiff, to sell said land for him as his agent; the said plaintiff during all this time, and up to the present time, being a resident of Clay Center, Clay county, Kansas, and therefore unable to personally negotiate a sale of the lands to any parties in Norton county.

"(5) On the seventeenth day of January, 1885, the said defendant Solomon M. Hollis wrote a letter dated at Clay Center, Kansas, addressed to his agent, Solomon Marsh, at Norton, Kansas, in which letter Hollis stated as follows: 'Wish I could sell I. Burgess my land and stock and tools. I would sell cheaper now than I will ever again, as I am needing money; so, if he has any notion of wanting to buy such a place, let him write me his highest figures and best terms.'

"(6) This I. Burgess, named in this letter, is the plaintiff named in this case, and defendant Hollis meant plaintiff when he wrote said letter. The contents of this letter were made known to Burgess by said Marsh in reference to the sale of the land, stock, and tools as stated therein and as above quoted; and in answer to the same Marsh wrote Hollis a letter dated January 20, 1885, at Norton, Kansas, in which he stated: 'Ike Burgess says that your figures on the land are very much too high for him. He will look at the cattle, and let you know soon what he thinks.'

"(7) Again, on the twenty-second day of January, 1885, Marsh wrote to Hollis another letter in which he states: 'I have urged Ike Burgess to buy the Snow place of you; and he told me this morning, if I had a mind to write to you an offer for it of \$1,200, he would assume the mortgage of \$600, and give you \$600 in cash in thirty days. I have got his money borrowed for that length of time. Ike is about the only man that I know of that has got the money, and I tell you that they are all after him to get hold of it that has got land to sell. He is offered a place four miles from town. It is as nice a prairie claim as that Peterson claim that we looked at, right north of the Tom Brown land. It has eighty acres broke on it, and a good sod house, and he has a strong notion of buying it, but he will not be likely to do anything about it for a few days. Write as soon as you get this.'

"(8) In answer to this last letter of Marsh's to Hollis, Hollis, on the twenty-third day of January, 1885, from Clay Center, Kansas, writes as follows to Marsh:

"CLAY CENTER, KAS., January 23, 1885.
"Cousin Solomon: Yours rec'd. I hardly know just what to say about selling Snow place, but I think I would sell at the price, if Ike would keep what stock I may have left from March 1st to July 1st. Of course, I should sell before July if I could get a fair price. I will not say that I will sell in this now, as I want to talk with Mrs. Hollis about it, but you or he can write me what he will do.'

"(9) Upon the receipt of this letter by Marsh, Marsh read the same to Burgess, and acquainted him with the proposition of Hollis about the terms and conditions upon which he (Hollis) would sell the land. Burgess then notified Marsh that he would accept the offer so made by Hollis, and would pur-

chase the land of Hollis according to his terms, as stated in this letter, and instructed Marsh to so write to Hollis, which Marsh did, on the twenty-eighth of January, 1885. [This last letter was not introduced in evidence, and therefore the court cannot give more than the substance thereof as shown by the evidence.]

"(10) In answer to this last letter of Marsh's to Hollis, Hollis, on the twenty-sixth day of January, 1885, writes as follows:

" 'CLAY CENTER, KAS., January 26, 1885.

" 'Cousin Solomon: Your postal and letter at hand, and in reply will say that we will sell the Snow place; Burgess to pay \$500 within one month, and assume the mortgage, and keep my stock from March 1st to July 1st,—feed to be found until grass; he to salt and look after them, and take good care of them; he to have possession March 1st, or before, if D. Wood is willing. I would like very much if he can pay me \$150 or \$200 by February 10th. I have a note due by that time. Have plenty due me, or will have by that time, to pay what I owe, if I can only collect. We will make out deed, and put in F. N. Bank here, and they send Ike deed when payments are made, if this will do. Wood is to have hay and stalks or straw enough on place to keep the stock out to grass. Hope you will be able to sell the other place. I shall look to you somewhat, and expect that you will see that the stock is well kept, in case Ike buys.'

"(11) Marsh received this letter on the following day, January 27th, about 11 o'clock A. M., and about the same time made the contents thereof known to Burgess; and on the same day, by instruction and request of Burgess then given to Marsh, Marsh wrote Hollis the following:

" 'NORTON, KAS., January 27, 1885.

" 'Mr. S. M. Hollis—DEAR SIR: I have just received your letter. Ike accepts your proposition; and with regard to the \$150 that you spoke of, he says he will send you \$100, and you must try and get along with that till thirty days is up, and then it will be forthcoming, as I have all the money in my possession. If you do not want to send the deed to your agent, please hold it, or send it to Norton Co. Bank. You will find inclosed draft for \$100. With regards to the stock, I think Ike will take good care of them. I do not think you will lose any more of them, unless it is some of the calves at Thompson's. They are very poor, but I will do all I can to have them taken care of.'

"(12) On the twenty-seventh day of January, 1885, the defendant Solomon M. Hollis and James E. Alsop had a conversation at Clay Center, Kansas, in which Alsop told Hollis he (Alsop) would like to buy all of Hollis' land in Norton county, including the Snow farm, and all the cattle of Hollis' in Norton county, Kansas. In this conversation Hollis told Alsop that he expected that he had sold the Snow farm to Isaac W. Burgess, of having sent the letter of the twenty-sixth of January above described, and the terms and conditions of said alleged sale of the land to Burgess. And said Hollis and Alsop then and there entered into a verbal agreement that Alsop should purchase of Hollis all the land belonging to Hollis situate in Norton county, Kansas, including the Snow place, and also Hollis' cattle then in Norton county, Kansas. Hollis then, on said day, after having the conversation with Alsop, as above stated, sent the following message by telegraph to Marsh:

" 'CLAY CENTER, KAS., January 27, 1885.

" 'To Sol. Marsh, Norton, Kas.: I have sold my whole property in Norton county to-day.

[Signed] S. M. HOLLIS.'

"Afterwards, and on the same day, Hollis sent Marsh a letter as follows:

" 'CLAY CENTER, KAS., January 27, 1885.

" 'Cousin Solomon: No doubt but what you have received my telegram before this, and no doubt but what you were very much surprised when you received it. Alsop came down last night to buy me out, and made a good offer, and take land, stock, and tools. I held off for quite a while, hardly

knowing whether I had ought to sell, still wanting to close all out at once. Inasmuch as Burgess had come so near buying another place, even if it was a little disappointment to him, it would not make the difference to him that it would to me. I was anxious to get those cattle off my hands before any more of them should die. What trouble you have been to to sell for me, send in your bill. Another reason why I rather sell all out, I am getting more money to use and pay up, where I am owing, and it will make me feel better. If you have to pay for the dispatch from Edmund over, Alsop is to pay you. Jim says, tell you he expects to start for Norton to-morrow night unless too cold. Have not time to write more to-day.'

"(13) This dispatch and letter were received by Marsh on the twenty-eighth day of January, 1885, and the contents were on said day made known to Mr. Burgess. In answer to the dispatch and letter, Marsh wrote to Hollis as follows:

'NORTON, KANSAS, January 28, 1885.

"*Mr. S. M. Hollis*—DEAR COUSIN: I have just received your dispatch, and in reply will say that it will be impossible to mend what has been done here with reference to the sale of your land to Ike Burgess. He has already taken possession of the place; David Wood having given his consent for him to take immediate possession. He has a carpenter at work there to-day repairing the house, and positively refuses to give up the place, but is willing to comply with his part of the contract in every particular. I have acted as your agent, and attended to all of your business here in a straightforward manner, and I don't think it would be right for you to try to dispose of this place to any one else after having sold it to Burgess. It would not be justice to him or me. I hope you will consider the matter, and make him no trouble about it. With reference to the deed, you can deposit it in the F. N. Bank at Clay Center, send it to me, or send it to Norton County Bank. We will send all the money directly to you. If it will be any accommodation to have \$50 more paid before the tenth of February, let us know, and we will send it before that time and the balance within the time agreed upon.'

"(14) To this letter of Marsh's, Hollis on the twenty-ninth day of January, 1885, wrote as follows:

'CLAY CENTER, KAS., January 29, 1885.

"*Cousin Solomon*: Your three letters received; also draft for \$100, which I return to you. I am very sorry indeed to learn that Ike is bound to have place. As I wrote before, I thought, inasmuch as he had come within \$25 of buying another place, that surely it could be no damage to him, and that you would get my dispatch within about three hours of the letter, and that he would not care but little, if any. Another point I thought perhaps we might not agree upon; that was the interest on the mortgage,—there was nothing said about interest; I should not have been willing to pay interest. Again, selling land is different, according to law, from anything else. As I understand it, there is nothing binding about a sale of land until the papers or deed is signed. You can see just how it is. I was doing so much better to sell all out together, tools and all, that I hardly think you can blame me for what I done. If Ike has paid for a day's work improving house, if Alsop will not pay that, I will. No doubt but what Alsop is out there now, and I hope all will be settled without any hard feelings.'

"(15) In answer to this letter, Marsh on the thirtieth day of January, 1885, writes as follows:

'NORTON, KANSAS, January 30, 1885.

"*Mr. S. M. Hollis*—DEAR COUSIN: I have just received your letter, and draft for one hundred dollars which I sent to you on land for Burgess. I shall hold the money as your agent, subject to your order. I also have the other fifty dollars which you requested us to pay by the tenth of February, making \$150 (one hundred and fifty dollars) in all. The balance in full will all be paid within thirty days, as we agreed upon. With regard to the matter of interest you speak of, we understood, when we agreed to assume that mortgage, that legally we assumed everything connected with it. Burgess

has not only done one day's work on the land, but he has done several of them. He has got lawful possession of the place, and expects to hold it without a doubt.'

"(16) On the sixth day of February, 1885, by direction of Burgess, and at his request, Marsh sent to Solomon M. Hollis, at Clay Center, the sum of six hundred dollars in a registered letter, which amount was duly received by Hollis as payment for said land; which amount of money the said Hollis deposited in the First National Bank of Clay Center, Kansas, subject to the order of Sol. Marsh, where the same now remains.

"(17) On the tenth day of February, 1885, Hollis wrote Marsh the following letter:

'CLAY CENTER, KANSAS, February 10, 1885.

'*Cousin Solomon:* Yours of the 6th at hand. Having never sold my land to Ike Burgess, the money you sent is in the First National Bank of Clay Center, Clay Co., Kansas, deposited there subject to the order of Sol. Marsh. You can draw it at any time.'

"All of these letters were signed by the respective writers, and received by the parties in due time, and were all the correspondence and letters sent by the parties in reference to the matter of the alleged sale of the land called the 'Snow Farm.' After the conversation had between Solomon M. Hollis and James E. Alsop on the twenty-seventh day of January, 1885, referred to in finding of fact No. 12, the said Hollis and Alsop on the same day went into the office of M. M. Whiting, a notary public, at Clay Center, Kansas, and had the said Whiting write two deeds. One of these deeds was a conveyance of the Snow farm from Solomon M. Hollis and wife to James E. Alsop. Neither of such deeds was signed by Hollis or wife at that time, but such deed was signed and acknowledged by Hollis and wife on the second day of February, 1885, and was there delivered to Alsop, and by him filed for record in the office of the register of deeds of Norton county, Kansas, on the fourth day of February, 1885.

"(18) Neither Marsh nor Burgess consented to the placing of the said \$600 in the First National Bank of Clay Center, Clay County, Kansas, subject to the order of Sol. Marsh; nor have they, or either of them, ever in any manner ratified such act, but, on the other hand, recognized, and still recognize, the same as the property of Hollis.

"(19) Upon the receipt of the letter dated January 26, 1885, and set forth in finding of fact No. 10, and after the acceptance thereof, as set forth in finding of fact No. 11, Burgess went into possession of the said land by and with the authority and consent of Sol. Marsh, acting as the agent of Solomon M. Hollis. Burgess went into possession of the said land on the twenty-seventh day of January, 1885.

"CONCLUSIONS OF LAW.

"(1) That defendant Solomon M. Hollis entered into a definite and certain contract in writing with said Isaac W. Burgess, in which he agreed to sell the said Burgess, on certain terms and conditions, the south-west one-quarter (4) of section number twenty-one, (21,) in township number two (2) south, of range number twenty-two (22) west, situate in Norton county, state of Kansas, as alleged in plaintiff's petition herein.

"(2) That said plaintiff promptly made known to said Solomon M. Hollis his acceptance of said Solomon Hollis' proposal and agreement to sell said land to him, through his agent, Solomon Marsh, as well as his willingness and promise to comply with all the terms and conditions of the same.

"(3) That said Isaac W. Burgess has complied with and fully performed all the terms and conditions of said written contract that he was required therein to do and perform.

"(4) That said Solomon M. Hollis, after the making and executing the written contract aforesaid, and after the acceptance thereof by said plaintiff, Isaac W. Burgess, as aforesaid, and in violation of the terms and condi-

tions of the same, sold and conveyed the said land to the defendant James E. Alsop.

"(5) That the said James E. Alsop, at and prior to the time said Hollis conveyed said land to him, had full knowledge of the terms and conditions of the written contract entered into by and between said defendant Hollis and the plaintiff Burgess in reference to the sale of said land.

"(6) That said defendants, and each of them, have refused to convey said land to said plaintiff, according to the terms and conditions of said written contract, although often requested so to do by the plaintiff herein before this action was commenced, and still so refuse to do.

"(7) That the said Solomon Marsh acted as the agent of the said Solomon M. Hollis in negotiating the sale of said land to the plaintiff Burgess by request of said Hollis."

It was accordingly adjudged that the defendant James E. Alsop should convey all of his estate, right, title, interest, and claim in and to the land, and that in default thereof this judgment should have the same effect and operation, and that the defendants Hollis and Alsop should pay the costs of the action. Exceptions were taken by the defendants to the findings of fact and conclusions of law, and also to the judgment entered, and as plaintiffs in error they now bring the case to this court for review.

L. H. Thompson, for plaintiffs in error. *J. R. Hamilton*, for defendant in error.

JOHNSTON, J. The letters contained in the findings embody a definite contract to sell the land, and we think the court rightly held it enforceable. The correspondence between Hollis, the owner, and Burgess, the proposed purchaser, was carried on through one Marsh, who, to a certain extent, acted for each. The letters of Hollis addressed to Marsh relating to the land were intended for, and were communicated to, Burgess, and Marsh acted for Burgess in writing and transmitting his replies to the proposals made by Hollis. This was sufficient. "It is not essential that the letter should be addressed by one of the contracting parties to the other, since the statute of frauds is only concerned with the evidence by which an agreement is to be established." Pom. Cont. § 84. In the correspondence, Hollis made a definite proposal of the terms upon which he would sell, and Burgess made an unqualified acceptance; and the letters, considered together, embrace all the essential elements of a completed contract. It is true that the word "except" was used, in one instance, instead of "accept," but the connection in which the term was used made it manifest that it was intended to express an acceptance of the proposal. The misspelling of the word did not, and could not, mislead; and in fact the letters themselves show that Hollis understood and treated the term as an expression of assent.

The land which formed the subject of the contract was described in the letters as the "Snow Farm," and it is objected that the description is too uncertain. The general doctrine regarding the certainty of description required under the statute of frauds, contended for by counsel for plaintiff in error, is not questioned. It is not essential, however, that the description should be given with such particularity as to make a resort to extrinsic evidence unnecessary. If the designation is so definite that the purchaser knows exactly what he is buying, and the seller knows what he is selling, and the land is so described that the court can, with the aid of external evidence, apply the description to the exact property intended to be sold, it is enough. Fry, Spec. Perf. § 209; Pom. Cont. § 90. The property in controversy was commonly designated as the "Snow Farm." It was so known and spoken of by all the parties at the time of the negotiations, as well as before and since that time. The description could be connected with the land without difficulty, and no doubt or dispute could arise regarding either its location or extent.

Other objections for uncertainty are made to the mortgage which Burgess was to assume, and the stock which he was to keep for Hollis from March 1st to July 1st of that year. The plaintiffs in error inquire, what mortgage and what stock were intended? The correspondence clearly denotes that the mortgage referred to was a \$600 mortgage on the land, and, from anything that appears in the record, it was the only mortgage existing against it. This mortgage Burgess unconditionally assumed, and in doing so assumed the payment of all the debt which it represented and secured. It was shown and found at the trial that the land was subject to a \$600 mortgage which had been duly executed upon it prior to the date of the contract, and that the mortgage at that time remained due and wholly unpaid. In respect to the stock, they are referred to throughout the correspondence as those belonging to Hollis and which were being wintered in that locality. In one of the letters written by Hollis during the negotiations, and which contained a proposal to Burgess, the stock which he desired to have cared for are alluded to as all that he had left there. On the whole, we think that the identity of the stock intended was sufficiently definite.

A final objection on that ground was that the deed was to be placed in the "F. N. Bank" of Clay Center. From the letters there can be no doubt but what the First National Bank of Clay Center was the one referred to. Besides, the person or bank through whom, or the method by which, the deed should be sent to Burgess, can scarcely be regarded as an essential or substantive feature of the contract, and only such need to appear on the face of the writing required by the statute.

We are of opinion that the letters stated the parties to the agreement, the subject of sale, and the terms of sale, with such certainty as to furnish evidence of a complete agreement; but, if they failed to meet the requirements of the statute, Burgess must still prevail. It appears that after the contract was made he immediately went into the possession of the land, and he had made lasting and valuable improvements thereon, before he learned of the attempted repudiation of the contract by Hollis. The possession was taken and the improvements made in pursuance of the agreement; and, in addition to this, he made a partial payment of \$100 to the agent of Hollis. These acts were performed on the faith of the agreement that had been made, and constituted such a part performance as would take the case out of the statute of frauds. *Edwards v. Fry*, 9 Kan. 417. Having complied with all the conditions of the contract, Burgess is entitled to a specific performance.

The judgment rendered, however, must be modified in one particular. The contract was made by Hollis without his wife joining him in it, and only the contract made can be enforced. The inchoate interest of the wife was not included in the agreement, and the judgment should be so entered as to protect that interest. *Gray v. Crockett*, 35 Kan. 66, 10 Pac. Rep. 452. When so modified, the judgment will be affirmed.

(All the justices concurring.)

(87 Kan. 520)

BARNHART and others v. FORD and another.

(Supreme Court of Kansas. November 5, 1887.)

1. TROVER AND CONVERSION—JOINT TORT-FEASORS—EMPLOYEES.

Where three persons, acting together, wrongfully took the possession of and deprived the owner of several stacks of oats, and, in an action of replevin brought for the immediate possession of the property, all of the defendants filed an answer containing a general denial, *held*, that it is no defense for two of the parties that they acted merely as employees in the transaction for the benefit of the third.

2. REPLEVIN—CROPS RAISED ON GOVERNMENT LAND—DEFENSE OF FRAUDULENT ENTRY.

In an action of replevin, to recover the immediate possession of certain stacks of oats, the plaintiff offered evidence tending to prove that she had sown and harvested the oats on land of which she had been in possession several years. *Held*, that, in

such an action, the defendants had no right to show that the plaintiff had made a settlement and entry of the land for the benefit of her father, and therefore that her possession was fraudulent as against the government.

(Syllabus by the Court.)

Error from district court, Neosho county; L. STILLWELL, Judge.

John Hall, for plaintiffs in error. *Cox & Stratton*, for defendants in error.

HORTON, C. J. Action by Laura and W. C. Ford, against John, Orin, and Joel Barnhart, for the immediate possession of one large stack of sheaf oats, of the value of \$70; one small stack of sheaf oats, of the value of \$3; and another small stack of sheaf oats, of the value of \$2. Joel and Orin Barnhart filed an answer containing a general denial. John Barnhart filed an answer containing a general denial, and also alleging that he was the owner of the oats described in the petition. To this the plaintiffs filed a reply, denying that he had any ownership or interest therein; trial before the court, with a jury; verdict for the plaintiffs, that the defendant wrongfully detained the property from the possession of the plaintiffs, and assessing the value of the property at the sum of \$45. Judgment was rendered accordingly.

1. It is contended that neither Orin nor Joel Barnhart had the oats in their possession or under their control, therefore that Orin and Joel should have recovered their costs, and that the judgment against them should be reversed. One of the witnesses testified that Joel, John, and Orin Barnhart took the oats; that Joel employed one Mix to help take the oats; and that Joel and Orin assisted John to take them. The evidence also shows that, when a demand was made upon Orin for the oats, he replied, "I won't if the rest don't;" that, when Joel was asked to return the oats, he came at the person with a chair, and said "he wanted him to go away." Laura Ford testified that she asked Joel, when she demanded the oats, if he could not say "Yes" or "No," and he said "Go home." If the defendants below were not the owners of the oats, or entitled to possession thereof, this evidence was sufficient for the foundation of the verdict against Orin and Joel, as it appears that they acted in concert with John Barnhart in unlawfully depriving the owners of their possession of the oats. That they were acting merely as employees in the transaction for the benefit of John Barnhart, does not exculpate them. Again, when Orin and Joel were sued jointly with John Barnhart, they did not disclaim, but filed a general denial, and went to trial thereon. *Meixell v. Kirkpatrick*, 33 Kan. 282, 6 Pac. Rep. 241; *Railway Co. v. Montelle*, 10 Kan. 119; *Williams v. Townsend*, 15 Kan. 563.

2. It is urged that the court erred in excluding testimony to show that Laura Ford's possession of the land, where the oats were grown, was not in good faith, but that she was merely acting for her father in obtaining title from the government, because he could not enter the land. *Caldwell v. Custard*, 7 Kan. 303.

The plaintiffs below offered evidence tending to prove that Laura Ford took possession of the land in 1880, and still continues in possession thereof; that her father, W. C. Ford, sowed the oats in the spring of 1884 on the land upon shares. About eight acres of land was sown, and W. C. Ford was to give his daughter one-third of the crop. After the oats were grown, W. C. Ford harvested the same, and put them in stacks. John Barnhart attempted to take possession of a part of the land in April, 1883, and, with his brothers Orin and Joel, hauled the stacks of oats away after they were harvested. Before John Barnhart went upon the land, John Porter was residing upon a portion of it. At that time, Laura Ford had a house upon the premises next to the creek and near the school-house. At the time that Barnhart attempted to take possession of the premises, he understood that Laura Ford was claiming the land. Soon after he went there, he also heard that the land-office had

decided adversely to John Porter and in favor of Laura Ford's right to the claim. Porter turned over the premises to John Barnhart without any consideration. The court properly rejected the evidence tending to show that the settlement or entry of Laura Ford was for the benefit of her father. The controversy in the case was not as to the title of the land, but simply as to the possession thereof, and as to the ownership of the oats. The defendants below could not contest the right of Laura Ford to enter the land in this action.

As to the alleged misconduct of counsel in arguing the case to the jury, it is sufficient to say that the attention of the trial court was not called to any objectionable remarks at the time they were made. *Baughman v. Penn*, 33 Kan. 504, 6 Pac. Rep. 890.

We have considered the other errors alleged, but find nothing in the record prejudicial to the rights of the parties complaining; therefore the judgment of the district court will be affirmed.

(All the justices concurring.)

(37 Kan. 606)

ST. LOUIS, F. S. & W. R. CO. v. TIERNAN.

(*Supreme Court of Kansas*. November 5, 1887.)

1. CORPORATIONS—DIRECTORS OF RAILROAD COMPANY—POWER TO FIX AND PAY SALARIES OF OFFICERS.

The board of directors of a railroad company can, by resolution at one of their meetings, fix the salaries and order payment of the officers of the company, who commenced to work for the success of the enterprise at a time when the company had no funds, with a common understanding and agreement that, if they succeeded in building any portion of the road sufficient to produce a revenue, a fair compensation should be paid them out of the revenue so produced, and such compensation and payment being fixed and ordered paid, long after the services are performed. *Bank v. Drake*, 29 Kan. 311, cited and distinguished.

2. SAME—CORPORATE NOTE IN PAYMENT OF SALARY—NON-COMPLIANCE WITH BY-LAWS AS DEFENSE.

Where the board of directors of a railroad company, at a regular meeting, authorized and directed its promissory note to be executed by the president of the company, in payment of the salary of one of its officers, when a by-law of the company provided that it shall be drawn by the auditor to the president, etc., it is not a good defense to an action on the note, that there had not been a strict compliance with all the requirements of the by-laws, in the execution of the note. The services having been performed for the payment of which the note was issued by the company, any matter of form and not of substance ought not to defeat the recovery.

3. SAME—PROOF OF DIRECTORS' AUTHORITY—ERROR CURED.

The authority of the officers of the railroad company to execute the note having been put in issue by the sworn answer of the company, some preliminary proof of their authority should have been given before the note was read in evidence; but this error was cured by the subsequent introduction of evidence tending to show all the circumstances under which the note was executed.

4. SAME—ACKNOWLEDGMENT OF LIABILITY.

Part payment by order of the managing officer of a railroad corporation, of a claim of one of its officers for two years' salary, the payment having been made subsequent to the rendition of the service, is an acknowledgment of liability on the part of the company.

5. SAME—FIDUCIARY RELATIONS—PROMOTERS—SIGNATURE TO CHARTER.

A person who signs his name to the charter of a contemplated railroad company, some time before it is filed in the office of the secretary of state, does not by that act alone assume a fiduciary relation towards the projected corporation. A corporation has no existence until the date of the filing of its charter, and the persons named therein as directors for the first year assume or incur no obligations until it is filed.

6. SAME—PROMOTER OF RAILROAD COMPANY, WHO IS.

To constitute a person a promoter of a railroad corporation, it must affirmatively appear that he was acting for and in behalf of the proposed incorporation, or that he assumed to so act, and that, on the strength of this authority or assumption, the party complaining so dealt with him.

7. SAME—SALE OF ROAD-BED—PAYMENT IN CAPITAL STOCK.

The owners of a graded railroad bed, can sell the same to a railroad company, whose officers, directors, and stockholders are composed of the owners of the road-bed, and receive in payment therefor shares in the capital stock of the railroad company, at a time when those who sell the road-bed, and own and control the railroad company, are the absolute owners of all the stock issued by the railroad company, and where the terms of sale, and the issue of stock, are matters of record on the books of the railroad company, and when the transaction occurs months before any other or additional stock is issued by the railroad company.

6. EVIDENCE—PAROL, TO EXPLAIN ERROR IN CORPORATE RECORDS.

Parol evidence is admissible to show that a resolution of the board of directors of a railroad company, entered upon the record of their proceedings, did not correctly recite the amount of money found due and ordered to be paid to one of its officers.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Bourbon county; C. O. FRENCH, Judge.

On the tenth day of December, 1884, Francis Tiernan filed his petition against the St. Louis, Fort Scott & Wichita Railroad Company in the district court of Bourbon county in the words and figures following, to-wit:

"PETITION FOR MONEY ONLY.

"The plaintiff, for cause of action, says—

"(1) That the defendant is a corporation duly organized under and by virtue of the general laws of the state of Kansas. *Second.* That the defendant is indebted to this plaintiff upon a promissory note, of which the following is a copy, to-wit:

FORT SCOTT, March 10, 1882.

"One hundred and eighty days after date the St. Louis, Fort Scott & Wichita Railroad Company promises to pay to the order of Francis Tiernan, ten thousand dollars, value received, payable at the First National Bank, Fort Scott, Kansas, with interest from date at ten per cent. per annum, the same being for salary from February 3, 1880, to February 3, 1882.

"ST. LOUIS, FORT SCOTT & WICHITA R. R. Co.

"By A. M. AYERS, President.

"Attest: IRA D. BRONSON, Secretary.

[Seal—St. L., Ft. S. & W. R. R. Co.]

—"That said note was for salary as president and vice-president and general manager from February 23, 1880, to March 7, 1882, and by mistake the recital was as above set forth. Wherefore, plaintiff demands judgment on said note as against this defendant in the sum of ten thousand dollars, with interest at ten per cent. per annum from March 10, 1882.

"(2) And for a second and further cause of action this plaintiff says that the defendant is indebted to this plaintiff for salary as president and general manager of this defendant railroad company from March 7, 1882, to March 7, 1884, at an agreed and understood rate of five thousand dollars per year, and this plaintiff alleges that he was, and acted and performed the duties and services of president and acting general manager of said defendant railroad company during the whole period of time from March 7, 1882, to March 7, 1884, and that such services were well worth the sum of five thousand dollars per year.

"*Second.* And this plaintiff alleges that he has received from said railroad company, this defendant, at various times, the following sums and amounts of money, which he hereby credits and applies upon his account for salary from March, 1882, to March, 1884, to-wit:

By corn delivered in 1882,	-	-	-	-	-	\$	48	60
" " " 1883,	-	-	-	-	-		52	35
1883, cash received to settle Whittaker claims,	-	-	-	-	-		1,500	00
Oct. 21, 1884, cash on account,	-	-	-	-	-		3,000	00
Total,	-	-	-	-	-		\$4,600	95

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"Wherefore plaintiff demands judgment against the defendant in the sum of ten thousand dollars, with interest at seven per cent. on five thousand dollars from March 7, 1883, and interest on five thousand dollars from March 7, 1884, less said credit of four thousand six hundred and 95-100 dollars. Wherefore, plaintiff demands judgment against the defendant for fifteen thousand three hundred and ninety-nine and 5-100 dollars with interest at ten per cent. per annum, from March 10, 1882, and costs of this action."

On January 10, 1885, the defendant filed its answer, in words and figures as follows, to-wit:

ANSWER.

"(1) The defendant, for answer to the first cause of action in plaintiff's petition set forth, says that the pretended promissory note therein set forth was not executed by this defendant and that A. M. Ayers, as president, and Ira D. Bronson, as secretary, of this defendant were not authorized by this defendant to execute the same, and that the same is not the note or obligation of this defendant.

J. H. RICHARDS,

"A. A. HARRIS,

"Attys. for Def't.

"*State of Kansas, County of Bourbon—ss.:* J. W. Miller, being duly sworn, says that he is the vice-president and general manager of the defendant herein, the St. Louis, Fort Scott & Wichita Railroad Company; that he has read and knows the contents of the foregoing answer; and that he verily believes the statements therein made are true.

J. W. MILLER.

"Sworn to and subscribed before me this eighth day of January, 1885.

[Seal.]

"J. S. WEST, Notary Public.

"Commission expires March 17, 1885.

"(2) For a second and further answer to the first cause of action in plaintiff's petition set forth, defendant says that it is and has been a duly incorporated railroad company, under the laws of the state of Kansas, from and since February 23, 1880; that the plaintiff was one of its original promoters, incorporators, and directors, and has, from February 23, 1880, continuously remained a director, and is such now, having during all that time assumed and taken upon himself the duties of a director, and continued and acted as such; that on February 28, 1880, the plaintiff was elected president of this defendant, and acted as such to March 9, 1881, at which time he was elected vice-president and general manager, and so continued and acted as such to March 10, 1882; that on May 10, 1880, the plaintiff was elected a member of, and chairman of, the executive committee of the board of directors of this defendant; said executive committee being, by resolution of the board of directors, vested with the power of making contracts, transacting business, and appointing officers on behalf of and for this defendant, and from May 10, 1880, to March 10, 1882, said executive committee exercised such powers, and were during that time mainly the managing body of the corporation; that previous to March 10, 1882, no promise, agreement, or contract had been made by this defendant to or with the plaintiff to pay him any sum of money for his services as president, vice-president, director, or general manager; that he agreed to serve as such without the payment of any salary therefor.

"(3) The defendant, for answer to the second cause of action in plaintiff's petition set forth, admits the payment to the plaintiff of the sum of \$4,600.95 at the times therein stated; but defendant says that this sum of money was paid by the officers of this defendant without authority from this defendant, and when the plaintiff had no just demand therefor against this defendant, and that the plaintiff wrongfully appropriated the same to his own use; and, except as herein admitted, defendant denies all, each, and every allegation in said second cause of action set forth, and demands judgment against plaintiff for the sum of \$4,600.95, and interest from this date.

"(4) The defendant, for further answer to plaintiff's petition and for cause of action against him, says that this defendant was duly incorporated as a railroad company under and by virtue of the laws of the state of Kansas, on February 23, 1880, for the purpose of constructing and operating a line of standard gauge railroad from a point on the eastern line of said state, east of Fort Scott, in Bourbon county, to Kingman, in said state,—a distance of about 250 miles; and that, from the time of its incorporation up to this time, it has continuously exercised the rights, powers, privileges, and franchises of a railroad company, under the laws of the state of Kansas; that the plaintiff was one of its original promoters, incorporators, and directors, and has, from February 23, 1880, continuously remained a director, and is such now, having during all that time assumed and taken upon himself the duties of a director, and continued and acted as such; that on February 28, 1880, the plaintiff was elected president of this defendant, and acted as such to March 9, 1881, at which time he was elected vice-president and general manager, and so continued and acted as such to March 10, 1882; that on May 10, 1880, the plaintiff was elected a member of, and chairman of, the executive committee of the board of directors of this defendant, said executive committee being, by resolution of the board of directors, vested with the power of making contracts, transacting business, and appointing officers on behalf of and for this defendant; and from May 10, 1880, to March 10, 1882, said executive committee exercised such powers, and were during that time mainly the managing body of the corporation; that as such president, vice-president, general manager, member of, and chairman of, the executive committee of the board of directors of this defendant, the plaintiff was the managing and chief administrative officer of this defendant; that on January 12, 1881, the plaintiff and one A. M. Ayers, who was then a director and vice-president of this defendant, and one J. J. Franklin, who was then the treasurer of this defendant, purchased of one M. S. Carter the road-bed of what was theretofore known as the 'Fort Scott, Humboldt & Western Railroad Company,' in the counties of Bourbon and Allen in the state of Kansas, the same consisting of some grading which had been done some ten years prior thereto on a contemplated line of railroad between Fort Scott and Humboldt, but which had long been abandoned, the plaintiff, said Ayers, and Franklin, paying to said Carter therefor the sum of fifteen thousand dollars, which was the full value thereof; that on January 13, 1881, at a time when this defendant was greatly indebted beyond its ability to pay, and when very little, if any, of its line of railroad, had been constructed, the plaintiff and said Ayers wrongfully, fraudulently, and in utter disregard of the duties which, as officers and directors of this defendant, they owed to it, and by collusion with their associate officers and directors, and in fraud of the rights of this defendant, its stockholders, bondholders, and creditors, the public, and the state of Kansas, procured their said associate officers and directors to purchase of them the said road-bed so purchased of said Carter; the plaintiff and said Ayers having previously, on November 12, 1880, procured the passage of a resolution to that effect at a meeting of the board of directors of this defendant, at which the plaintiff and said Ayers were present, and in which they participated and voted in favor of said resolution. As the purchase price of said road-bed, the plaintiff, said Ayers, and Franklin procured to be paid to themselves of the moneys of this defendant the sum of two hundred thousand dollars, the same having been finally paid to them June 12, 1882. In addition to the said sum of money so paid to them as aforesaid, the plaintiff, said Ayers, and Franklin, procured to be issued to themselves three million six hundred thousand dollars of the capital stock of this defendant; the plaintiff receiving as his share of the money so paid the sum of sixty-six thousand six hundred and sixty-six dollars, sixty-six and two-thirds cents, and of the capital stock of this defendant the sum of one million two hundred thousand dollars. This defendant received no other

consideration for said sum of money so procured by said parties to be paid to themselves, and the capital stock of this defendant, so procured by them to be issued to themselves, than the said road-bed so purchased by them of said Carter. This defendant further says that its capital stock, at the time it was so procured by the said parties to be issued to themselves, was of the value of one hundred cents on the dollar. Wherefore defendant prays judgment against the plaintiff, for the value of said money and capital stock, in the sum of three million eight hundred thousand dollars. Wherefore upon all causes of action hereinbefore stated in favor of the defendant and against the plaintiff, the defendant prays judgment against the plaintiff for the sum of three million eight hundred and four thousand six hundred dollars and ninety-five cents, (\$3,804,600.95.)"

Afterwards, and within the time required by law, the plaintiff filed his reply to defendant's answer, in words and figures as follows, to-wit:

"REPLY.

"The said plaintiff, for reply to defenses numbers 1 and 2, in defendant's answer herein, says that he denies each and every allegation therein contained. For reply to defendant's answer number 4, filed herein, plaintiff denies each and every allegation therein, except as herein specifically admitted, and plaintiff says that he and A. M. Ayers and J. J. Franklin were the owners of the road-bed and old grade of the Fort Scott, Humboldt & Western Railroad Company prior to the organization of this defendant railroad company; that, upon the organization of this present railroad company, defendant herein, it was found desirable and necessary by it for the success of this defendant corporation in building its proposed line of railway, to acquire said road-bed of the Fort Scott, Humboldt & Western Railroad Company, and upon a fair and full presentation of all the facts in the case to the board of directors of this defendant, and without any fraud or collusion, or underhand proceeding whatever this plaintiff and his associates did sell the same to the railroad company, this defendant, for the notes of this defendant in the sum of two hundred thousand dollars, and for a majority of the stock of this defendant company to the nominal amount of its face value of three million six hundred thousand dollars; that said notes at that time had no value whatever, and only could become of any value upon the success of the railroad company in building its road; the said stock had no value at the time of said sale, and has no market value now, and never had any value except for the purpose of securing the control of the railroad of the defendant; that only a portion of said notes have ever been paid; that said company, this defendant, only paid a fair price for said old road-bed, and the transaction was a fair and valid one in all respects, and was known to, and ratified, and affirmed by all the stockholders of the defendant corporation. And for a further reply to said answer number 4, this plaintiff says that more than two years have elapsed since said transaction up to the bringing of this suit. And for a further reply this plaintiff says that more than three years have elapsed between said transaction and the bringing of this action. And for reply to the third defense set up in defendant's answer, plaintiff says that he denies that the payment therein admitted and set forth was the unauthorized and mistaken act of the officers of this defendant, but was a duly-authorized payment on account by this defendant to this plaintiff upon account, and for the purpose of being so applied, upon a due presentation of an account for services made by this plaintiff upon the defendant. Wherefore plaintiff demands judgment as in his petition."

Afterwards defendant filed a denial of plaintiff's reply, in words and figures as follows, to-wit:

"DENIAL OF PLAINTIFF'S REPLY.

"Defendant, with reference to plaintiff's reply to count number 4 of defendants answer, denies all, each, and every allegation in said reply contained, save and except in so far as the same are admissions of the allegations of said count number 4, and of defendant's right to recover of plaintiff for the cause of action therein stated."

On October 5, 1885, the defendant, by leave of court, filed an amendment to its answer, which is as follows:

"AMENDMENT TO ANSWER.

"(1) Defendant, by leave of court, first had and obtained, files this, its amendment to its answer herein, and says that the plaintiff signed the articles of incorporation of the defendant, and became a director thereof, on the nineteenth day of January, 1880, and from that time, up to the time of filing said answer, continuously remained and acted as a director of the defendant. (2) That the plaintiff, Ayers, and said Franklin paid M. S. Carter the \$15,000 for the road-bed of the Fort Scott, Humboldt & Western Railroad out of the moneys belonging to this defendant."

The cause was tried at the September term, 1885, by the court, without the intervention of a jury, by agreement of parties, upon the pleadings, as hereinbefore set forth. The court decided the issues in favor of the plaintiff, and rendered a judgment in his favor, the journal entry of which is as follows:

"JOURNAL OF THE DISTRICT COURT OF BOURBON COUNTY, KANSAS, OCTOBER 5, 1885.

"*Francis Tiernan, Plaintiff, vs. St. Louis, Fort Scott & Wichita Railroad Company, Defendant.*

"Now, at this day, this cause came on for hearing and trial by the court, both parties waiving the intervention of the jury. The plaintiff appeared by E. M. Hulett and J. D. McCleverty, his attorneys, and the defendant by J. H. Richards, A. A. Harris, and J. H. Sallee, its attorneys; and the court, having heard the evidence and arguments of counsel, and considered of the same, finds upon the issues joined herein, in favor of the plaintiff, and against the defendant, and that the plaintiff is entitled, in accordance with the allegations and prayer of his petition, to have the note sued on reformed as prayed for, and for judgment upon both counts of said petition. It is, therefore, by the court considered, ordered, and adjudged, that said plaintiff have and recover of and from the said defendant the sum of twenty thousand and one dollars and fifty cents, and his costs, to be taxed herein; and execution is awarded herefor. It is further ordered that of said judgment the sum of thirteen thousand six hundred and fifty-three and 30-100 dollars shall bear interest at the rate of ten per cent. per annum, and the sum of six thousand three hundred and forty-seven and 20-100 dollars shall bear interest at the rate of seven per cent. per annum. To said finding and judgment, and to each and every part thereof, the defendant duly excepted and excepts."

On the same day, to-wit, October 5, 1885, the defendant filed its motion for a new trial of said case, which is in words and figures as follows, to-wit:

"MOTION FOR NEW TRIAL.

"Now comes the defendant and moves the court to set aside the judgment rendered herein, and to grant a new trial in this action, for reasons as follows: (1) The said judgment and decision is contrary to law. (2) The said judgment and decision is not sustained by sufficient evidence. (3) Errors of law in the rejection and reception of testimony, prejudicial to the defendant, occurring at the trial, and excepted to by the defendant at the time."

And thereupon, on the same day, to-wit, October 5, 1885, the said motion for a new trial coming on to be heard, the court overruled and denied it; and the journal entry overruling said motion is as follows, to-wit:

"JOURNAL OF THE DISTRICT COURT OF BOURBON COUNTY, KANSAS, OCTOBER 5, 1885.

"*Francis Tiernan, Plaintiff, vs. St. Louis, Fort Scott & Wichita Railroad Company, Defendant.*

"Now, on this fifth day of October, this cause came on to be heard on the motion of defendant for a rehearing and a new trial of this action, and the court, after having heard the arguments of counsel, and being fully advised in the premises, does overrule and deny said motion, to which ruling of the court the defendant duly excepted and excepts. And thereupon, on motion of the defendant, sixty days are given defendant to make and serve on plaintiff's counsel a case made for the supreme court, and ten days thereafter are granted to plaintiff's counsel to make and serve on defendant's counsel amendments thereto, and five days thereafter are granted to defendant to present said case to the judge of this court for signing, settlement, and allowance."

J. H. Richards, A. A. Harris, and J. H. Sallee, for plaintiff in error. J. D. McCleverty and E. M. Hulett, for defendant in error.

SIMPSON, C. The investigation of the important questions involved in this case has been much lightened and expedited by the very careful and judicious preparation of the cause for review in this court. The record of the case made is printed in large, clear type, supplied with a thorough and admirable index; the documentary evidence arrayed in the natural order for examination; and, in a word, everything has been done to lessen the labor of the court, and to render its discharge of duty easy and pleasant. We express the obligation of the court to counsel for plaintiff in error, for their care and skill in the preparation of the case for review here. Counsel on both sides have exhausted the sources of information on the legal questions involved, and left to the court nothing to complain of in this regard. Condensing the documentary and oral evidence into a brief summary, and reciting them in chronological order, the material facts are as follows: The note sued upon by the plaintiff below was executed by the president of the railroad company, and it was claimed that this was done in pursuance of a resolution of the board of directors, adopted at a meeting held on the tenth day of March, 1882. The authority of the president to execute the note is denied by a verified answer. As this is one of the most vigorously contested questions in the case, we pass it for the present.

The balance of the plaintiff's demand against the railroad company consisted of a claim for salary as president and general manager from March 7, 1882, to March 7, 1884, at an established rate of \$5,000 per year; and about this part of the claim there does not seem to be much controversy. The answer of the defendant below alleges that Tiernan and Ayers were promoters, incorporators, and directors of the railroad company, and that Tiernan was its president and active manager; that, while acting in that capacity, he and Ayers, on the twelfth January, 1881, purchased from one M. S. Carter a road-bed of a defunct railroad corporation, extending from Fort Scott to Humboldt, at its full value, for \$15,000, and then, in collusion with other certain officers and directors of the St. Louis, Fort Scott & Wichita Railroad Company, sold it to that company for the sum of \$200,000 cash, or its equivalent, and \$3,600,000 of the capital stock of said company; that this was done in violation of their obligations and duties as officers of said railroad company; that the stock was of par value,—and pray a judgment against Tiernan for \$3,804,600.95.

For some years before the organization of the St. Louis, Fort Scott &

Wichita Railroad Company, there had been graded a road-bed, with some bridges built on it, from Fort Scott to a little distance beyond Humboldt, by an organization known as the "Fort Scott, Humboldt & Western Railroad Company." The length of this road-bed was about 44 miles. The company that had graded the road-bed and built the bridges had failed, and one M. S. Carter had foreclosed a mortgage against it, and bid in its property, consisting of the road-bed and bridges, and had become the absolute owner. On the seventeenth day of February, 1880, Carter sold this road-bed to Francis Tiernan and Alexander M. Ayers, together with all maps and profiles in the possession or in the control of Carter, of said line of road between Fort Scott and Humboldt, and thence westward, or south-westward through the state of Kansas. The consideration of this sale was the sum of \$15,000, to be paid as follows: \$1,000 within 90 days, and \$14,000 within one year, and the additional agreement that the said Tiernan and Ayers were to commence within 30 days to procure the unsecured right of way over which the said road-bed or line of railroad was originally surveyed, established, and partially graded; and all deeds and contracts for the right of way, side tracks, and switches, depot grounds, tanks, and stock-yards were to be taken in the name of M. S. Carter, and were to inure to his benefit, and to be absolutely his, until Tiernan and Ayers paid in accordance with the terms herein specified; and Tiernan and Ayers agreed that within 90 days they would use their best endeavors to secure aid to said road, by procuring bonds to be voted by the various municipalities through which said line would pass, in Bourbon and Allen counties, and that all such aid procured in the construction of a railroad from Fort Scott to Humboldt, should accrue to the benefit of Carter and become his property, if they should fail to pay him as specified. The terms of this agreement were reduced to writing, and signed by the parties, on the seventeenth day of February, 1880. The first one thousand dollars was paid on the fourteenth of May following. On the twenty-third day of February, 1880, the charter of the St. Louis, Fort Scott & Wichita Railroad Company was filed in the office of the secretary of state. It was signed and acknowledged by Francis Tiernan and Alexander M. Ayers, in Champaign county, Illinois, on the twentieth day of January, 1880. On the twentieth day of February, 1880, the company was organized at Fort Scott by the election of Francis Tiernan as president; Alexander M. Ayers as vice-president; and Ira D. Bronson as secretary. On the seventeenth day of April, 1880, Tiernan and Ayers sold to John J. Franklin, of Philadelphia, one-third interest in the road-bed known and called the "Fort Scott, Humboldt & Western Railroad," commencing at Fort Scott and running to Humboldt, estimated distance 44 miles, for the consideration of \$25,000. Of that amount \$5,000 was to be paid as soon as Franklin could examine the title and approve it, and the sum of \$20,000 to be paid within eight months. When Franklin paid the \$5,000 he was to be elected treasurer of the St. Louis, Fort Scott & Wichita Railroad Company.

Some time during the month of May, 1880, the St. Louis, Fort Scott & Wichita Railroad Company made an agreement to purchase the old road-bed of the Fort Scott, Humboldt & Western Company, and it is this agreement that is hereafter referred to in the minutes of the meeting of the directors of the St. Louis, Fort Scott & Wichita Railroad, held on November 12, 1880. On the twelfth day of November, 1880, the directors of the St. Louis, Fort Scott & Wichita Railroad adopted a resolution approving and confirming the contract of Tiernan, Ayers, and Franklin of the sale by them, and the purchase by the company, of the road-bed, etc., ordering the issue and delivery of the stock and the execution and delivery of orders for cash, or first mortgage bonds, as provided in the agreement of sale. On the third day of December, 1880, Franklin sold to Ira J. Bronson all his right, title, interest, and claim in and to the St. Louis, Fort Scott & Wichita Railroad Company, and the old road-bed, etc. On the sixth day of March, 1881, at a meeting of the

stockholders of the St. Louis, Fort Scott & Wichita Railroad Company, the following resolution was adopted by a vote of all the stockholders present in its favor: "Be it resolved that all actions of the board of directors of the St. Louis, Fort Scott & Wichita Railroad Company, in relation to selling and disposing of the capital stock of said railroad, and receiving payment therefor in the manner and kind in which such payments were made, be, and they are hereby, approved and ratified." The road-bed was paid for by issuing to Francis Kiernan, Alexander M. Ayers, and Ira J. Bronson, or his assignee, each \$1,200,000 of paid-up capital stock, and an order on the railroad company in favor of each one of these persons for \$66,666.66 $\frac{2}{3}$ in cash, or first mortgage bonds; but the order for cash or bonds was in no manner to become a lien on that part of the road running from Fort Scott to a point where it crosses the Kansas City, Lawrence & Southern Kansas Railroad in Allen county. At the time of these various transactions about the old road-bed, there had been no amount of the capital stock of the railroad company issued, the first being issued to one L. M. Bates of New York, in December, 1880. Bates was an assignee of Ira J. Bronson, for a part of Bronson's share of the stock of the purchase of the road-bed.

On this state of facts, supplemented by the other acts of the parties that will be noticed hereafter, the contention of counsel for plaintiff in error is: *First.* Tiernan was president, general manager, and chairman of the executive committee for two years, during which time no agreement existed whereby he was to be paid for his services; and, at the end of that time, he and his associate directors could not legally vote him a salary for services theretofore rendered. *Second.* Ayers, Bronson, and Hill were, respectively, vice-president, secretary, and superintendent of the company during the time Tiernan was president. No contract or agreement had been made whereby they were to be paid a salary, nor no resolution or by-law had been adopted to that effect. At a meeting of the directors, at which Tiernan, Ayers, Hill, Bronson, and another, who was a subordinate officer of the company, only were present, and no notice of the meeting had been given to the absent directors, a resolution could not be legally adopted allowing salaries to Ayers, Bronson, and Hill for services theretofore rendered, and authorizing the execution of the company's notes therefor. *Third.* The by-laws of the company, adopted by the stockholders at meeting regularly called for that purpose, provided the manner in which the company's notes should be executed, and persons who were both stockholders and directors, and who had favored the adoption of such by-laws, could not ignore them, and procure the company's notes to be executed to themselves, in a manner different from that prescribed in the by-laws. *Fourth.* Tiernan and Ayers, occupying the positions hereinbefore recited, bought in an old road-bed that the company needed for \$15,000, and for the purpose and with the intention of selling it to the company, with an agreement among themselves, Bronson, and Hill, to divide the profits of the transactions, sold it to the company for \$200,000 cash and \$3,600,000 of the company's capital stock, and then carried out their agreement about the division of profits. The company is entitled to recover of Tiernan the difference between the price paid by him and Ayers for the road-bed and that at which they sold it to the company. *Fifth.* Tiernan and Ayers did not disclose to any of their associate directors, except Bronson and Hill, the price paid by them for the road-bed, and the other five directors had no knowledge on that subject. Such a transaction will not be upheld when it is challenged in a proper action by the company. *Sixth.* Tiernan took \$3,600,000 of the company's capital stock in the manner above set forth, and in a proper action by the company he is answerable to it for the par value of the stock, and that judgment should be rendered against him accordingly. *Seventh.* Tiernan was a director from the time of the organization of the company down to the time of the commencement of the action to recover for

the matters hereinbefore referred to. And as, during all that time, he was trustee for the company, statutes of limitation did not commence to run as long as that relation continued.

Contentions as to the Note. Numerous questions arose on the pleadings and at the trial, with reference to the authority of the board of directors of the railroad company to execute the \$10,000 note set forth as the first cause of action in the petition of the plaintiff below, and they are as follows:

First. It is claimed that after services had been performed by Tiernan as president of the company, without any express agreement as to their value and payment, the board of directors could not legally vote him a salary for past services. We do not think this objection fairly states the facts in this particular case, for this reason: that there is in the record some evidence tending to show that there was a common understanding among those persons who were actively engaged in the work of the company, that they were to receive compensation for such services. It is true that the record does not disclose any affirmative action by the governing body of the company, at the commencement of these services, or for a long time thereafter, declaring a liability and providing a measure of compensation in respect to them, but the fact remains that they all went to work with a common understanding that if their united efforts were successful, and anything substantial resulted from their labors, fair pay for labor performed would follow. It must be recollected that the only capital this railroad company possessed at its birth, and in its earlier struggles for existence, was the energy and capacity of Tiernan, Ayers, Bronson, and Hill. They necessarily reserved the question of compensation for the future to be settled and determined by the success attained; for, without their labors resulted in the construction and equipment of a railroad, there would be no revenue produced sufficient to pay expenses or salaries. If their projected road became an accomplished fact, the measure of compensation was to be determined by the degree of success. If there is any one thing more manifest in the record than all others, it is the tireless energy and wonderful management of these four men in the organization of the company, and the success of the enterprise. It may be fairly said that the resolution of the board of directors of the company, passed on the tenth day of March, 1882, allowing salaries to the persons therein named, was but expressive of the common understanding had at the commencement of the work, that they were to be paid a reasonable compensation for services rendered, whenever the success of the enterprise justified the payment.

This case differs from that of *Bank v. Drake*, 29 Kan. 311, in this respect, for in the reported case it was claimed on the part of the bank that when Drake was appointed cashier he had agreed to act without compensation. He was a large stockholder; he was allowed room in which to transact his private business, and space in the safe of the bank in which to deposit his valuable private papers; and because he owned a large share of the stock, and was allowed these other privileges and facilities for the transaction of his private business, he assumed the duties of cashier without other compensation. It is said in that case, (page 330:) "As this case goes back for a new trial, we desire to add, to guard against any misconception, that we do not agree with all the authorities heretofore cited as to the lack of power on the part of the directors to appropriate money in payment of the salary of the cashier or other officers, after the services have been rendered; and in cases where such cashier or other officer happens to be a director, we think the rule is, in the absence of positive restrictions, that an executive office like that of cashier is entitled to reasonable compensation for his services, and that the directors have power to fix the salary after the expiration of the term of office, and this, though the appointee is also a director, and continues to be such, while holding the independent office." We conclude therefore, that the board of directors had the power to pass the resolution of the tenth March, 1882, for the

reason that it only expressed a previous agreement, and that they had the right to award reasonable compensation to an officer for services performed, after they had been rendered. It is not necessary, in view of the fact that there is ample testimony in the record to establish the common understanding existing as to compensation, to sustain our ruling in the case by that of the *Drake Case*. The writer of this opinion has serious doubts as to the application of the rule in that case to the facts here presented, and is very decided in his conviction that such a rule can only be supported with reference to a class of appointive officers who have no control over the management and disposition of the property of a corporation. It is very clear that the learned judge who delivered the opinion in the *Drake Case*, and had considered all the cases now cited, had the distinction between managing and controlling officers and ministerial ones in mind, and that his remarks were made with reference to that distinction.

Second. It is insisted by counsel for plaintiff in error that the resolution of the board did not authorize the execution and delivery of a note of \$10,000 to Tiernan for his services. The answer of the company denied the authority of its officers to execute the note sued upon. The answer was supported by an affidavit, and, while this raised the other question disposed of above, this question still remains. The minutes of the proceedings of the directors' meeting held on the tenth day of March, 1882, recite that "whereas the salaries of A. M. Ayers, president, F. Tiernan, vice-president and general manager, J. D. Hill, superintendent, and Ira J. Bronson, secretary and treasurer, not having been heretofore fixed, therefore it is resolved that the salaries of each of said officers be and the same are now fixed at \$5,000 per annum, from the fourth day of March, 1881, to March 7, 1882;" and "whereas, there is due F. Tiernan, \$5,000 on said salary," etc., and "whereas, this railroad company is now unable to pay such salary, therefore be it resolved that the railroad company, by its president and secretary, at once execute and deliver its promissory note for the amount herein specified." Then follows a resolution pledging some Eureka township bonds to secure the payment of the note, but these are not material. It was under and by virtue of the authority of this resolution that the \$10,000 note sued upon was executed. The plaintiff below claimed that the record of the minutes, when rightfully understood, would show the amount recited to be due Tiernan as \$10,000, instead of \$5,000; that the intention of all present and participating in the meeting was to authorize the execution of a \$10,000 note, and that the record originally read \$10,000, but had been changed to \$5,000. They introduced the testimony of several witnesses upon this question, over the objection of the railroad company, and may fairly be said to have established this state of facts: that the original proceedings of the meeting were noted on loose sheets of paper, and afterwards transcribed from those loose sheets onto the record-book, and the explanatory evidence consisted of a book called the record of "Bills Payable," in which was recited the notes executed by the railroad company. These recitals were made up by the direction of Bronson, the treasurer, the entries being made a short time after the notes were executed. This book showed under the date of March 10, 1882: "Time 180 days." Drawer, "The St. Louis, Fort Scott & Wichita Railroad Company," in favor of "Francis Tiernan." Where payable, "The First National Bank of Fort Scott." Due, "September 6, 1882." Amount, "\$10,000." Bronson testified that he had in his possession the original short notes of the proceedings of the meeting, made on the day it was held, and as the transaction occurred. They read as follows, "March 10, 1882, board convened pursuant to adjournment. Present same as yesterday. Motion by Hill as to Malin bonds carried. Motion for salaries \$5,000 per annum. Motion as to note 180 days and Eureka bonds carried." Bronson produces a second paper, identifies it as his handwriting, but does not give a very satisfactory account of its origin. The contents of this paper are substan-

tially those of the first, except that the proceedings of the meeting are in greater detail. In this paper there is the statement that there is due Tiernan on his salary, the sum of \$10,000. It was first inserted in figures \$5,000, and that is crossed out by parallel lines being drawn over it with a pen, and followed by the figures, \$10,000. Herrick, a clerk of Bronson's, who transcribed the minutes from these loose papers into the record-book, testifies that he had first written, "whereas there is due Tiernan on his salary, \$10,000," and had subsequently erased \$10,000, and written \$5,000, but that he had no recollection positively why the change was made, and that the erasure could be seen from the under side by looking through the leaf. Hill, who introduced the resolution about the salaries testified that the object and purport of the resolution was to fix the salaries of these officers at \$5,000 per annum for each year, for all the time past, and all the time to come in the future.

This is enough of the evidence to show the character of the objection to its introduction made by the railroad company. This object is twofold. In one of its features it is technical, being confined to the admissibility of parol evidence to vary, contradict, or impeach the record. The other feature goes to the authority of the board of directors to execute the notes of the company except in the manner and under the conditions prescribed in its by-laws. On the first feature or reason given to sustain the objection, we think reason and authority alike concur in affirming the ruling of the trial court. That parol testimony is admissible for the purpose for which it was issued in this case, is manifest from the decision of this court in the case of *Troy v. Railroad Co.*, 11 Kan. 519; and this on the theory most favorable to the plaintiff in error—that the record-book absolutely stated that the amount due was \$5,000.

The precise contention here is, what did the record say,—\$5,000 or \$10,000? Herrick says that it was first written \$10,000, and then changed to \$5,000, and this leaves the question as to what are the facts an open one. Official bodies, such as the board of directors of a railroad company, have the same right as courts of record to make their journals speak the truth; or, if a question arises as to just what facts the record does state where it contains erasures and interlinations, what did transpire, and was attempted to be recorded, can be established, to aid in the construction of the recitations on the record. We are not disposed to disturb the finding of the trial court in this respect, necessarily included in the general judgment rendered in favor of the plaintiff below, because it seems to have been amply justified by the evidence introduced, and this evidence is reinforced by the strongly suggestive fact that on the very day that this resolution was adopted, the note was executed for \$10,000.

The other ground of objection can be stated in a few words. A by-law of the company adopted at a meeting of the stockholders, provided: "If cases arise in which it may become necessary to issue the notes of the company, instead of its acceptances, such shall be drawn by the auditor, to the president, or vice-president, countersigned by the treasurer, and a proper record made of their maturity by the latter officer." Who shall determine, when it shall become necessary to issue the notes of the company, but the governing body,—the board of directors? Then the objection goes, not to the authority of the board, but the mere form of the note. It is objected to because not drawn in accordance with the requirements of the by-laws. It is in effect, saying, we will not pay this paper because it is not in exact accordance with the form we have prescribed for our notes. We suppose that in the absence of any by-law prescribing the form, or authorizing the issuance of promissory notes of the corporation, if it become necessary in the transaction of the ordinary business of the company, the president, by the order of the board of directors, could execute the promissory note of the corporation for a valuable consideration, and as this objection is clearly technical, and goes to the form, and not to the substance, it ought not to be allowed to bar a recovery. The execu-

tion of the note is the act of the company, done in pursuance of an order made at a meeting of its directors, made in accordance with an agreement between its creditors and the company, delivered because the company had not the money to pay for services rendered, and for which payment was due and ought to have been made; and the company ought not now to be allowed to say we will not pay this company's note because it is not drawn in strict conformity to the company's by-laws. Even a cursory glance at the two authorities cited by counsel, (*Samuel v. Holladay*, 1 Woolw 400; *Charitable Corp. v. Sutton*, 2 Atk. 400,) ought to have satisfied them that in those cases the court was considering matters of substance, and not of form. The question as to whether the facts existed that authorized the officers of a railroad company to execute its notes, is a different question from whether the notes are in the exact form prescribed in the by-laws or not. The first determines the existence of the notes; the other concedes the right to issue, but insists on a certain prescribed form. In *Samuel v. Holladay*, 1 Woolw. 400, the question was whether or not a deed of trust was void, because the meeting of directors at which it was executed was held without the notice prescribed for such meeting by the by-laws of the company. In *Charitable Corp. v. Sutton*, 2 Atk. 400, the officers of the company lent money on pledges, repeated loans on the same pledges, and on imaginary pledges, in violation of the by-laws.

Third. Another error assigned and urged for reversal is this: The court admitted the note to go to the jury when only the signature of the officers executing it had been proved, and this was done over the objection of the plaintiff in error. The authority of the officers of the company who had executed the note to make it was put in issue by the sworn answer of the company; and, under the state of the pleadings at the time of the trial, some preliminary proof of the authority of the officers to execute the note should have been given, before it could be permitted to be read. If this ruling stood alone, isolated from the other facts, and rulings of the court, it could not be sustained; but the error was subsequently cured by the admission of the parol and other evidence heretofore noticed, tending to show the power of the officers under the resolution adopted at the meeting on the tenth March, 1882, and hence the ruling complained of does not operate to the prejudice of the plaintiff in error.

This disposes of the first three contentions of the plaintiff in error.

As to the Two Years' Salary. Counsel for the plaintiff in error does not indulge in a very lengthy controversy about the two years' salary that constitutes the second cause of action in the petition of the plaintiff below, but what is said may be resolved into these two objections:

First. The resolution adopted by the board of directors at the meeting held on the tenth March, 1882, did not fix the salary for the future.

Second. The payments made thereon, made by the auditor of the company, were without authority, and did not bind the company to make any further payments.

The proper solution of the first objection depends upon the construction to be given the resolution of the tenth of March, 1882. Construing it in the light of the testimony of its author, and it appears that it was intended to fix the salary at \$5,000 per annum, for the past and for the future, and in the absence of all evidence it would seem that this was the natural inference from the words of the resolution. The salary is fixed at a definite sum per annum, and then, in view of all the other facts apparent on the face of this resolution, it is determined what is due for past services. Under and by virtue of this resolution, as it remained on the record of the proceedings of the board of directors, any person who had succeeded Tiernan in the office could have reasonably concluded that his salary was fixed at \$5,000 per annum. There does not seem to be any dispute but that Tiernan performed the services for the payment of which he seeks to recover, and as the record discloses that about

this time he sold out all the stock he had, and the others ceased to have any connection with the company, Tiernan could certainly recover the value of services performed at the rate established by the resolution, without there is some affirmative showing of a different agreement.

A very short statement will dispose of the second objection. Tiernan was performing the duties of president and general manager of the railroad company from March 7, 1872, to March 7, 1874. During this time he was paid in cash and articles prescribed, the sum of \$4,600.95. These payments were made by the auditor of the company, the last one of \$3,000, cash, being made on the twenty-first day of October, 1884, at a time long subsequent to the performance of the services. This payment was made by the order of one Miller, who was then vice president and general manager of the company, who gives the reasons that prompted the payment, in his testimony. A part payment is an admission of some liability. We think that the officers of the company, under the facts heretofore stated with reference to the resolution of the board of directors, had authority to make the payment, and that Tiernan is entitled to recover the balance due.

As to the Road-bed. (1) Some very important questions grow out of the purchase of the road-bed by Tiernan and his associates, and their sale of it to the railroad company. It is alleged in the answer of the railroad company that, at the time the purchase was made, Tiernan was one of the incorporators and directors of the company, and occupied such a position towards the company, that whatever dealings he had respecting the road-bed, resulted to the benefit of the corporation; or, if this is not so, then if he made the sale to the company while acting in the capacity of president and director, he was bound to disclose the price he paid; the profit he was making; and that the whole transaction must be characterized by fair, open, and unmistakable candor in all its features. The first question we shall discuss is, were the defendants in error, Tiernan and Ayers, corporate fiduciaries at the time they purchased the road-bed? They signed and acknowledged the charter of the St. Louis, Fort Scott & Wichita Railroad Company on the twentieth day of January, 1880, at Champaign county, state of Illinois. It was filed with the secretary of state on the twenty-third day of February, 1880. The contract of purchase of the road-bed was made on the seventeenth day of February, 1880. It thus appears that the road-bed was purchased before the railroad company had any existence. Section 10, c. 23, Comp. Laws Kan. (Dass.) 1885, (being the act concerning private corporations,) is as follows: "Sec. 10. The existence of the corporation shall date from the time of filing the charter, and the certificate of the secretary of state shall be evidence of the time of such filing." This express statutory declaration determines the fact that the railroad company had no existence prior to the twenty-third day of February. Important legal consequences flow from this determination. The legislature has prescribed the act that gives life to a corporation, and the date of the performance of that act is the birthday of its creation. From the moment of the filing of the charter with the secretary of state, the duties and obligations of those named as its first directors began. There could not have existed any fiduciary relations before that time, because there was no corporation in existence to create them. It is clear, then, that at the time they made the purchase of the road-bed, they were not directors, and did not occupy such a relation of confidence and trust to this railroad company, that this purchase was presumably for its benefit, or, by operation of law, resulted in its favor. All such theories and considerations are swept out of our pathway by the vigorous terms of the statute.

It is sometimes the case that parties who are dealing with each other about the organization of a corporation make such declarations, or give such pledges respecting its future creation, that causes of action arise between them that must be settled in accordance with the recognized rules of law, with reference to contracts, agency, or partnership. There is nothing developed in the rec-

ord that justifies the assertion that such causes of action arose against Tiernan and his associates on behalf of others who participated in the organization. We do not believe that any one would seriously contend for a single moment that there is such a statement of facts in the record that if Tiernan had refused to sell his road-bed to the railroad company it could have enforced the sale. To make him responsible in this action there must be an affirmative showing that at the time he made the purchase he was either acting for and on behalf of the company, or that he so assumed to act, or that he occupied such a relation of trust and confidence with respect to the company that his purchase resulted to its benefit, and not to his own profit. The first we regard as impossible, because at that time the company had no existence, and hence he could not have acted on its behalf or authority, and for the same reason he could not have assumed to act for a corporation when there was none in being.

(2) It is alleged in the answer of the railroad company that Tiernan was a promoter of the railroad company, and the same statement is repeated in the briefs with italicized vigor, and great stress seems to be laid upon the assumed fact. This word promoter had its origin in the methods by which joint-stock companies were formed in England, where by law they were declared partnerships. Subsequently, when the era of railroad building began in that country, the business of promoting the organization of such companies assumed definite form. The ordinary proceeding was this: The promoter introduces the enterprise to the notice of persons of wealth in the locality through which the line of the road is proposed to be located, informing them of its nature and prospects, furnishing an estimate of its probable cost. These persons were solicited to aid by their influence or subscriptions, or both. Enough persons were secured to constitute a provisional committee, and then this committee appoints from their number a managing committee, who issue a prospectus, announcing the nature and probable profits of the scheme, the proposed means to carry it out, the amount of capital required, the number and price of shares, and other details, to which is generally attached the names of the promoters, with references to the names of those persons constituting the provisional committees. If all this resulted in fair probabilities of success, application was then made to parliament for a bill of incorporation. If the scheme failed, the expenses incurred gave rise to litigation, and many questions as to the liability of these committees and of the promoters were determined. If the incorporation was secured by the action of parliament, then another class of questions arose as to what acts of the promoters could be ratified by, and what acts resulted to the benefit of, the incorporation, and many others growing out of the condition of affairs. That has no resemblance to our method of organizing corporations. It is true that the word has been found to have its uses in our jurisprudence, but in a much more restricted sense than that used in the English reports.

The American cases upon this subject are not very numerous and most all of them will be found in 16 Amer. Law Rev. 671, and in 1 Mor. Corp. 545. Assuming that a promoter is a person who organizes a corporation, and that he intends to sell its property, or to subscribe for its stock, or to take an active part in its management and business, let us inquire if there are sufficient facts recited in this record to determine that the fiduciary relation of promoter of this corporation was ever assumed by Tiernan, or if his acts in respect to its organization were such that a relation of this character could fairly be inferred. To start on, there is not one single word of parol testimony that can be fairly said to authorize an inference that Tiernan was the promoter of the corporation. It does not appear that he ever advised or suggested the organization of the company. In the next place, there is nothing in very many voluminous written instruments in the record that justifies any such inference. The charter itself would seem to rebut any such conclusion, so far as Tiernan was concerned, as it was signed and acknowledged by him in the

state of Illinois. There is nothing to justify the allegation in the answer of the railroad company, or the assumption of its counsel in their briefs, that Tiernan was a promoter of the company. There is, in the written agreement between Tiernan, Ayers, and Franklin, whereby a one-third interest in the road-bed purchased by them from Carter was sold to Franklin, an understanding on the part of Franklin that if Tiernan and Ayers wish to sell the road-bed to the St. Louis, Fort Scott & Wichita Railroad Company, Franklin will join in the conveyance of it to the company, if his share in the purchase money is not less than \$40,000; but this agreement was made on the seventh day of April, 1880, after the purchase by Tiernan and Ayers, and after the organization of the company, so that we cannot utilize this fact to establish a relation as existing before the railroad company had any corporate life. There is no evidence that Tiernan was a promoter.

(3) At the time of the sale of the road-bed to the railroad company Tiernan was part owner of the road-bed, and was a director and president of the railroad company; and hence it is very properly said that the sale must be a fair, open one in all respects, the price paid by Tiernan and his associates must have been disclosed to the directors of the company, and the whole transaction must not only be for the evident interests of the company, but it must have been conducted in all its stages in the utmost good faith on the part of the directors, and with a complete knowledge of the time when, the circumstances under which, and the exact amount paid by Tiernan, at the date of his purchase, to be relieved of that suspicion with which courts of justice universally regard a transaction in which the seller and the buyer is represented by one and the same person. It has been decided that a director is not prohibited from dealing with his company; he can sell them real estate or any other kind of property, but there are certain rules strictly applicable to him that do not operate upon a person entirely disconnected with the corporation, and these he must faithfully observe to make his contract of sale one that the law will uphold. *Hotel Co. v. Wade*, 97 U. S. 13; *Mor. Corp.* §§ 297, 521, 545; *Simons v. Oil Co.*, 61 Pa. St. 202; *Van Cott v. Van Brunt*, 82 N. Y. 535; *Parker v. Nickerson*, 137 Mass. 487.

It has been decided time and time again, that the owner of a mine, an oil well, or a valuable patent, can organize a corporate company to develop mineral, or oil, or to manufacture the patented article, take a very large amount of stock in payment of his mine, oil well, or patent, and trust to the value given the stock by the success of the corporation for payment of his labor and discovery. In this class of cases there is a mere transfer of the *status* of the mine, oil well, or patent. It ceases to be personal property, and becomes corporate property, and each individual interest, as well as that of the owner, discoverer, or patentee, is represented by shares of stock. It is now decided in this case that the owners of a graded railroad bed can sell the same to a railroad company whose officers and directors are composed of the same identical persons who own the road-bed, and issue the capital stock of the railroad company in payment thereof, at a time when those who sell the road-bed, and own and control the railroad corporation are the absolute owners of all the stock issued by the railroad company, and when the terms of sale and the issue of stock are matters of record on the books of the railroad company, and when this transaction occurs months before any other or additional stock is issued by the company; that parties owning an old railroad grade with culverts and some bridges erected thereon, and who organize, control, manage, and own a railroad company, whose stock at the time of the issue has no market, but only a nominal value, can transfer the railroad grade to the railroad company, and issue the stock of the company in payment therefor; they, and they alone, at that time, being the only persons interested in the road-bed, and in the railroad company. At the time of the sale of the railroad grade, or old road-bed, it was owned by Tiernan, Ayers, Brouson, and Hill, and they in fact constituted the railroad company. There were some other directors, but

the evidence is that just sufficient stock was placed in the name of the other directors to authorize them to act as such, and this transfer was but temporary, and for that sole purpose. This sale was ratified by the directors of the railroad company, and subsequently by the stockholders; but directors, stockholders, and owners of the road-bed were one and the same persons. By this transaction the value of the road-bed was represented by the stock of the railroad company, instead of remaining as the personal estate of the owners. At the time of the sale, and when the board of directors ordered the issue of the obligations and stock of the company in payment of the purchase price of the road-bed, the record affirmatively shows that all the persons who had any interest of any kind or character whatever in the railroad company, except Bates, the assignee of part of Bronson's stock, were Tiernan, Ayers, Bronson, and Hill. They owned the road-bed, they constituted the railroad company, they sold the road-bed to the railroad company, and took the stock of the railroad company in payment, at a time when witnesses on both sides concede that the stock had only a nominal value. The developments in this record abundantly show that the title to and possession of the road-bed was of great pecuniary benefit to the railroad company; it alone enabled the company to construct the first 50 miles of its road, and to make such a beginning that its future success and final accomplishment were assured. The record does not show that there has ever been any other stock issued by the railroad company, except small amounts to municipalities through whose territory the line was built, and that it is owned, managed, and controlled to-day by the amount of stock issued to pay for this road-bed.

Tiernan and his associates sold their stock to Gould, in August, 1882, for a consideration of \$100,000, so that now, so far as it appears, the value of the stock issued representing a completed road 150 miles in length is much less than the actual cost of the road-bed. The railroad company in this action represents this stock, and it seeks to retain it. It has the use and enjoyment of the road-bed, and wants to recover from Tiernan the par value of the stock, being the sum of \$3,600,000.

It is useless to pursue the discussion further, as it is not controlled or governed or affected in any degree by those self-evident equitable principles and unyielding rules of law that govern in all cases where persons sustain fiduciary relations to corporations, or to other persons, by reason of their being representatives of their pecuniary interests. This case involves the proposition as to whether or not the absolute owners of property can, when it seems to them to be to their profit, so change the relation of their property as to make it stock in a corporation. Whoever succeeded to the rights of Tiernan and his associates as the holders of the stock, did so with all the facts showing the sale and purchase of the road-bed and the issue of the obligations and stock of the railroad company spread upon its record, and have now no right to complain, however different the case might be if they had then an interest in the corporation. This same issue, in its most important features, has very recently been tried and decided by the circuit court of the United States for the district of Kansas, in the action of *Stewart v. Railroad Co.*, a manuscript opinion of Judge FOSTER's having been furnished us. Stewart brought his action to recover on several promissory notes issued by the railroad company, aggregating \$85,000. These notes constituted a part of the \$200,000 that was to be paid in cash, or its equivalent, for the road-bed, and a \$5,000 note issued to Hill for salary as general manager. The same defenses that are made here, were set up in that action. The circuit court rendered judgment for the full amount claimed by Stewart, overruled all the defenses, and discussed very many of the questions alluded to in this opinion, with the same result.

We see no material error in the record, and recommend that the judgment of the district court of Bourbon county be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

(37 Kan. 552)

STILES and another v. STEELE.

(Supreme Court of Kansas. November 5, 1887.)

1. NEGOTIABLE INSTRUMENTS—FAILURE OF CONSIDERATION—EVIDENCE—DIRECTING VERDICT.

Where the only defense to an action upon a promissory note is failure of consideration, and the testimony offered in behalf of the defendant has no tendency to establish that defense, or a proposition essential to the maintenance of the defense, it is the duty of the court to direct the jury to return a verdict for the plaintiff.

2. EVIDENCE—OPINION OF ATTORNEY AS TO TITLE TO LAND.

The opinion of an attorney regarding the title to a tract of land which he had examined, is not competent to show that the title claimed by one of the parties is imperfect.

(Syllabus by the Court.)

Error from district court, Shawnee county; JOHN GUTHRIE, Judge.

L. J. Webb and C. F. Spencer, for plaintiffs in error. *Case & Moss*, for defendant in error.

JOHNSTON, J. This was an action to recover upon a promissory note executed on November 1, 1883, by Frank G. Stiles and W. W. Manspeaker, in favor of Watson & Thrapp, for the sum of \$250, payable in one day after date, with interest at 12 per cent. per annum. Prior to the commencement of the action, the note was duly sold and transferred to the plaintiff, James W. Steele. The execution and delivery of the note was admitted, and the indorsement and sale were not questioned; but it was alleged, by way of defense, that the note was given in pursuance of a contract, whereby James W. Steele agreed to sell a tract of land to Francis L. Stiles for the sum of \$10,000, and the note was given as a part of the purchase price of the land sold. Among the terms stated in the agreement of sale, were that the balance of the purchase price should be paid within 20 days from the date of the agreement, or as soon as the deed was signed and delivered, and an abstract furnished showing a clear title in Steele. It was also conditioned that, in case the title was not shown to be perfect, or the first party failed to deliver the deed upon demand, then the \$250 paid on the purchase, and for which the promissory note in the suit was given, should be refunded. When the testimony was concluded, the court advised the jury that the defendants below had wholly failed to establish the defense set up, and directed a verdict in favor of the plaintiff for the amount shown to be due upon the note. This ruling is the ground of error assigned for the reversal of the judgment.

If the testimony submitted had no tendency to establish the theory of the defense, or a proposition essential to the maintenance of the defense, it was the duty of the court to direct the verdict. The defense was a failure in consideration, because Steele had not a good title to the land agreed to be sold, and, further, had failed to execute and deliver a sufficient deed to the proposed purchaser on demand. It devolved on the plaintiffs in error to show the title of Steele to be imperfect, or that he refused on demand to convey the land. An abstract of title was furnished by Steele immediately after the agreement of sale was made. This was taken by Stiles to attorneys for examination, and, after obtaining their opinion with respect to the title, he met and informed Steele that, judging from the opinion of his attorneys, he did not think the title was good. For this reason he denied liability on the note, and refused payment. The written opinion of his attorneys was offered in evidence, but as it was clearly incompetent to show imperfect title, it was properly rejected by the court. Even in the opinion rejected, the attorneys certify that Steele appears to have a good title to the land. They add, however, that, in an early conveyance of the land, the grantor was represented to be, and conveyed as, an unmarried man, while, in conveyances of other land made at other times, the same grantor conveyed with another, as his wife,

and it is suggested that, if he had a wife at the time the land in question was conveyed who is yet living, or had survived her husband, the title of Steele would be imperfect. The examiners, however, do not find or state that this grantor had a wife living when the conveyance first mentioned was executed and delivered. If, therefore, the opinion was competent and admissible, it furnished no proof militating against the title of Steele.

Taking all the testimony in the case, with all the inferences which the jury might properly draw from it, there was nothing to show that the title of Steele was not good. There was also an absolute failure of proof that Stiles demanded, and that Steele refused, the execution and delivery of a deed to the land. In that state of the case, there was nothing to go to the jury, and hence no error in directing a verdict. The judgment will be affirmed.

(All the justices concurring.)

(37 Kan. 523)

VAN HORN and another, Partners, etc., v. GREAT WESTERN MANUF'G CO.

(*Supreme Court of Kansas. November 5, 1887.*)

SERVICE OF PROCESS—ENTICING PARTY INTO STATE—SETTING ASIDE SERVICE.

Where a person, by fraud and deceit, inveigles another into the jurisdiction of the court, for the purpose of suing him, and of obtaining service of summons upon him in that jurisdiction, the summons and the service thereof should be set aside. Such an abuse of judicial process cannot be tolerated in any court of justice.¹

(*Syllabus by the Court.*)

Error from district court, Pawnee county; J. C. STRANG, Judge.

This was an action brought in the district court of Pawnee county, by E. R. Van Horn and Charles Van Horn, partners in trade and doing business under the firm name of Van Horn Bros., against the Great Western Manufacturing Company, of Leavenworth, Kansas, a firm consisting of John Wilson and D. F. Fairchild, to recover \$33,200 for alleged loss and damages. Service of summons was made upon Wilson in Pawnee county, and upon Fairchild in Leavenworth county. The defendants moved to set aside the summons and the service thereof, upon various grounds, among which were the following: No security for costs was given; the summons was not properly attested by any seal of the court; and the service of summons was procured by fraud, trick, device, and deception. The motion was heard by the court upon affidavits and oral testimony, and the court made the following findings and conclusions, to-wit:

"FINDINGS OF FACT.

"(1) That plaintiffs, Charles Van Horn and E. R. Van Horn, partners as Van Horn Bros., reside and do business in Larned, Pawnee county, Kansas; that defendants, John Wilson and D. F. Fairchild, partners as Great Western Manufacturing Company, reside and do business in Leavenworth, Leavenworth county, Kansas; that in 1881 plaintiffs purchased from defendants a large amount of milling machinery, supplies, etc., which were paid and settled for a long time prior to the commencement of this action; that in 1883 a small purchase was again made by plaintiffs, and paid for about the same time; that in 1883 and 1884, and not later than February 11, 1884, of that year, plaintiffs again purchased a large amount of such machinery and material, which latter account was closed up by plaintiffs; giving their note to defendants for the amount on June 17, 1884, due in six months.

"(2) That the flouring-mill of plaintiffs in Larned, Kansas, was not run

¹Where service of process upon a defendant is obtained by making false representations to him to induce him to come within the jurisdiction of the court, the service will be set aside. *Townsend v. Smith*, (Wis.) 3 N. W. Rep. 439. And the court held in the above case that, although the defendant might have entered a general appearance, the action should have been dismissed.

with the roller process, and that on October 20, 1884, plaintiffs wrote a letter to defendants of which the following is a copy:

"LARNED, KANSAS, October 20, 1884.

"*John Wilson, Great Western M. F. Co., Leavenworth, Kansas:* We have got to put in rolls to compete with this mill here, and the quicker we can get it done the better for us. We want you to come here and see us, and fix us up right, and we want Mr. Wilson to come in person, and not an agent or proxy. You can leave home on night train, and get here at noon next day, and leave here on 4 P. M., arrive home next morning. Telegraph what time you will be here. Respectfully yours, VAN HORN BROS.

"P. S. We run with gear before we changed."

—That in pursuance of said letter defendant John Wilson telegraphed the plaintiffs that he would arrive in Larned on Saturday, October 25, or Sunday, October 26, 1884; that Wilson did arrive in Larned on said Sunday, and on Sunday evening had a general conversation with plaintiff Chas. Van Horn, and they made an appointment to meet at Van Horn's office the next morning (Monday) to confer about their business; that they met the next morning, and conversed about three hours, during which time Van Horn informed Wilson "that defendants had, in 1881, 1883, and 1884, while furnishing the said material-supplies, etc., agreed to fix plaintiffs' mill so that it would make good flour, and compete with neighboring mills, and that the mill was a failure," and plaintiffs demanded compensation in a large sum, having been damaged; that Wilson said if that was what Van Horn got him to come to Larned for, he would talk no longer with him; thereupon Van Horn went out, and shortly afterwards Wilson was served with a summons in this case. Van Horn pointed him out to the officer. The summons in the case was issued about half-past eleven o'clock Monday morning, October 27, 1884.

"(3) That on Saturday, October 25, 1884, plaintiffs made preparations to institute this suit, and gave to J. K. Doughty, one of their attorneys, the items of their claims, as they now appear in the petition; that plaintiffs had also consulted W. H. Vernon, an attorney at law, about the suit, at least two days prior to Monday, October 27, 1884; that on Sunday, October 26, 1884, Mr. Doughty, to whom the items were given, drew up a draft of a petition on such items, and submitted it to Mr. Freeland, his partner, and attorney in this case, on the same day; that Mr. Freeland approved of it; that Mr. Doughty did not know on Sunday that defendant Wilson had arrived; that Doughty came to his office about half-past eight, Monday morning, and commenced work on the petition, which was filed in the case, and was preparing the papers while Van Horn was talking with Wilson.

"(4) That Wilson came to Larned from Leavenworth, believing that he would secure the contract for putting a roller process in plaintiffs' mill, and believed that such was the motive of plaintiffs in writing the letter, and he and his co-defendant did not know he was going to be sued, and did not know that plaintiffs claimed to have any cause of action for damages against the defendants before Van Horn made the demand of him on Monday morning, October 27, 1884; that plaintiffs never at any time wrote or otherwise communicated the fact of such a claim to defendants, or either of them, before said morning; that if Wilson had known of such claim, or that he would be sued, he would not have come to Larned; that, after he was notified of such claim, he did not have time to leave the county before the summons was served; that plaintiffs wrote the letter above copied for the purpose of procuring Wilson to come within the jurisdiction of this court for the purpose of suing him.

"(5) That, when the petition and *præcipe* in this case were presented to the clerk of this court for filing, Mr. Doughty also presented a bond for costs, signed alone by the plaintiffs; that the clerk told him that he considered the

plaintiffs good for the costs, but that he (Doughty) should get some surety on the bond in order to have it in form, and that he should consider the bond filed as of the date of issuing the summons; that afterwards, and some time between the fifth and fifteenth of November, 1884, J. W. Miller signed the bond as the sole surety therein, and the same was then presented to the clerk, and the filing and approval indorsements made by the clerk as of October 27, 1884; that no other security for costs has been given except as above mentioned; that said J. W. Miller is, and was at the several times above mentioned, a practicing attorney, resident in Larned, Pawnee county, Kansas; that as a fact the plaintiffs are financially able to pay the costs specified in the bond.

"(6) That the authenticating seal on the summons in this action is entitled 'Clerk of District Court, Seal, Pawnee Co., Kansas;' and it does not appear in the summons that no seal of this court has been furnished by the secretary of state to the clerk, but the court finds that no seal has been so furnished.

"CONCLUSIONS OF LAW.

"I find, as a conclusion of law resulting from the above findings of fact, that the service of summons in this case is void, and it is therefore set aside."

Upon the evidence, and the foregoing findings and conclusions, the court below sustained the defendant's motion, set aside the summons and the service thereof, and dismissed the plaintiffs' action; and the plaintiffs, as plaintiffs in error, bring the case to this court for review.

Freeland & Doughty, for plaintiffs in error. *Lucien Baker, Wm. C. Hook, and Nelson Adams*, for defendant in error.

VALENTINE, J. The only thing necessary to be done in this case is to affirm the judgment of the court below. No comment is really necessary. The plaintiffs, by fraud and deceit, inveigled one of the defendants, John Wilson, into the jurisdiction of the district court of Pawnee county, for the purpose of obtaining service of summons upon him in an action intended to be brought against him and his partner in that county. Such an abuse of judicial process cannot be tolerated in any court of justice. *Dunlap v. Cody*, 31 Iowa, 260, 7 Amer. Rep. 129; *Townsend v. Smith*, 47 Wis. 623, 32 Amer. Rep. 793, 3 N. W. Rep. 439; *Steele v. Bates*, 2 Aiken, 338, 16 Amer. Dec. 720; *Wood v. Wood*, 78 Ky. 624; *Williams v. Reed*, 29 N. J. Law, 385; *Wanzer v. Bright*, 52 Ill. 35; *Allen v. Miller*, 11 Ohio St. 374; *Hevener v. Heist*, 9 Phila. 274; *Metcalf v. Clark*, 41 Barb. 45; *Goupil v. Simonson*, 3 Abb. Pr. 474; *Baker v. Wales*, 14 Abb. Pr. (N. S.) 331. The decision of the court below, we think, is undoubtedly correct, both as to the law and the evidence. The decision was rendered upon a motion made by the defendants to set aside the summons, and the service thereof. The motion was heard upon affidavits and oral evidence. The appearance of the defendants was only special, and for the purpose of the motion only. No material error was committed by the court below. The testimony of the plaintiffs' counsel, introduced by the defendants, was properly received. It was virtually a cross-examination of the counsel with reference to matters set forth in their affidavits previously and voluntarily filed by them and their clients in the case. Besides, no proper objection was made to this testimony. The only objection that was made with reference thereto was made before the counsel were sworn, and not afterwards. Also, the most of this testimony was not with reference to confidential communications made between the counsel and their clients. The evidence rejected was not offered until long after the hearing was had; and it was then offered in the absence of the defendants and their counsel, and without notice to them. It was also incompetent. As the service of summons upon Wilson in Pawnee county was obtained wrongfully and fraudulently, and must be

set aside, so also must the service of summons upon Fairchild in Leavenworth county be set aside. *Brenner v. Egly*, 23 Kan. 123.

The judgment of the court below will be affirmed.

(All the justices concurring.)

(37 Kan. 472)

BEEBE v. WELLS.

(Supreme Court of Kansas. November 5, 1887.)

1. COSTS—STENOGRAPHER'S FEE—SERVICES NOT RENDERED.

Section 6, c. 189, Sess. Laws 1885, provides that a stenographer's fee shall be taxed in each case in the district court in any county in which a stenographer may be appointed. Such a fee must be taxed as costs in every case in such county, though the stenographer is not called upon to render any services in that particular case.

2. SAME—STENOGRAPHER'S FEE NOT A TAX.

When a stenographer's fee is taxed as a part of the costs in an action in which no services of a stenographer have been rendered, such an item is not a tax within the purview of section 1, art. 11, Const. Kan. It is a fee to the public, imposed for the purpose of adjusting on an equitable basis, as between suitor and the public, the expense of the administration of justice.

(Syllabus by Holt, C.)

Commissioners' decision. Error from district court, Chase county; L. HOUK, Judge.

Almerin Gillett, for plaintiff in error. Mills & Wells, for defendant in error.

HOLT, C. This action was tried at the December term, 1885, in the district court of Chase county. There is but a single question to be decided here, and that is whether the stenographer's fee of two dollars may be taxed and collected in an action wherein no stenographer is employed.

Section 6, c. 189, Sess. Laws, 1885, is as follows. "A stenographer's fee of two dollars shall be taxed by the clerk of the court as costs in each case in the district court in any county in which a stenographer shall be appointed, which, when collected, shall be paid in the county treasury." There is no condition in this section itself that requires the services of a stenographer to be rendered before the fee is taxed. Plaintiff in error contends this section is unconstitutional, being in contravention of section 1, art. 11, Const. Kan., which is that the legislature shall provide for a uniform and equal rate of assessment and taxation. He urges that the fee required from the suitor in each action is an arbitrary exaction to defray the salaries of public officers, which is a public matter, and should be borne by the general public by a general tax.

We have no inclination to controvert his argument against the policy of this law. We are simply called upon to examine and pass upon the question whether the legislature had the power to enact such a law, and have nothing to do with the policy of such an enactment. It will be noticed that the two dollars to be collected is called a fee, not a tax, although it is to be taxed by the clerk. We presume it will be admitted that the word "taxed" is here used in the sense of assessing, fixing, or determining the amount to be paid by the unsuccessful party in an action in court. This signification of the word "tax" is a familiar one in judicial proceedings.

The plaintiff urges, however, that it is an arbitrary exaction, for which no services have been rendered, and, though it may not bear the name, it is in reality a tax, and, being one, it lacks the essential elements of equality and uniformity. To support his claim he cites *Railroad Co. v. Howe*, 32 Kan. 737, 5 Pac. Rep. 397. In that case it was decided by this court that section 4, c. 124, Laws 1883, was in violation of section 1, art. 11, Const. Said section is as follows: "To provide a fund for the payment of the salaries and current expenses of the board of commissioners and secretary, the board shall

certify to the auditor of state, on or before the twentieth of May, in each year, the amount necessary to defray the same; which amount shall be divided *pro rata* among the several railroad companies, according to the assessment valuation of their property in the state; and the auditor shall thereupon certify to the county clerk of each county the amount due from the several railroad corporations located and operated in said county, and the county clerk shall place the same on the tax rolls of his county, to be collected the same as other taxes on railroad property; and the county treasurer shall account to the state for the same as provided by law for the other state funds: provided, that in unorganized counties the amount so found due from railroad companies therein shall be included in, and levied and collected with, such taxes as are levied and collected by the state from railroad companies located in said unorganized counties." Mr. Justice HURD, speaking for the court in that case, said: "We think that the taxation provided for in the fourth section of chapter 124 of the Laws of 1883 is a tax upon one class or species of property, to be collected from property in the same manner as taxes on personal property are collectible within the state; and that the section aforesaid, authorizing the levy and collection of such taxes, is in conflict with section 1 of article 11 of the constitution, providing for a uniform and equal rate of taxation. * * * It is evident that the legislature regarded this tax as a property tax, and not as a license or an inspection tax, because the tax is not assessed upon all the companies, corporations, and persons subject to be regulated by the provisions of the statute."

We think there is this difference between section 6, we are now considering, and section 4 of that act, which was then pronounced unconstitutional: In the law providing for the salaries of railroad commissioners, the tax was to be collected from one class of property assessed upon an *ad valorem* basis, but not assessed upon the property of all the companies, corporations, and persons subject to be regulated by the provisions of the statute. In the act now under consideration, it is not proposed to tax property on any principle of valuation; but the same fee is taxed in each case, without regard to the number or condition of the parties to the action, the amount involved, or the time consumed in the trial of the cause. There is no case excepted; all suitors are treated alike. In that respect, at least, the law has the elements of uniformity and equality.

The question now presents itself, what is a tax, within the purview of section 1, art. 11? This section of our constitution has been repeatedly examined and discussed by this court. Mr. Justice VALENTINE, speaking of the construction of the clause "the legislature shall provide for a uniform and equal rate of assessment and taxation," says: "The constitution does not require that the manner or mode of assessing and taxing property, or the manner or mode of collecting the taxes, shall be equal and uniform, but it simply requires that all property shall be assessed and taxed at an equal and uniform rate. This the legislature has provided for. All taxable property, real and personal, within this state, must, under the statutes, be assessed at its true value in money, and the taxes levied upon said assessment must be at an equal and uniform rate. The state taxes, under the statutes, are equal and uniform throughout the state, being levied on a uniform valuation, and fixed at a uniform rate on each dollar of the valuation throughout the state. Each county tax is equal and uniform in the same manner throughout the county, and the same may be said of the taxes of each township, district, city, and village; that is all that is required by the constitution." *Railroad Co. v. Morris*, 7 Kan. 221. Also *Commissioners Ottawa Co. v. Nelson*, 19 Kan. 234. It is said, *arguendo*: "Neither do we suppose that capitation taxes, or poll taxes, or requirements to work on the roads, or to train in the militia, come within said constitutional provision, although, evidently, they are all taxes in one sense."

The courts in other states also have construed constitutional provisions similar to the one contained in section 1, art. 11, of our constitution. They have uniformly held that the words "equal and uniform," used in reference to assessment and taxation, apply only to a direct tax upon property, in order to prevent arbitrary taxation from being imposed without regard to the kind, quality, or value of the property taxed. It has also been repeatedly cited that such a provision is no limitation on the power of the legislature as to the other subjects of taxation. *State v. Lancaster Co.*, 4 Neb. 537; *Sawyer v. City of Alton*, 3 Scam. 127; *Glasgow v. Rowe*, 43 Mo. 479, 491; *Aulanier v. Governor*, 1 Tex. 653.

The power of taxation is an attribute of sovereignty; and the rule is well established that the taxing power in the legislature is without limit, except such as may be prescribed by the constitution itself; and before a statute should be pronounced unconstitutional it must be clearly an infringement of the superior law, beyond a substantial doubt. *State v. Robinson*, 1 Kan. 17.

Applying the rules so plainly laid down in the authorities cited to section 6, that we are now considering, it is evident that such section is not clearly an infringement of our constitution providing for an equal rate of assessment and taxation; it is not a tax as therein contemplated, not being a burden imposed upon property to raise money for public purposes. Laws similar to the one now being considered, under similar constitutional provisions, have been held valid by the courts of Tennessee, Arkansas, North Carolina, and Nebraska, and the amounts charged and collected have been pronounced legal under the different names of "taxes," "charges," "penalties," "costs," and "fees." They all have had virtually the same essential properties, whatever they may have been designated, and have been usually imposed for the purpose of adjusting on an equitable basis, as between suitor and the public, the expense of the administration of justice.

Considering its nature and object, the item of two dollars provided for in section 6 may very properly be characterized as a fee to the public, as distinguished from a tax. It is taxed as a stenographer's fee, and, though it has some of the qualities of a tax, it is not levied, assessed, or collected as taxes usually are in this state, and especially is wanting in the essential qualities of being assessed upon property in proportion to its value. We cite, as authorities sustaining the views set forth in this opinion: *Cooley, Tax'n*, 31, and note; *Murphy v. State*, 38 Ark. 514; *Hewlett v. Nutt*, 79 N. C. 263; *Harrison v. Willis*, 7 Heisk. 35, and those cited *supra*.

It is recommended that the judgment of the court below be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

(37 Kan. 463)

ATCHISON, T. & S. F. R. Co. v. KOEHLER, Adm'r, etc.

(Supreme Court of Kansas. November 5, 1887.)

1. RAILROAD COMPANIES—INJURIES TO EMPLOYE—NEGLIGENCE OF CO-EMPLOYEES.

K. was in the service of a railroad company, engaged on the track and in the yard of the company. He assisted in loading a car of iron rails which were to be taken to other portions of the company's road. The rails to be loaded were in a pile 10 feet high and 10 feet from the track. The manner of loading was to place rails as skids; one end on the top of the rail pile, and the other on the middle of the track below. Two employees of the company who were on top of the pile placed the rails on the skids, and allowed them to slide down, until 10 of them were so lowered. They would then wait until eight men who were on the ground would lift the rails, and shove them into a car which was standing on the track near by, and also until these men had stepped aside out of danger, when those on top would lower a like number of rails, which would in turn be placed in the car by the eight men on the ground. K. was one of the men engaged in placing the rails in the car, and after lifting the last rail of a certain lot, but before he had stepped aside, and without waiting the usual time to do so, the employees on top lowered another

rail, which struck him with great force, crushing his leg, and from the effects of which he died. There was nothing to prevent those on top from seeing that K. had not reached a place of safety. *Held*, that he had a right to expect that the rail would not be thrown down until he was safely out of the way, or at least until he had sufficient time to get away after warning had been given; and that the employes on top of the rail-pile were guilty of culpable negligence in lowering the rail as they did.

2. SAME—LIABILITY OF COMPANY.

The character of the employment and service of K. at the time of the injury places him within the provisions of the act which makes railroad companies liable to their employes for damages resulting from the negligent acts of other employes, (chapter 93, Laws 1874;) which act is held to be valid.¹

(*Syllabus by the Court.*)

Error from district court, Barton county, G. W. NIMOCKS, Judge.

Geo. R. Peck, A. A. Hurd, and M. W. Sutton, for plaintiff in error. *Dif-fenbacher & Banta and S. J. Day*, for defendant in error.

JOHNSTON, J. Susanna Koehler brought this action against the railroad company, as the personal representative of Karl Koehler, deceased, to recover damages sustained by reason of his death, which occurred while he was in the service of the company, and which is alleged to have been caused by the negligence of its employes. On March 3, 1883, he was engaged, with a number of others, in loading rails on one of the cars of the company at Ellinwood, Kansas, and while so engaged a rail was thrown against him by the other employes of the company, which crushed his leg, and he died from the effect of the injury two days thereafter. His representative, who sues for the benefit of herself and seven minor children, obtained a verdict and judgment for \$1,500, at a trial had at the June term, 1885, of the district court of Barton county. The railroad company brings the case here, and raises three points against the judgment: *First*, that its demurrer to the evidence of the plaintiff below should have been sustained; *second*, that, if negligence was shown in the case, it was that of a fellow-servant, for which the company cannot be held liable; and, *third*, that the act of 1874, under which the liability is sought to be established, is unconstitutional and void.

The first point made involves the question whether the testimony of the plaintiff below with respect to negligence was sufficient to send the case to the jury, and to support the verdict rendered. It appears that the iron rails which were being loaded were in a pile at the side of the track, which was 10 or 12 feet high, and about 10 feet away from the track. To lower the rails from the pile, two skids were used; placing one end on the top of the rail pile, and the other on the middle of the railroad track. Two men on top of the pile would bring forward six or eight rails to the edge of the pile and to the end of the skids, and then lift them on the skids one at a time, and allow them to slide down to the ground, and to the middle of the railroad track. A stock car was standing on the track a few feet from the end of the rails thus thrown down, and eight men who were on the ground would lift these rails one at a time, and put them into the car, while two men who were inside of the car placed them in position. Another man, designated by some as "boss," and others as a "foreman," sat at one side, and kept a tally of the rails as they were loaded. When the rails thrown down were placed in the car, these eight men would step aside until the men on top would slide down six or eight more rails when the men would return to load them into the car. Koehler was at work at the end nearest the car. He with others on the ground had just placed the last rail of a certain lot in the car, and had not yet passed

¹As to the constitutionality of a statute which makes a railroad company liable to its employes for injuries incurred by them from the negligence of co-servants, see *Bucklew v. Railway Co.*, (Iowa,) 21 N. W. Rep. 103, and note to *Hawley v. Railroad Co.*, (Iowa,) 29 N. W. Rep. 793.

aside, when the men on top threw down a rail, which struck Koehler, and resulted in his death. A very brief time elapsed between the loading of the last rail, and the starting of the other from the top. Several of the men were in the way when it started, but all escaped except Koehler. He had started to get out of the way, and when apprised that the rail was coming he made a strong effort to avoid the danger, but failed.

The duty of the men on top of the pile was clear. They ought to have given the men below a reasonable time to step aside and out of danger. Not only that, but they should not have lowered a rail until the men on the ground had reached a place of safety. There was no obstruction in the way, and hence those on top could see when the men below had completed their task, and had stepped aside. It was not necessary that the rails should be lowered with exact regularity as to time; nor need they lower any until the way was clear. It seems that sometimes the men on top would, before starting the first rail, shout "Look out!" and the boss, or some one below, would respond "Ready!" and then the rail would be lowered; but this was not always done. Just as the rail was dropped which did the injury, some one said "Look out!" but all agreed that the rail descended with such velocity that there was not sufficient time after it started for Koehler to get out of its way. It is insisted on behalf of the company that if Koehler had looked up he might have seen that the rail was about to be thrown down and have gotten out of the way; and also that if he had moved more quickly, and in another direction, he might have escaped. There is plenty of testimony offered on behalf of the plaintiff below to show that Koehler had no fair warning or opportunity to avert the injury.

J. H. Parkerson, a witness for plaintiff below, testified as follows: "*Question*. You may state to the jury whether or not Mr. Koehler did not get out of the way, if you know. *Answer*. He could not. *Q*. You say he could not; why could he not? *A*. Well, I think that it came too fast for him. * * * *Q*. Well, had those on the rail-pile been in the habit or not of waiting for the parties who were loading the iron below to get out of the way before throwing down other iron? *A*. Yes, sir. *Q*. Well, did they or not wait long enough for these parties to get out of the way when they threw this piece of iron down which struck Mr. Koehler? Had he time to get out of the way after loading the last bar of iron before it struck him? *A*. I hardly think he did. *Q*. Well, now, how long was it between the loading of the last rail and the coming down of the other rail? *A*. I do not know how long it was. *Q*. Well, give it as near as you can,—whether or not it was almost instantaneous. *A*. It seemed like a very short time; I know we had not lifted the rail out of the way and in the car." On cross-examination he was asked: "*Question* How many men were there handling that rail—that put it in? *Answer*. I do not know whether there were eight or ten. *Q*. Well, they all got out of the way, didn't they? *A*. Yes, sir; they all got out of the way. They were not out of the way, though, when the rail started. *Q*. They all got out of the way except this one man that got hurt? *A*. Yes, sir. *Q*. Well, this man had just as much time to get out of the way as any other? *A*. No, he didn't have." On a re-examination he testified as follows: "*Question*. Then you say that from where you saw them, that it was impossible for him to get out of the way of the iron that was thrown down from the pile? *Answer*. Yes, sir; it was. When the iron started it was impossible for him to get out of the way? *Q*. Well, now, you spoke of another man being by his side? *A*. Yes, sir; Mr. Sauer. *Q*. Well, how was it with him? *A*. Well, I believe that, if it had not caught Koehler, it would have caught him. *Q*. If it had not caught Koehler, it would have caught him? *A*. Yes, sir; he was ahead of Koehler, and it seemed as though Koehler had jumped against him, and probably helped him along a little. *Q*. By Koehler jumping against him pushed him out of the way, and saved him? *A*. Yes, sir."

Robert Hutton, the foreman in charge of the men, testified, among other things, as follows: "*Question.* Well, you may state whether or not, in your judgment, he had time to get away after loading the other rail? *Answer.* He had, if he knew the rail was coming. *Q.* But not knowing it? *A.* But not knowing it, after the rail started, he didn't have time. *Q.* Well, after the loading of the other rail into the car, how soon was the other rail thrown down? *A.* Oh, it was not but a few moments. * * * *Q.* Well, was not the rail thrown quicker than usual after the loading of the iron? *A.* Yes, sir; I think it was." Further along, the same witness was asked: "*Question.* If those men, then, had looked towards that pile of iron before they started to go through, there was nothing to prevent them from seeing that the men on top was starting iron down, was there? *A.* Well, nothing to prevent them seeing they were ready to; but then the men on the ground were not supposed to look up to a pile of iron 12 feet high. Those men who were on top were to look down, and see if the men were ready." At another time this witness was asked: "You say that it was the business of the men on the pile to see that everything was clear below before throwing the iron? *Answer.* Yes, sir; it was, most assuredly. *Q.* Then, at that time it was not clear? *A.* The ground below was not clear just at that time quite. *Q.* I mean the men were not out of the way? *A.* Mr. Koehler and Mr. Sauer was not out of the way."

Joseph Schermoly, another witness, was working by the side of Koehler when the rail fell, and stated that the usual time was not given for the men to get out of the way before the rail was sent down. He stated that one of the men on top let go of the rail, while the other held on a moment, and shouted "Look out!" but he quickly let it go. The witness stated that he was in the way, but when it started he saved himself by a quick jump.

Simon Epps testified that he was working in company with Koehler at the time of the injury, and that Koehler had no time between the loading of the last rail and the lowering of the other to get out of the way.

There is some testimony tending to show that Koehler would have had a better chance to escape if he had moved more quickly, and in another direction. But it is also shown that he was proceeding in the usual way to a place of safety; and it further appears that the rail was precipitated upon him so suddenly that little time was given for reflection as to the safer course. It did not devolve on him to watch the movements of the men on the top of the pile, nor to anticipate that they would depart from the usual course of waiting until the way was clear. He had a right to expect that no rail would be thrown down until he was out of the way, or at least until he had sufficient time to get away after a warning had been given. Common prudence and the most ordinary care would dictate that such a course should be pursued. We cannot say, from the testimony, that the injury was the result of Koehler's fault, and the evidence against which the demurrer was directed abundantly shows negligence on the part of those who threw the rail against him. On a demurrer to the evidence, all that is required to send the case to the jury is that the testimony fairly tends to establish the essential facts of the case; and we are of opinion that more than this was shown.

The next contention of the plaintiff in error is that the employment of Koehler was not connected with the operation of the railroad so as to make the company liable for injuries inflicted upon him through the negligence of a co-employee. Koehler was a track or section hand, who worked on the track and in the yard. The first part of the day on which he was injured he was engaged with a crew in repairing the railroad track, and in the afternoon he assisted in loading the rails for use on other parts of the company's road. He was therefore an employe and engaged in the business of the company when injured. The service was actually performed on the company's road, was necessary to its use and operation, and the result in the case sufficiently shows

the hazardous character of the service. The case of *Railway Co. v. Harris*, 33 Kan. 416, 6 Pac. Rep. 571, rules the present action. There a section-man, who, with others, was engaged in unloading rails from a car, to be used in the repair of the track, was injured through his co-employees carelessly throwing a rail on his foot; and on a like objection he was held to be within the protection of the statute. The character of the employment is substantially the same in both cases, and the reasoning there applies here, and need not be repeated. See, also, *Trust Co. v. Thomason*, 25 Kan. 5.

The third and final point contended for by plaintiff in error is that chapter 93, Sess. Laws 1874, which makes a railroad company liable for injury sustained by one servant on account of the negligence of a co-employee, is class legislation, which is forbidden by both the state and federal constitution, and is void. This question has been several times considered in this court, and decided adversely to the contention of plaintiff in error. It is settled, so far as may be, by this court, that the statute is valid. *Railway Co. v. Haley*, 25 Kan. 35; *Railway Co. Mackey*, 33 Kan. 298, 6 Pac. Rep. 291. See, also, *Railway Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. Rep. 110.

It is expressly stated that the other assignments of error are not insisted on, and therefore we will not consider them; and, as the points made against the judgment cannot be sustained, there must be an affirmance.

(All the justices concurring.)

(37 Kan. 470)

LEITZ v. RAYNER and others.

(Supreme Court of Kansas. November 5, 1887.)

PLEADING—DEMURRER TO AMENDED ANSWER—FURTHER AMENDMENT.

Where a petition was filed by the plaintiff, and defendant answered thereto, and afterwards an amended answer was filed, and the plaintiff demurred thereto, and said demurrer was overruled, and plaintiff replied to said amended answer; and at the trial plaintiff objected to the introduction of any testimony under said answer, which objection was overruled; and afterwards a new trial was granted, and plaintiff then, by permission of the court, withdrew his reply, and refiled a demurrer to said amended answer, which was by the court sustained; and defendant then asked leave to amend his amended answer, which was by the court refused: held, that after an amended answer has twice been held good by the court when attacked by the plaintiff, it was error for the court to refuse the defendant leave to amend after the demurrer to his amended answer had been sustained.

(Syllabus by Clogston, C.)

Commissioners' decision. Error from district court, Marion county; L. HOUK, Judge.

This action was commenced by the defendant in error upon a note for \$275 given by the plaintiff in error upon a contract of purchase and warranty of a Walter A. Wood twine self-binding harvester. Three trials were had in the court below; resulting, in each, in a verdict for the defendant. Each of said verdicts was by the court set aside, upon the ground that the same was not sustained by sufficient evidence. After the second trial the defendant was allowed to file an amended defense, to which amended answer the plaintiffs filed a demurrer, upon the ground that the amended answer did not state facts sufficient to constitute a defense, which demurrer was by the court overruled. At the third trial the plaintiffs objected to the introduction of any evidence under said amended answer, for the reasons stated in the demurrer, which objection was by the court overruled. The plaintiffs filed a reply to said answer. Trial thereunder, and verdict for the defendant, which was set aside by the court. The cause was continued, and afterwards came on regularly for trial, whereupon the plaintiffs, by permission of the court, withdrew their reply, and filed a demurrer to the amended answer on the same grounds contained in their former demurrer thereto, which demurrer was by the court sustained; and thereupon the defendant asked leave of the court to amend his said answer; which request the court refused to grant; and thereupon, on mo-

tion of the plaintiffs, the court rendered judgment for the plaintiffs for \$391, and costs, taxed at \$463.75. The defendant brings the case here for review.

J. S. Dean and R. L. King, for plaintiff in error. *L. F. Keller*, for defendants in error.

CLOGSTON, C. In the course of the three trials of this case many rulings were made by the court that are now urged as error, but we shall pass them by, except the ruling of the court after the last trial by the jury. After the court sustained the demurrer to the defendant's answer, leave was asked to amend the same, and this leave was refused by the court. We think this was error. This answer had been twice attacked by the plaintiffs before the last trial: *First*, by demurrer; and, *second*, to the introduction of evidence thereunder. These objections were by the court overruled, and by these rulings the defendant was assured that his answer contained a defense to the plaintiffs' action, if the facts alleged in said answer were true; and at the trial these facts were so far established that, under the instructions of the court, a jury returned a verdict for the defendant. Now, while it was discretionary with the court to permit the plaintiffs to withdraw their reply, and refile a demurrer, and discretionary to permit the defendant again to amend his answer, yet, under the facts of this case, we think it was an abuse of discretion to refuse to permit the amendment asked by the defendant. The court, as well as the defendant, had been misled, up to this time, as to the allegations in this answer. The answer had been treated by the court as sufficient to raise an issue of fact. Then, if the defendant could amend his answer by alleging facts that would raise such an issue, he ought not to be deprived of that right simply because he, as well as the court, had been misled as to the allegations in the former answer. The court, in justice to the parties, might have permitted the amendment, upon such terms as he thought just; but to refuse, after large costs had been made in former trials, was unjust to the defendant. As this case must be reversed, we express no opinion upon the amended answer. It is recommended that the judgment of the court below be reversed.

BY THE COURT. It is so ordered; all the justices concurring.

(37 Kan. 477)

CUNNINGHAM and another v. JONES.

(*Supreme Court of Kansas. November 5, 1887.*)

ATTORNEY AND CLIENT—PUBLIC POLICY—PURCHASE OF TAX TITLE AGAINST CLIENT.

Public policy demands that there should be no temptation on the part of any one occupying the important relation of an attorney to make private gain out of the subject-matter of his professional employment, and therefore the purchase by an attorney at a tax sale of land in litigation, in opposition to the title of his client, is inconsistent with his relation to his client, and void.¹

(*Syllabus by the Court.*)

Error from district court, Chase county; **L. HOUR**, Judge.

Cunningham & McCarty, for plaintiffs in error. *Madden Bros., A. M. Mackey*, and *C. N. Sterry*, for defendant in error.

HORTON, C. J. This was an action in ejectment brought by the plaintiffs. Trial by the court without a jury. A general finding for defendant was entered, and judgment rendered thereon. Plaintiffs excepted, and bring the

¹ An attorney cannot buy in, at a tax sale, and hold as his own, the land of his client. *Elliott v. Tyler*, (Pa.) 6 Atl. Rep. 917. As to the confidential relation existing between attorney and client, and the duty which the attorney owes to his client, growing out of it, see *Bingham v. Salene*, (Or.) 14 Pac. Rep. 523, and note; *Briggs v. Hodgdon*, (Me.) 7 Atl. Rep. 387.

case here. The facts are these: On May 3, 1877, one Charles Ahrendt was the owner of the land in controversy. On that day he conveyed to Caroline Schutt, who took possession and placed her deed on record. On June 21, 1877, J. G. Farlin, a creditor of Ahrendt, attached the land as his property. Judgment was rendered against Ahrendt, and Farlin purchased the land at sheriff's sale. H. S. Sook obtained title to the land by virtue of a deed from Caroline Schutt. Subsequently Farlin brought his action in ejectment against Sook, claiming that the conveyance from Ahrendt to Caroline Schutt of May 3, 1877, was void as against his creditors. In that action it was held that H. S. Sook's title was perfect, and that the attachment proceedings of Farlin against Ahrendt did not avoid or affect his title. *Farlin v. Sook*, 30 Kan. 401, 1 Pac. Rep. 123. The action of ejectment of *Farlin v. Sook* was brought August 15, 1880, and judgment was rendered December 23, 1882. During all the litigation between Farlin and Sook, the plaintiffs in this action were practicing attorneys at law, and were also the attorneys of Farlin. On September 2, 1879, while Farlin and Sook claimed to own the land in controversy, it was sold for delinquent taxes, and bought in by the county. On May 26, 1881, during the pendency of the litigation between Farlin and Sook, and while the plaintiffs were the attorneys of Farlin in that litigation, tax certificates of the land in controversy were assigned to W. E. Cunningham, one of the plaintiffs, who subsequently assigned an undivided one-half thereof to W. T. McCarty, the other plaintiff. On these certificates a tax deed was issued September 13, 1882. The plaintiffs derive their alleged title from the tax deed.

The learned trial court rendered a judgment in favor of the defendant, upon the theory that plaintiffs' tax deed was void, because they were the attorneys for Farlin during all the time he was seeking to obtain title to and possession of the land embraced in the tax certificates and tax deed. In this view we fully concur. The purchase by an attorney of an interest in the thing in controversy, in opposition to the title of his client, during litigation concerning the same, is forbidden, because it places him under temptation to be unfaithful to his trust. *Weeks, Attys.* §§ 274-277; *Wright v. Walker*, 30 Ark. 44; *Wade v. Pettibone*, 11 Ohio, 59; *Zeigler v. Hughes*, 55 Ill. 288; *West v. Raymond*, 21 Ind. 305; *Simpson v. Lamb*, 7 El. & Bl. 90.

Plaintiffs concede this general doctrine, but contend that their purchase under the tax proceedings is not absolutely void, but voidable only, at the election of their client; that, as their client is not complaining of their conduct, no one else ought to be heard to object. It is undoubtedly true that the purchase of the plaintiffs might have inured to the benefit of their client, if he had made a claim therefor; but does his failure to demand the benefits of their purchase condone the offense, and render their title, so acquired, valid? We think not. An attorney, while acting for his client, is bound to the most scrupulous good faith. While the relation of an attorney and client continues, the courts will carefully and zealously scrutinize the dealings between them, and guard the client's rights against every attempt by the attorney to secure an advantage to himself at the expense of the client. *Haverty v. Haverty*, 35 Kan. 438, 11 Pac. Rep. 364. After the purchase by the plaintiffs of their title under the tax proceedings, their interest was antagonistic to that of their client. The purchase by them, therefore, was such, we think, "as might have betrayed their judgment and endangered their professional fidelity." It is contrary to the policy of the law, and also contrary to the principles of equity, to permit an attorney at law to occupy at the same time, and in the same transaction, the antagonistic and wholly incompatible position as adviser of his client concerning a pending litigation threatening the title to his property, and that of purchaser of such property, in opposition to the title of his client. Some of the courts have gone so far as to hold that, where an attorney purchases from his client the subject of litigation, he must, before doing so, divest himself of the character of attorney, so that his former client

may deal with him as a stranger. *Rogers v. Marshall*, 3 McCrary, 76-95, 9 Fed. Rep. 721. Public policy seems to demand that there should be no temptation on the part of any one occupying the important relation of an attorney, to make private gain out of the subject-matter of his professional employment, and therefore we think that the purchase by plaintiffs of the premises in dispute, pending litigation, was as to them wholly void. The judgment of the district court will therefore be affirmed.

(All the justices concurring.)

(37 Kan. 510)

SOUTH BEND IRON-WORKS v. PADDOCK and another.

(*Supreme Court of Kansas.* November 5, 1887.)

1. NEGOTIABLE INSTRUMENTS—NEGOTIABILITY—NOTE WITH PROVISION FOR SEIZURE OF PROPERTY SOLD.

S. gave his note to P. & Co., which contained a provision that, if the note was not paid at maturity, the payee might take possession of and sell the property for the payment of which the said note was given. *Held*, that where a note contains other provisions than the unconditional payment of money, it is non-negotiable.¹

2. SAME—TRANSFER OF NON-NEGOTIABLE NOTE—EQUITIES—AUTHORITY OF COMMON PARTNER.

Where P. & Co. transferred said non-negotiable note to L. & Co., without indorsement, before due, in payment of a debt owing by P. & Co. to them; and afterwards, while the note was the property of L. & Co., they desiring to procure money on said note, L., a member of both firms, indorsed the name of P. & Co. on the back of said note; and afterwards, after the dissolution of the firm of P. & Co., but before the maturity of the note, L. & Co. delivered the note, without indorsement by them, to the plaintiff, as collateral security for a debt due L. & Co.: *held*, in a suit by the plaintiff against P. and P., members of the firm of P. & Co., that said defendants might make any defense they could have made if said note had remained the property of L. & Co.; that the indorsement of L., without the knowledge or consent of the other members of said firm of P. & Co., was void as to them; and that said indorsement gave the plaintiff no greater rights than L. & Co. had in said note.²

(*Syllabus by Clogston, C.*)

Commissioners' decision. Error to district court, Marion county; L. HOUK, Judge.

The note, the subject of this action, was given by Joseph Sylvester to the firm of Lockwood, Paddock & Co., and was transferred, without indorsement by Lockwood, Paddock & Co., to the firm of W. C. Lockwood & Co. Afterwards, and while the note was the property of W. C. Lockwood & Co., and while both firms were in existence, W. C. Lockwood & Co. wrote the name of Lockwood, Paddock & Co. across the back of said note. This was done without the knowledge or consent of Lockwood, Paddock & Co. Said indorsement was made by said W. C. Lockwood for the purpose of placing said note with other notes in the First National Bank of Marion as collateral security for a loan which W. C. Lockwood & Co. were endeavoring to secure through said

¹ In the case of *Smith v. Marland*, (Iowa,) 13 N. W. Rep. 852, a promissory note was held to be non-negotiable which contained a condition that, if at any time the payee should deem himself insecure, even before the maturity of the instrument, he might take possession of the property in consideration of which the note was executed, and sell it, on five days' notice; the court putting its decision on the ground that the amount to be collected on the instrument was rendered uncertain by the clause permitting sale of the property. But in the case of *Bank v. Taylor*, (Iowa,) 25 N. W. Rep. 810, a note secured by mortgage, and containing a similar provision, was held to be negotiable, the court distinguishing *Smith v. Marland*, *supra*, on the ground that while the payee of the note in suit was empowered to take possession of the mortgaged property before maturity he could not sell until after maturity. In general, as to the requisites of negotiable instruments, see *Hughitt v. Johnson*, 28 Fed. Rep. 865, and note; *Chandler v. Carey*, (Mich.) 31 N. W. Rep. 309; *McComas v. Haas*, (Ind.) 8 N. E. Rep. 578, and note; *Cowan v. Hallack*, (Colo.) 13 Pac. Rep. 700; *Schlesinger v. Arline*, 31 Fed. Rep. 648, and note.

² Concerning the authority of a partner to bind the firm by the execution and indorsement of firm paper, see *Bank v. Alburger*, (N. Y.) 4 N. E. Rep. 341, and note.

bank. The loan was not made, and the notes were returned to the possession of W. C. Lockwood & Co. Afterwards this note was turned over to the plaintiff as collateral security for a debt owing by W. C. Lockwood & Co. to the plaintiff. At the time of the transfer of the note to the plaintiff by Lockwood & Co., the firm of Lockwood, Paddock & Co. had been dissolved. Said firm was composed of W. C. Lockwood, Henry Seibert, A. W. Paddock, and H. P. Paddock. The firm of W. C. Lockwood & Co. was composed of W. C. Lockwood and Henry Seibert. Sylvester made default, and judgment was rendered against him on said note in favor of the plaintiff. The defendants, Paddock and Paddock, denied the indorsement of the firm name of Lockwood, Paddock & Co. under oath. Trial by jury, and judgment for the defendants. The plaintiff brings the case here.

L. F. Keller, for plaintiff in error. *J. S. Dean*, for defendants in error.

CLOGSTON, C. The first question to be determined is whether the note sued on was a negotiable promissory note. It reads as follows:

"\$141.34.

HILLSBORO, KANSAS, November 20, 1884.

"Six months after date I promise to pay to the order of Lockwood, Paddock & Co., one hundred and forty-one and 34-100 dollars, at the office of Lockwood, Paddock & Co., Hillsboro, Kansas, with interest at ten per cent. per annum until due, and if not paid at maturity to draw 12 per cent. on the amount then due. The conditions of this sale of book-accounts for which this note is given are such that the title and ownership, or right of possession, does not pass from the said Lockwood, Paddock & Co. until this note and interest is paid in full. The said Lockwood, Paddock & Co. have full power to declare this note due and take possession of said ——— at any time they may deem themselves insecure, even before the maturity of the note; and if said Lockwood, Paddock & Co., from any cause, retake into their own possession the property for which this note is given, then it is expressly agreed that the makers and indorsers of this note shall pay to the said Lockwood, Paddock & Co. a sum of money equal to the difference in value of said property at the time of its sale and the time of its return to the said Lockwood, Paddock & Co.

"JOSEPH SYLVESTER."

The court held that this note was a non-negotiable note. We think this ruling was correct, and coming directly within the rule laid down in *Killum v. Schoeps*, 26 Kan. 310.

At the trial below the defendants were permitted, over the objection of the plaintiff, to show that at the time of the dissolution of the firm of Lockwood, Paddock & Co. there was an oral agreement between said firms of Lockwood, Paddock & Co. and W. C. Lockwood & Co., that on all the notes turned over by the former to the latter, the defendants A. W. and H. P. Paddock were not to be held liable, and that on the notes and accounts retained by A. W. and H. P. Paddock at said dissolution, said Lockwood & Co. were not to be responsible. At the time of this agreement the note in question was the property of W. C. Lockwood & Co. Plaintiff insists that the ruling of the court was erroneous, for the reason that it received this note before maturity from Lockwood & Co., without notice of this agreement, and that the note when so received bore the indorsement of Lockwood, Paddock & Co. At the time plaintiff received this note the firm of Lockwood, Paddock & Co. had been dissolved, and of this dissolution the plaintiff must take knowledge. Plaintiff then had knowledge that the firm that purported to have indorsed this note was out of existence. This was sufficient notice to put plaintiff upon inquiry.

The law presumes that the indorsement made upon this note was made at the time it was delivered to the plaintiff, and it stood in no better position than Lockwood & Co., but took the note subject to whatever notice or knowledge Lockwood & Co. had in regard to it. Mr. Daniel, in his work on Negotiable Instruments, § 371, says: "A note takes effect by delivery. It has

been held that a note signed in the partnership name, before the dissolution, and delivered to the payee after the dissolution, without the consent of the other members of the firm, would not bind them; and, in like manner, if the paper was indorsed before dissolution of the firm, and not put in circulation until afterwards, unless all the partners united in so doing, they would not, according to high authorities, be bound by it." *Glasscock v. Smith*, 25 Ala. 474. If this be the true doctrine, then the indorsement made upon this note, but made without the authority of all the partners, although made while the partnership was in existence, and not placed in circulation and delivered to the plaintiff until after the partnership was dissolved, could not bind the partners of the firm of Lockwood, Paddock & Co., without their consent and knowledge. There was some conflict in the evidence as to their knowledge of this indorsement, but the jury found in favor of the defendants. The defendants insist that, even if this note had been regularly indorsed by Lockwood, Paddock & Co., and transferred by said indorsement to W. C. Lockwood & Co., said note, being non-negotiable, would be subject in the hands of any person to any defense that the maker or subsequent indorsers might have to it. This is not a settled question in this country. In a number of states it has been decided that by an indorsement of a non-negotiable instrument, as between indorsers, it must be considered a negotiable instrument, and the holder is only bound by whatever equities the maker may have, and none other, without notice. While, on the other hand, Iowa, Wisconsin, Michigan, Missouri, and many other states, have held the reverse of this rule. In Iowa the court held "that such an indorsement on a note not negotiable, or any other instrument of writing, except negotiable paper, without proof, oral or written, of an undertaking to become responsible in some manner for a good consideration, means nothing, and an indorser incurs no liability." *Fear v. Dunlap*, 1 G. Greene, 334. Daniel's Negotiable Instruments, § 709, says: "If the note be not negotiable, it is plain that such party cannot be regarded as an indorser, for the simple reason that there is no such thing as an indorsement, in its strict and proper commercial sense, of any other than negotiable paper." *Graham v. Wilson*, 6 Kan. 490. We are inclined to the latter view, that the indorsement of a name upon a non-negotiable note simply transfers the title of a party, and does not make him liable as if said note were a negotiable instrument. *Story v. Lamb*, 52 Mich. 525, 8 N. W. Rep. 248; *Bank v. Gay*, 71 Mo. 627. He guarantees the note to be genuine and that it is what it purports to be; nothing more. He does not guaranty its payment, though he might do this; but to do so would take a contract, either expressed in the indorsement or by an independent contract between the parties. *Kline v. Keiser*, 87 Pa. St. 485. This being true, Lockwood & Co. accepted this note without any contract, either expressed or implied, that the Paddocks should become indorsers in a commercial sense; and when this note was transferred to the plaintiff, it obtained no greater rights than Lockwood & Co. *Edw. Bills*, § 351, and authorities cited.

Defendants also insist that this note was not indorsed by Lockwood, Paddock & Co., and plaintiff wholly failed to establish that fact, which it was bound to do under the pleadings. It was admitted that W. C. Lockwood did make the indorsement. But he made it after it became the property of Lockwood & Co. He made it not for Lockwood, Paddock & Co., nor for their benefit, or with their knowledge, but made it for the benefit of Lockwood & Co. They were seeking to raise money upon this note, and for that purpose they indorsed it. This was not the indorsement of Lockwood, Paddock & Co. It is true that one member of a firm, while the firm is in existence, may indorse and transfer firm paper without the knowledge of all the members of the firm, but that is not this case. The act must be done for the firm, when done by any member of the partnership, to bind the firm. This transaction was

had for the benefit of the firm who then held the paper. We think that defendants are correct, and that there was entire failure of evidence to establish the fact that this indorsement was made by Lockwood, Paddock & Co. The instructions objected to by the plaintiff, given by the court to the jury, fairly stated the law as herein interpreted, and we find no error in said instructions.

It is therefore recommended that the judgment of the court below be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

(37 Kan. 480)

BOARD OF COUNTY COM'RS OF SMITH Co. and others v. LABORE and others.

(*Supreme Court of Kansas. November 5, 1887.*)

1. ERROR, WRIT OF—WHEN PROCEEDINGS DEEMED COMMENCED—DATE OF SUMMONS.

A proceeding in error in the supreme court will be deemed commenced at the date of the summons, where the summons is served within a reasonable time afterwards.

2. SAME—PROCEEDING COMMENCED WITHIN ONE YEAR.

A proceeding in error, commenced in the supreme court on the same day of the same month of the next year after an order or judgment sought to be reversed is made or rendered, is commenced within one year, and in proper time.

3. SAME—COMPUTATION OF TIME.

In such cases, the first day is to be excluded, and the last day included, in the computation of the time.

4. EMINENT DOMAIN—ESTABLISHMENT OF HIGHWAY—DAMAGES.

Where three quarter sections of land, lying in a body, are owned severally by three persons, who, under a written contract between themselves, use the land in common; and each quarter section is more valuable by being so used than it would be if used separately; and a public road is established across these three quarter sections, separating the stock water from the pasture land, and thereby rendering the use of the land in a body, under the contract, less valuable, and thereby lessening the value of each quarter section: *held*, that damages for this loss of value to each quarter section may be awarded to the owners of the land.

(*Syllabus by the Court.*)

Error from district court, Smith county; CLARK A. SMITH, Judge.

On July 11, 1884, the board of county commissioners of Smith county established a public road across the lands of C. C. Labore, Lewis W. Labore, Arthur C. Labore, and others. The commissioners awarded to C. C. Labore, \$66.67 damages; to Lewis W. Labore, \$133.33 damages; and to Arthur C. Labore, nothing,—and these parties severally appealed to the district court. Afterwards, and by consent of all the parties, the appeals were consolidated, and all heard together as one case. This consolidated case was tried before the court and a jury, and the jury rendered the following verdict, and made the following findings, to-wit:

VERDICT.

"We, the jury impaneled and sworn in the above-entitled case, do find, from the law and the evidence, the issues of this case in favor of the plaintiffs, and that they ought to recover as damages the following amounts, viz.: Damage to the land of C. C. Labore, \$80; damage to land of L. W. Labore, 0 dollars; damage to land of A. C. Labore, 22.60 dollars; damage to use of all their land, under contract, until expiration of same, 410 dollars."

FINDINGS.

"Question 1. How much is the actual damage to his [C. C. Labore's] land as a farm, for all purposes? Answer. \$80. Q. 2. What was the actual value of C. C. Labore's farm on or about July 11, 1884, immediately before locating the said road? A. \$5,000. Q. 3. What was the market value of said land v.15p.no.10—37

immediately after the location of said road? A. \$4,920. Q. 4. How many rods of fence is C. C. Labore required to build, if any, by reason of the location of said road? A. 160 rods. Q. 5. Give each item of damage to C. C. Labore's farm, separate, name the items, and give the amount of each item, for which you allow damages. A. For fence, \$50; for land \$30." "Q. 7. If you find for Lewis W. Labore; you will answer the following questions: What is the actual damage to his farm by the location of said road? A. None. Q. 8. Give each item of damage to Lewis Labore's farm, separate, and give the amount of each item for which you allow damage. A. None. Q. 9. Is the road located a direct and special benefit to his farm? A. Yes. Q. 10. If you find for Arthur C. Labore, what is the actual damage to his farm by the location of said road? A. \$22.60. Q. 11. Give each item of damage to Arthur C. Labore's farm, separate, and give the amount of each item for which you allow damage. A. Fence, \$21; land, \$1.60. Q. 12. Were the plaintiffs damaged by the location of said road under and by virtue of a contract? A. Yes. Q. 13. If you answer question 12 in the affirmative, how much is C. C. Labore's damage? A. \$136.66 $\frac{2}{3}$. Q. 14. How much is Lewis W. Labore's damage by reason of the contract? A. \$136.66 $\frac{2}{3}$. Q. 15. How much is Arthur C. Labore's damage by reason of the contract? A. \$136.66 $\frac{2}{3}$."

Upon this verdict and these findings, the court below rendered the following judgment, to-wit: "It is therefore ordered and adjudged by the court that plaintiff C. C. Labore have judgment for \$80; and that A. C. Labore have judgment for \$22.60; and that all the plaintiffs jointly have and recover of the defendant \$410, and costs of this action herein, taxed at \$359.30."

John Q. Royce and *L. C. Uhl*, for plaintiffs in error. *Frank J. Kelley*, for defendants in error.

VALENTINE, J. The defendants in error, plaintiffs below, move to dismiss the petition in error and case from this court, for the reason that the case was not brought to this court within one year after the judgment of the court below was rendered. It appears from the record that the judgment of the court was rendered on April 28, 1885. When the motion for a new trial was overruled, whether before or after the rendering of the judgment, or at the same time, is not shown. The petition in error, the case, and a *præcipe* for a summons were all filed in this court on April 22, 1886. The summons was issued on April 28, 1886. On May 1, 1886, a paper, signed by the attorneys of the defendants in error, plaintiffs below, waiving the issuance of summons, and accepting the service of summons, was filed in this court. When this paper was signed, is not shown. On May 6, 1886, the summons was served upon the defendants in error, plaintiffs below; and the motion to dismiss the case from this court was not filed until October 20, 1887.

We know of no good reason why this proceeding in error should not be deemed to have been commenced in this court on April 22, 1886, when the plaintiffs in error filed in this court their case, their petition in error, and their *præcipe* for summons. But even if there should be some reason for considering this proceeding in error as not having been commenced at that time, then we would think that undoubtedly it should be considered as having been commenced on April 28, 1886, when the summons was issued. *Thompson v Manufacturing Co.*, 29 Kan. 476. And if the proceeding in error was commenced at that time, then it was commenced within proper time, and within one year after the judgment of the court below was rendered. Under section 722, Civil Code, time is to be computed by excluding the first day, and including the last, except when the last day falls on Sunday, and then Sunday is also to be excluded. Now, if we exclude the first day in the present case, to-wit, April 28, 1885, which was the day on which the judgment was rendered, then the year within which the case is to be brought to this court would commence on April 29, 1885, and it would not

end until the last moment of April, 28, 1886; hence, under the Civil Code, it is clear that this case was brought to this court within proper time.

From the record in this case the following facts appear: C. C. Labore is the father of Lewis W. Labore, and Arthur C. Labore. Each owns a quarter section of land in Smith county, Kansas. These three tracts of land adjoin each other, are used together, and, in fact, constitute one body or tract of land. It is principally grazing land, and is used by the three Labores jointly, for the purpose of raising and pasturing cattle thereon, which cattle they own in common as partners. The water for the cattle is principally, if not entirely, on the land of C. C. Labore. The partnership between the Labores was created by a written contract in January, 1883, and was to continue for the period of 12 years. A public road was established across this land in July, 1884, which took a portion of each quarter section, and separated a large proportion of the grazing land from the water. This separation of the grazing land from the water injured the value of the land as a whole, and, if the use of the water may be considered in connection with the use of each quarter section, then such separation also injured the value of each quarter section. If, however, the use of the two quarter sections belonging to Lewis W. Labore and Arthur C. Labore, and on which the water is not situated, is not to be considered in connection with the use of the water which is situated on the land of C. C. Labore, then the separation of the grazing land from the water cannot affect the value of such two quarter sections. In the court below, it was held in substance, if not in terms, that the injury to each quarter section by reason of the separation of the water from the grazing land was \$136.66 $\frac{2}{3}$, and that the injury to the whole of the land, in the aggregate, was \$410; and for this amount, together with the other damages to the land, the court below awarded damages in favor of the Labores, and against the county; and whether this award for the \$410 damages is correct or not is the only material or substantial question involved in this case.

We think the decision of the court below is correct. Where land is taken for public purposes, the owner is entitled to full compensation for all the resulting loss sustained by him, whatever the elements of that loss may be, and he is entitled to compensation, not only for the loss of the land actually taken, but also for the loss of the value, or the depreciation in the value, of that not taken. It is really the loss of the value of his property for which he receives compensation,—the difference in value with the road, and without it, where he suffers loss; and there may be innumerable elements constituting or contributing to that value. Land is never valued solely because of its inherent qualities, or merely for what is in it or upon it. Its value depends as well upon many extrinsic circumstances. Vacant and unimproved land near some one of our large cities, which once might have been purchased for less than five dollars per acre, might now, in many cases, be sold for more than \$1,000 per acre. In such cases it is not anything in the land itself, or upon it, which has brought about this great increase in the value; but the increase has been brought about solely by extraneous circumstances. And yet, if the land were taken from the owner for public purposes, he would be entitled to recover from the public the full amount of its enhanced value. Or if a part only were taken, and a part left, then he would be entitled to recover, not only for the part taken, but also for the entire depreciation of this enhanced value of the part left.

We suppose it will be admitted that any one of the Labores would have a right to an award of damages for all the loss which he might sustain by reason of having his own grazing land separated from his own stock water. But that is not precisely the case. In this case the grazing lands of Lewis W. Labore and Arthur C. Labore were separated from the stock water on the land of C. C. Labore. But still the right of Lewis W. Labore and Arthur C. Labore, under the written contract with C. C. Labore, to use the stock

water on C. C. Labore's land, made their lands more valuable than they otherwise would be, while the right of C. C. Labore, under the contract, to use the land of the other two Labores, for pasturing his cattle thereon, made his land more valuable than it otherwise would be. This right made his stock water immensely more valuable to him, because he could use so much more of it at a profit. Now, may the Labores be deprived of all these benefits and profits and the enhanced value of their lands resulting therefrom, without their having any remedy? May not each be awarded damages for the loss of value as to his own land? May not each be awarded damages for the difference in value of his own land with the road, and without the road, where he suffers loss, although a portion of this enhanced value may be the result of his having the right to use the lands of others?

It is claimed, however, by the plaintiffs in error, defendants below, that this enhanced value is based solely upon a lease, and the fact of tenancy, and that tenants or lessees have no right to have damages awarded to them in condemnation proceedings. Now, it is not necessary in this case, in order to sustain the judgment of the court below, that any one of the Labores should be awarded anything as a tenant or lessee, or anything for any injury done to the land of either of the others. Each originally claimed, and we may consider each as still claiming, damages only for injuries done to his own land. But may not tenants or lessees have an award of damages for losses sustained by them by reason of condemnation proceedings? *Turnpike Road v. Brosi*, 22 Pa. St. 29; *Brown v. Powell*, 25 Pa. St. 229; *Railroad Co. v. Davis*, 26 Pa. St. 238; *Dyer v. Wightman*, 66 Pa. St. 425; *Railroad Co. v. Thompson*, 10 Md. 76; *Gerrard v. Railroad Co.*, 14 Neb. 270, 15 N. W. Rep. 231, and 20 Amer. & Eng. R. Cas. 423; *Renwick v. Railroad Co.*, 49 Iowa, 664; *Kimball v. Railroad*, 7 Fost. 448; *Coutant v. Catlin*, 2 Sandf. Ch. 485; *Astor v. Hoyt*, 5 Wend. 605; *Turner v. Williams*, 10 Wend. 140; *Gillespie v. Thomas*, 15 Wend. 464; *In re Streets*, 19 Wend. 678; *Wiggin v. The Mayor*, 9 Paige, 16; *Parks v. Boston*, 15 Pick. 198; *State Lunatic Hospital v. County of Worcester*, 1 Metc. 437; *Ashby v. Railroad Co.*, 5 Metc. 368; *Edmonds v. Boston*, 108 Mass. 535; *Cobb v. Boston*, 109 Mass. 438. The word "owner," as used in the statutes relating to condemnation proceedings, may perhaps be construed to apply to every person having any interest in the property to be taken. Such seems to be the purport of the above-cited cases.

We would think that justice has been done in this case, and no material error has been committed; and therefore the judgment of the court below will be affirmed.

(All the justices concurring.)

(37 Kan. 457)

STICKEL v. BENDER.

(Supreme Court of Kansas. November 5, 1887.)

1. EVIDENCE—DECLARATIONS OF GRANTOR TO PROVE FRAUD.

In an action between S. and B., S. claimed that B. fraudulently procured the title to a certain piece of land while acting as his agent. In order to prove the fraud of B., S. offered the testimony of witnesses to prove the oral and written statements of the original owner of the land made after the conveyance of the land to B., but not made in his presence or hearing. *Held*, that the court committed no error in rejecting the evidence.

2. EQUITY—SUBMISSION OF ISSUES TO JURY—REFUSAL TO INSTRUCT AS TO WHOLE CASE.

In an action in the nature of a suit in equity, the court, in its discretion, submitted two questions of fact for the jury to answer, and subsequently, upon the findings of the jury and all the evidence in the case, rendered judgment for the defendant. *Held*, that the plaintiff was not prejudiced by the refusal of the court to instruct the jury upon matters of law applicable to the whole case, but which would not have aided the jury in deciding the particular questions of fact submitted to them.

(Syllabus by the Court.)

Error from district court, Dickinson county; M. B. NICHOLSON, Judge.
C. C. Bitting, Jr., for plaintiff in error. *John H. Mahan*, for defendant in error.

HORTON, C. J. This was an action brought by William E. Stickel against J. C. Bender for the recovery of certain real estate, the title to which Stickel claimed that Bender acquired fraudulently, while acting as his agent. In 1884, Stickel had possession of 160 acres of land in Lincoln county, in this state, under a land contract, upon which he had paid \$400, and upon which there was remaining due, as purchase money, \$1,200. This land had been purchased by Bender for Stickel from D. Crawford, of Kansas City, Missouri, at \$10 an acre. In July, 1884, the land in Lincoln county was placed in the hands of Bender for sale. About July 26, 1884, the land was exchanged by Bender to William E. Starr for lots 11 and 12 in block 29 of Keeny and Hodge's addition to Abilene; and upon that day Starr and wife executed to Stickel a warranty deed therefor. About the same time, William E. Starr and wife executed to Bender the conveyance of lots 93 and 95 on Spruce street, in Abilene. Stickel claims that Bender received these lots as part consideration for the Lincoln county farm, and that he fraudulently obtained the title in his own name; that subsequently the lots were disposed of by Bender for certain other real estate, situated in the county of Dickinson. Bender claims that lots 93 and 95 were no part of the trade for the Lincoln county land; that the lots were deeded by Starr and wife to him by way of a mortgage to secure a debt of \$150 which Starr owed Bender; and that the rest of the property, or the proceeds thereof, were to be applied by Bender to the payment of installments upon the land which Starr obtained from Stickel.

Upon the trial, the court submitted the following issues of facts to the jury: "Did the defendant J. C. Bender take the title to lots ninety-three (93) and ninety-five (95) on Spruce street, in Southwick & Augustine's addition, as part of the consideration for the plaintiff's land in fraud of the plaintiff's rights? No. Or did he take the title to said property as security for a debt due to him from Starr in part, and the remainder in trust for the use of Starr, to be applied to the deferred payments on the Lincoln county land? Yes." Upon the special findings of the jury and the evidence introduced in the case, the court found the issues for the defendant, and rendered judgment accordingly. Of this complaint is made.

It is urged as error that the trial court improperly refused to permit Stickel to prove the declarations of Starr concerning the ownership of lots 93 and 95. The declarations were made by Starr after the conveyance to Bender, and were not in his presence or hearing. If it was intended to prove by these declarations that Starr is the equitable owner of the lots, the evidence was immaterial. The jury found that the title to the lots was only held by Bender for security. If it was intended to show, by the declarations of Starr, that Bender procured the conveyance of the lots to himself fraudulently, then the evidence was incompetent and properly excluded. After the execution and delivery of the deed, Starr's statements, made in the absence of Bender, and without his knowledge, would not affect or bind him. *Crust v. Evans*, 37 Kan. —, 15 Pac. Rep. 214. Starr's deposition might have been taken if his statements of the transactions with Bender were favorable to the claim of Stickel.

We do not think that the plaintiff was prejudiced by the instructions.

Only two issues of fact were submitted to the jury. The jury were not required to render a general verdict, and the only matter for their consideration was the evidence upon the issues of fact submitted. Upon these matters they were required to pass upon the credibility of the witnesses, and to answer the questions "yes" or "no." The instructions refused would not have aided the jury in deciding the questions of fact presented to them. The same

might be said of some of the instructions given. The court submitted these questions to the jury as a matter of advice, and, after all the evidence had been introduced, made a general finding for Bender. There is sufficient evidence in the record to sustain the findings and judgment of the trial court; and, although much of the evidence is conflicting, this court will not interfere, even if the testimony preponderates against the findings.

The judgment of the district court must be affirmed.

(All the justices concurring.)

(37 Kan. 460)

FITZGERALD v. WELLINGTON.

(*Supreme Court of Kansas. November 5, 1887.*)

APPEAL—FROM JUSTICE—BOND—LIABILITY OF SURETIES.

Where a judgment is rendered by a justice of the peace in favor of the plaintiff, and against the defendant, and the defendant appeals to the district court, and afterwards dismisses his appeal, the sureties on the appeal-bond are liable for the amount of the judgment rendered in the justice's court, and not merely for the amount of the judgment for costs rendered in the district court.

(*Syllabus by the Court.*)

Error from district court, Marshall county; EDWARD HUTCHINSON, Judge.

This was an action commenced originally before a justice of the peace by Richard Wellington against Gideon Fitzgerald on an appeal-bond, in which action judgment was rendered by the justice of the peace in favor of the plaintiff, and against the defendant, for \$300 and costs, and the defendant appealed to the district court, where the case was again tried before the court without a jury, and the court made the following findings and conclusions, and rendered the following judgment, to-wit:

FINDINGS OF FACT.

"(1) On the twenty-third day of December, 1884, the said Richard Wellington, plaintiff in this action, recovered a judgment before E. F. BENEDICT, a justice of the peace of Marshall county, Kansas, against John B. Price and W. F. Price, partners as Price Brothers, for the sum of two hundred thirty-six dollars and eighty cents debt for work and labor, and eight dollars and seventy-five cents costs. Price Brothers appealed from the judgment of the district court of Marshall county, Kansas; Gideon Fitzgerald, the defendant above named, being the surety on the appeal-bond.

"(2) The appeal-bond given in said case reads as follows:

"*Richard Wellington, Plaintiff, vs. John B. Price, William F. Price, Partners as Price Brothers, Defendants.* Before E. F. BENEDICT, a Justice of the Peace, Blue Rapids Township, Marshall County, Kansas.

"*State of Kansas, Marshall County—ss.:* Whereas, the defendants, John B. Price and William F. Price, partners as Price Brothers, intend to appeal from a judgment rendered against them in favor of the plaintiff, Richard Wellington, for the sum of two hundred thirty-six dollars, on the twenty-third day of December, 1884, by the undersigned justice of the peace of Blue Rapids township in said county, now, we, the undersigned residents of said county, bind ourselves to said plaintiff in the sum of four hundred and seventy-five dollars, that the said defendants shall prosecute their appeal to effect, and without unnecessary delay, and satisfy such judgment and costs as may be rendered against him thereon.

[Signed]

" 'GIDEON FITZGERALD

" 'Approved by me this second day of January, A. D. 1885.

" 'E. F. BENEDICT, Justice of the Peace.'

"Said action was afterwards regularly docketed in the district court of said county, and afterwards said Price Brothers dismissed their appeal, whereupon the district court rendered judgment against said Price Brothers for the

costs made in the district court on said appeal, and said case was certified back to the justice of the peace for further proceedings.

"(3) An execution was afterwards issued by said justice of the peace on said judgment of the said justice of the peace, which execution was returned: 'No goods. Received this writ October 13, 1885. November 9, 1885, I have made diligent search, and I can find no personal property of the within-named John B. Price and William F. Price, or either of them, in my county. This execution is wholly unsatisfied. LEWIS B. DOTEN, Constable.' After the return of said execution, the plaintiff, commenced this action against the defendant Gideon Fitzgerald on said appeal-bond, to recover the amount of the judgment rendered by said justice of the peace on the twenty-third day of December, 1884, with interest thereon from the date of the judgment."

CONCLUSIONS OF LAW

"The plaintiff is entitled to recover of the defendant the sum of two hundred and sixty-one dollars and costs."

JUDGMENT.

"It is therefore by the court adjudged that the said plaintiff have and recover from the said Gideon Fitzgerald, on the bond set forth in plaintiff's bill of particulars, the sum of \$261, and the further sum of \$—— as costs in this action, for which let execution issue."

The defendant, Gideon Fitzgerald, as plaintiff in error, brings the case to this court for review.

John V. Coon and Ed. A. Berry, for plaintiff in error. *W. H. H. Freeman*, for defendant in error.

VALENTINE, J. The only question involved in this case is as follows: Where a judgment is rendered by a justice of the peace in favor of the plaintiff, and against the defendant, and the defendant appeals to the district court, and afterwards dismisses his appeal, are the sureties on the appeal-bond liable for the amount of the judgment rendered in the justice's court, or only for the amount of the judgment for costs rendered in the district court? This question is purely one of statutory construction. The statutes applicable to the case, to-wit, sections 121, 124, and 129 of the Justice's Code, provide, among other things, as follows:

"Sec. 121. * * * [The condition of the appeal-bond or undertaking must be as follows:] *First*, that the appellant will prosecute his appeal to effect, and without unnecessary delay; *second*, that, if judgment be rendered against him on appeal, he will satisfy such judgment and costs."

"Sec. 124. * * * If the appeal be dismissed, the cause shall be remanded to the justice of the peace, to be thereafter proceeded in as if no appeal had been taken."

"Sec. 129. When any appeal shall be dismissed, or when judgment shall be entered in the district court against the appellant, the surety in the undertaking shall be liable to the appellee for the whole amount of the debt, costs, and damages recovered against the appellant."

We think the foregoing question must be answered that the sureties are liable for the judgment rendered in the justice's court. The statutes provide that the condition of the appeal-bond must be "that the appellant will prosecute his appeal to effect, and without unnecessary delay," and also that, "when any appeal shall be dismissed, * * * the sureties in the undertaking shall be liable to the appellee for the whole amount of the debt, costs, and damages recovered against the appellant." Now, when the appeal is dismissed from the district court, no judgment for any "debt" or "damages" is ever rendered in that court, but only a judgment that the appeal be dismissed,

and in favor of the appellee for the costs which have accrued in the district court; hence we think that the debt and damages for which the sureties on the appeal-bond are to be held liable in such cases are the debt and damages recovered by the appellee against the appellant in the justice's court.

The judgment of the court below will be affirmed.

(All the justices concurring.)

(37 Kan. 454)

STAUFFER v. REMICK.

(*Supreme Court of Kansas. November 5, 1887.*)

1. JUDGMENT—SATISFACTION—AGREEMENT OF PARTIES.

K. recovered a judgment against R. R., in an action against S., obtains a verdict in his favor. By the agreement of K. and S., the amount of the verdict is indorsed upon an execution of K. against R. *Held*, such indorsement does not relieve S. of his liability to R., upon the judgment subsequently rendered against him on the verdict, unless it appears that the verdict was rendered in an action arising on contract.

2. SAME—VERDICT IN ACTION OF TORT—DEBT—ENTRY OF JUDGMENT.

A verdict in an action in tort does not convert the tort into a debt. It does not become a debt until it is merged into a judgment.

(*Syllabus by Holt, C.*)

Commissioners' decision. Error from district court, Barton county; G. W. NIMOCKS, Judge.

Maher & Osmond, for plaintiff in error. *Clayton & Clayton*, for defendant in error.

HOLT, C. Plaintiff in error, plaintiff below, filed his petition in the Barton district court, of which the following is a copy: "Comes now the plaintiff, Jacob Stauffer, and complains of the defendants, Joseph Remick, James S. Dalziel, and Joshua Clayton and James Clayton, partners as Clayton & Clayton, saying: That on the fifteenth day of May, 1884, there was tried in the above court a cause entitled *Joseph Remick vs. Jacob Stauffer*, and a verdict found by the jury against said Jacob Stauffer for the sum of \$88.75, and costs; that on the sixteenth day of May, 1884, an execution was issued out of said court upon a judgment rendered in favor of H. M. Kline, and against said Joseph Remick; that the sheriff, James S. Dalziel, in whose hands said execution was placed, not being able to find any property upon which to levy, presented said execution in favor of H. M. Kline and against said Joseph Remick to said Jacob Stauffer, who thereupon obtained, by order of said execution creditor and owner of said judgment, an indorsement on said execution, crediting the said sum of \$88.75; that after the said payment to the sheriff, the court entered judgment upon said verdict as found against said Jacob Stauffer, and in favor of Joseph Remick, for \$88.75, and costs; that said Jacob Stauffer immediately paid said costs; that immediately after the entry of judgment by said court, and after the said payment to the sheriff, the defendants Joshua Clayton and James Clayton entered an attorney's lien upon said judgment, and procured from said Remick an assignment of said judgment to themselves; that said defendants have caused an execution to be issued and placed in the hands of the defendant James S. Dalziel, sheriff of Barton county, Kansas, who will levy said execution on the property of the said Jacob Stauffer, unless restrained by the order of this court. Plaintiff says that said judgment has been fully paid and satisfied in the manner aforesaid. Therefore plaintiff prays this court to issue its order restraining the collection of said judgment and proceeding under said execution until the further order of this court, and that, upon a final hearing of this cause, a perpetual injunction be granted forever restraining the collection of said judgment and execution, and such other and further relief as equity may require." The defendants below demurred because the petition did not state facts suffi-

cient to constitute a cause of action. The court below sustained the demurrer. Plaintiff excepts, and presents such ruling to this court for review.

Plaintiff contends that the payment by Stauffer to the sheriff is authorized by section 486 of the Civil Code. Section 486 reads as follows: "After the issuing of execution against the property, any person indebted to a judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as may be necessary to satisfy the execution. The sheriff's receipt shall be sufficient discharge for the amount so paid or directed to be credited by the judgment creditor on the execution."

The first question that arises in this case is whether Stauffer was indebted to Remick at the time the indorsement was made on the execution issued in the action of *Kline v. Remick*. It is not alleged in plaintiff's petition that he was so indebted. It states a jury had found a verdict in Remick's favor against him, but is silent as to the cause of action upon which it was found. If it was upon a contract for liquidated damages, it would have been a debt, not because of the verdict of the jury, but because of the liability on the contract. If the verdict was found in an action in tort, the verdict would not have been a debt. A verdict on a cause of action resting in tort, does not convert the tort into a debt. It must be merged into a judgment before it becomes a debt. *Freem. Judgm. § 167; Thayer v. Southwick*, 8 Gray, 229.

Where a petition is attacked by demurrer, for the reason that it does not state facts sufficient to constitute a cause of action, the rule is to construe the pleading against the pleader, on the ground that, as he himself selects the language, he should make his meaning clear. *Draper v. Cowles*, 27 Kan. 484. The plaintiff does not state in his petition that Remick was indebted to him at the time of the indorsement. The simple statement is there was a verdict found against him. We cannot say whether it was in an action arising on contract or in tort. To hold it to be sufficient we would be compelled to infer that the action was founded upon a contract. Under the rule of pleading above stated, we are not justified in making such an inference.

Immediately after the rendition of the judgment, Clayton & Clayton filed their attorneys' lien upon said judgment, and procured an assignment from Remick. We think, under the pleadings in this case, that they obtained a right to the judgment rendered against Stauffer. Of course, if Remick in person had directed this payment of his judgment against Stauffer, upon execution in favor of Kline against him, an entirely different question would have been presented from that we are now considering; but this indorsement was not made at his suggestion or by his consent. It may be fairly inferred that it was made without his knowledge, and if he had known of it he would have protested.

We think the ruling of the court was correct, and therefore recommend the affirmance of the judgment.

BY THE COURT. It is so ordered; all the justices concurring.

(37 Kan. 433)

ALMA TP. v. CAST.

(*Supreme Court of Kansas*. November 5, 1887.)

MUNICIPAL CORPORATIONS—ACTION BY, FOR OBSTRUCTION OF ALLEY—BILL OF PARTICULARS.

Where a township, as plaintiff, states in its bill of particulars that the defendant deposited dirt and earth in an alley of a city, thereby obstructing the same, and that the "overseer of road-district No. 3" removed the same at his costs, but fails to show that either said city or road-district was within the limits of the township that brings the action, such bill of particulars does not state a cause of action.

(*Syllabus by Holt, C.*)

Commissioners' decision. Error from district court, Wabaunsee county; R. B. SPILMAN, Judge.

W. A. Doolittle, for plaintiff in error. *Barnes & Carroll*, for defendant in error.

HOLT, C. Plaintiff in error, plaintiff below, filed the following bill of particulars in the justice's court. Upon a judgment for plaintiff, defendant appealed to the district court, and there demurred to the bill of particulars, which was as follows:

"Alma Township, Wabaunsee County, Kansas, Plaintiff, v. Math. Cast, Defendant."

"Said plaintiff alleges that said defendant is indebted to said plaintiff in the sum of ten and 50-100 dollars, for, upon having deposited on the alley of block 9, city of Alma, Wabaunsee county, Kansas, a lot of dirt and earth which he excavated from his cellar at the time of building his store building, said defendant was requested to remove said obstruction, but refused to do so, whereupon the complainant, being road overseer of said road-district No. 3, removed said obstructions at his costs. For further explanation see exhibit A. That there is due said plaintiff on said work from said defendant ten and 50-100 dollars, which he claims.

"ROAD-DISTRICT NO. 3, BY G. ZWANZIGER, ROAD OVERSEER.

"Exhibit A."

May 22.	Team one day,	-	-	-	-	-	-	3 00
May 22.	Team $\frac{1}{2}$ day,	-	-	-	-	-	-	1 50
May 23.	2 teams one day,	-	-	-	-	-	-	6 00
								<u>\$10 50"</u>

By consent of both parties, the title of said action was amended by correcting a mistake in the name of party plaintiff, by striking out "road-district No. 3," and substituting "Alma township, Wabaunsee county, Kansas," as plaintiff. The court below sustained the demurrer to such bill of particulars, and plaintiff brings the case here for review. We think the judgment of the court below was correct. The bill of particulars is awkwardly drawn. If it contained a cause of action, we would disregard all omissions therein; but it does not state a cause of action against defendant in favor of plaintiff, even crudely. There is no allegation that said city of Alma is in road-district number 3, or that it is within Alma township. It alleges that the overseer of road-district No. 3 removed an obstruction from the alley of block 9 in the city of Alma at his own cost, not at the cost of road-district No. 3, of the township of Alma. Of course, if the city of Alma was not in road-district No. 3, or if it was not in Alma township, Wabaunsee county, Kansas, or if Zwanziger volunteered to pay for the removal of said obstruction, the plaintiff herein could not recover as against the defendant.

The plaintiff in error filed a brief, in which he argues an entirely different cause of action from that set forth in its pleadings. We have felt bound simply to pass upon the record as presented to us, without attempting to decide upon the question presented in his brief.

We recommend that the judgment of the court below be affirmed.

By THE COURT. It is so ordered; all the justices concurring.

(37 Kan. 435)

FRANKLIN SUGAR CO. v. TAYLOR.

(Supreme Court of Kansas. November 5, 1887.)

FRAUDS, STATUTE OF—CONTRACT TO BE PERFORMED WITHIN A YEAR.

Where there were negotiations between a company and T. for his employment as superintendent prior to April 1, 1884, and subsequently he commenced work for

the company as superintendent, and on April 10, 1884, entered into a verbal contract with the company to serve as superintendent for the period of one year from April 1, 1884, for \$1,200, payable monthly, *held*, that the contract as made was one to be performed within a year, and therefore not necessary to be in writing.

(*Syllabus by the Court.*)

Error from district court, Franklin county; A. W. BENSON, Judge.

John W. De Ford, for plaintiff in error. *W. Littlefield*, for defendant in error.

HORTON, C. J. Alfred Taylor brought his action against the Franklin Sugar Company to recover the sum of \$400, alleging that he entered into a verbal contract with the company to take charge of and superintend its cane department for the term of one year, commencing April 1, 1884, at a salary of \$1,200, payable monthly; that he entered upon the performance of his duties as superintendent in April, 1884; but that on November 30, 1884, without any reasonable cause, he was wrongfully discharged from employment, and was only paid \$800. Trial had before the court with a jury; verdict for the plaintiff. After Taylor had introduced his evidence, the company demurred thereto, which demurrer was overruled, and exception taken. The contention is that Taylor made a verbal contract for several years' service, to begin at some future time; and therefore that his contract was void by the statute of frauds.

Taylor testified, among other things, that he had negotiations with W. L. Parkinson, for the sugar company, at various times prior to April 10, 1884, as to his employment as superintendent of the company; that on April 10, 1884, it was agreed that his salary should commence April 1, 1884, and that he was to receive \$1,200 for the year; that he was in the service of the company from April 1st as superintendent until November 30, 1884, when Parkinson informed him that the president "wanted to get rid of him, to cut down expenses;" that he continued to work for the company until the third day of December, 1884, when he was discharged; that he was then offered by the company \$2.25 a day to work in the mill, but refused so to do; and that he was ready and willing to perform all the services for which he was employed during the entire year.

A parol contract will not be adjudged void by reason of the prohibition of the statute of frauds and perjuries unless it affirmatively appears that, fairly and reasonably interpreted, it does not admit of performance within the year. *Sutphen v. Sutphen*, 30 Kan. 510, 2 Pac. Rep. 100. It appears there was ample evidence introduced on the part of Taylor that, after he commenced work, the date of April 1, 1884, was fixed as the commencement of his services, and also the date for the commencement of his pay; and therefore the contract would remain good for one year from that time. The court committed no error in overruling the demurrer to the evidence.

For like reasons, the court committed no error in the instructions complained of. If there were verbal negotiations concerning the employment of Taylor as superintendent prior to April 1, 1884, yet, after he commenced work, a contract was entered into on April 10, 1884, between him and the sugar company that he was to serve for one year as superintendent, commencing April 1st, for \$1,200, the contract was clearly to be performed within one year; therefore it was not necessary that it should have been in writing.

It is further contended that the district court erred in admitting in evidence various letters written by Parkinson to Taylor. It appears that the sugar company was not incorporated until March 21, 1884, and some of the letters were dated prior to that time. One of the letters, however, from Parkinson is dated after the incorporation of the company. Concerning these letters, the court instructed the jury that, if they were written before the sugar company was incorporated, they would not bind the company, unless the com-

pany, with a knowledge of their contents, afterwards ratified and confirmed them. The testimony shows that the arrangements of the company, as detailed in the letters of Parkinson, were carried out by the company after its incorporation. Urner was made president, Parkinson managing director, and Taylor superintendent of the cane department. This evidence, however, could not have been prejudicial to the sugar company, because it clearly appears from its own evidence that Parkinson was the managing director of the company after its incorporation, and that he was the official of the company, having the entire control of hiring and discharging employees.

As there was evidence to sustain the verdict, and as the alleged errors are insufficient to set the verdict aside, or to require a new trial, the judgment of the district court will be affirmed.

(All the justices concurring.)

(37 Kan. 441)

THORN v. SALMONSON.

(*Supreme Court of Kansas. November 5, 1887.*)

1. JUDGMENT—FOREIGN JUDGMENT—WANT OF JURISDICTION—COLLATERAL ATTACK.

A foreign judgment rendered without jurisdiction of the person of the defendant may be attacked in either a direct or collateral proceeding in which the validity of the judgment is questioned.¹

2. SAME—RECITALS IN—EXTRINSIC EVIDENCE TO CONTRADICT.

Although a recital, contained in a judgment, that service was made on the defendant, raises a strong presumption in favor of the truth of the recitals and of the jurisdiction, yet the defendant may show by extrinsic evidence, if such be the fact, that no service was actually made.

(*Syllabus by the Court.*)

Error from district court, McPherson county; S. O. HINDS, Judge.

F. G. White and John McPhail, for plaintiff in error. *Simpson & Bowker*, for defendant in error.

JOHNSTON, J. This is a proceeding in error to reverse the rulings of the district court of McPherson county in overruling a demurrer to the answer of the defendant, and in sustaining a demurrer to the reply of the plaintiff, and in the judgment given against her. In her petition, the plaintiff substantially alleged that, in 1852, at Jonkoping, in the kingdom of Sweden, she was married to Karl Johan Thorn, and that they lived together there as man and wife until 1862, and had six children born to them, four of whom died in infancy; that in 1862 he separated from her, and went into a distant portion of the kingdom of Sweden, where he obtained a pretended decree of divorce, which was procured without notice to her, and was void; that, after the pretended decree of divorce was granted, he married Sophia Carlsdotter, now Sophia Salmonson, and soon afterwards they emigrated to America, and lived together as man and wife in McPherson county, Kansas, until August 17, 1881, when he died; that at the time of his decease he was the owner of 160 acres of land in McPherson county of the value of \$5,000, and of personal property worth \$2,000; that a will made by him in 1869, which bequeathed all his personal property to the defendant, was probated, and under which she took and appropriated all the personal property of which he died possessed; that, after the death of Thorn, the defendant took the proceeds of the sale of the personal property, and purchased the interest of his two children in the real estate mentioned; and that since that time the defendant has been in the possession of the land, claiming the same as the widow and legal heir of Thorn. The plaintiff therefore asked that she be adjudged to be the

¹ The want of jurisdiction is a matter that may always be set up against a judgment when sought to be enforced, or when any benefit is claimed under it. *Grimmett v. Askew*, (Ark.) 2 S. W. Rep. 707, and note.

lawful widow of Thorn, and entitled to all the property, real and personal, which belonged to the estate of the deceased, and the issues and profits of the same, and for an accounting.

The defendant answered that Karl Johan Thorn was legally divorced from the plaintiff in February, 1864, in one of the district courts of Sweden, and she attaches to her answer an authenticated copy of the decree. She further alleges that subsequent to the rendition of the decree, and while it was in full force and effect, she was legally married to Thorn in Sweden, and she sets forth a copy of the marriage certificate, duly signed by the parish pastor. She further answers that the decree of divorce has been fully adjudicated in the courts of the kingdom of Sweden, and was duly affirmed by the court of highest resort in that kingdom, and she refers to and makes a part of her answer an exhibit which embodies a transcript of the proceedings of the courts in that respect.

The plaintiff demurred to the answer, alleging that it was insufficient to constitute a defense. The demurrer being overruled, she filed a reply, in which she alleged, in substance, that she had never received any personal or other notice of the divorce proceeding, or of any of the proceedings referred to in the answer; that she never made any voluntary appearance, or otherwise submitted her cause, or any cause personal to her as the wife of C. J. Thorn, in any of the courts of the kingdom of Sweden.

The court sustained a demurrer to the reply, on the ground that it did not state sufficient facts. These two rulings are the ones upon which error is assigned.

The ruling upon the answer is certainly not erroneous. The averments there made show that a decree of divorce was granted by a regularly constituted judicial tribunal of the kingdom of Sweden, and the decree is regular and valid upon its face. Both of the parties were natives and residents of the kingdom of Sweden, and were subject to its laws, and to the process of its courts, at the time the action for divorce was pending and determined. The divorce was granted to Thorn on the ground that the plaintiff had abandoned him, and it is recited that notice by publication was given for a year and a night before the judgment of divorce was rendered, in accordance with law and the rules of the church, and this judgment was in full force and effect when Thorn and the defendant were married. If these averments are established, they will of themselves constitute a complete defense to the plaintiff's action. But the answer goes further, and states that in a subsequent proceeding the validity of the judgment of divorce was questioned and determined in the higher courts of that country, and in which both the plaintiff and defendant, as well as Thorn, appeared and were heard. It is there shown that at that time Thorn and the defendant were married, and the plaintiff then made known in that proceeding that she did not wish to change or disturb the marriage relation existing between Thorn and the defendant; and the supreme court of Sweden, before which the case was taken and heard, affirmed the divorce which had been granted. That decision was taken on appeal before his royal highness, where it was again affirmed. It requires no argument to demonstrate that these facts, if proven, completely answer the charges of the plaintiff.

The ruling made on the demurrer to the reply, however, cannot be sustained. While the judgment of divorce appears to have been granted by a competent tribunal which had jurisdiction of the subject-matter, as well as of the parties, and is therefore entitled to liberal presumptions, it is not so far conclusive as to preclude the plaintiff from showing that it was rendered without jurisdiction, or was fraudulently obtained. The reply specifically denies that the plaintiff was ever served with process, or had her day in court, in any of the proceedings mentioned in defendant's answer. If in truth there was no service, personal or otherwise, and she had never been given an op-

portunity to be heard, she cannot be bound or affected by any of the orders or judgments made in those proceedings. A foreign judgment rendered without jurisdiction may be assailed in either a direct or collateral proceeding. Although the recitals contained in the judgment that service was made, raise a strong presumption in favor of the jurisdiction and of the truth of the recitals, yet the plaintiff may show by extrinsic evidence, if she can, that no service was actually made. Strong proof will be required to overthrow the presumption of jurisdiction raised by the recitals; but if it is clearly shown that the plaintiff was not served with process, and did not voluntarily appear or submit to the jurisdiction of the court, the recitals are of no value. *Litowich v. Litowich*, 19 Kan. 451, and cases cited; *Mastin v. Gray*, Id. 458; *Pollard v. Baldwin*, 22 Iowa, 328; *Lazier v. Westcott*, 26 N. Y., 146; *Freem. Judgm.* 588 *et seq.*

The judgment of the district court will be reversed, and the cause remanded, with the direction to overrule the demurrer filed against the plaintiff's reply.

(All the justices concurring.)

(37 Kan. 413)

D. M. OSBORNE & Co., a Corporation, etc., v. EHRHARD.

(*Supreme Court of Kansas.* November 5, 1887.)

1. NEW TRIAL—MOTION FOR—SUFFICIENCY.

A recitation in a record that "thereupon the defendant filed his motion for a new trial, as follows," which is followed by a full and formal motion, including the style of the case in which it was filed, the grounds upon which it was based, and purporting to be signed by counsel, fairly implies that the motion was in writing, and should be so treated when its sufficiency is challenged in this court.

2. SALE—BREACH OF WARRANTY—MEASURE OF DAMAGES.

E. purchased a machine, and gave his negotiable note therefor, upon the condition that if it failed to do good work, and the defects were not remedied by the company selling it, his note would be returned to him upon a return of the machine. The machine proved to be defective, and was returned, but, instead of returning the note, the seller indorsed it before due to L. When L. brought an action against E. to recover on the note, E. believing, and having some cause to believe, that the transfer was not *bona fide*, employed counsel to defend, but was unsuccessful. *Held*, in an action for damages against the seller for breach of warranty, that the defense against the note was judicious and apparently necessary, and that the expenses of counsel therein were a legitimate consequence of the wrongful action of the defendant, and were properly taken into consideration by the jury.

3. SAME—RIGHT OF VENDEE TO RETURN OF NOTE AND PAYMENTS.

If, under the warranty, the failure of the machine and its return entitled E. to a return of the note and money paid, the subsequent action of the company or its agent in refusing to receive the machine could not defeat the right of E. to the note and money, or to an action for damages in case the company refused to surrender the same.

4. APPEAL—REVIEW OF CONFLICTING EVIDENCE.

The fact that the verdict of the jury is against the weight of the testimony, which is conflicting, will not authorize the supreme court to set the verdict aside, or to reverse the judgment rendered thereon.

(*Syllabus by the Court.*)

Error from district court, Clay county; EDWARD HUTCHINSON, Judge.

M. M. Miller, for plaintiff in error. *Harkness & Godard*, for defendant in error.

JOHNSTON, J. Adolph Ehrhard brought an action against D. M. Osborne & Co., alleging, in substance, that on or about the twenty-eighth day of June, 1882, he purchased from the agent of the company at Clay Center, Kansas, a combined reaper and binder for the sum of \$165; that by the terms of the contract he was to return the machine if it did not work in a good and satisfactory manner; and that in payment he gave his negotiable promissory note

for \$150, due the first day of the following October, and paid in cash the sum of \$15; further, that by the terms of the contract the note was to be returned to him if the machine did not work in a good and satisfactory manner. He alleges that after repeated trials of the machine it was found that it would not do the work for which it was sold, and was utterly worthless to the plaintiff, whereupon he returned the machine to the defendant's agent, and demanded his note. He further states that the agent accepted the machine when so returned, and agreed to return the note as soon as it could be obtained from the company. But, instead of doing so, the note was sold and transferred before due to one James Lyon. It was averred that on the tenth day of March, 1883, James Lyon brought suit against him in the district court of Clay county upon the note, and on the twenty-fourth day of September of the same year a judgment was rendered against Ehrhard, and in favor of Lyon, for the sum of \$168.60, together with costs, taxed at \$15.25, which judgment he was compelled to pay. Ehrhard further alleges that, believing the note was not transferred to James Lyon before maturity, and that he had a good and sufficient defense to the action thereon, he, in good faith, employed attorneys to defend for him in that action, and paid them the sum of \$25 for their services therein. He therefore prayed for judgment against the company for the sum of \$223.80, with interest. The defendant company answered by a general denial, and at a trial had with a jury in May, 1885, a verdict was returned in favor of Ehrhard, assessing his damages at \$245, and the court gave judgment for that sum.

D. M. Osborne & Co., as plaintiff in error, is here asserting that the court below erred in not granting its motion for a new trial of the cause. The grounds of the motion were—*First*, "that the damages given by the jury in this case are excessive;" *second*, "that the verdict given in the case is against and contrary to the weight of the evidence and the law of the case;" and, *third*, "that the court erred on the trial of the case in giving the sixth and eighth instructions to the jury."

Counsel for Ehrhard claim that the rulings of the court are not reviewable here, for the reason that the motion for a new trial was not reduced to writing and filed as prescribed by the Code; and they cite *Douglas v. Insley*, 84 Kan. 604, 9 Pac. Rep. 475. The present case does not fall within that authority. The record here does not in terms state that a written motion was filed, but that much is fairly implied. The motion copied in the record is full and formal. It includes the style of the case, formally states the grounds on which it was based, and then purports to be signed by counsel. The record respecting the motion recites that "thereupon the defendant filed his motion for a new trial as follows." The fair implication of this language is that it was a written motion, as it could not well be filed if not in writing.

The first contention of the plaintiff in error is that the damages awarded are excessive, to the extent of the allowance manifestly made for counsel fees in defending the action brought by Lyon on the note. The testimony respecting the counsel fees was received without objection; and the only basis for the claim that the expenses should not have been allowed is that he had notice before the commencement of that suit that Lyon was the *bona fide* holder of the note before due, and that therefore the expenses incurred were not judicious or necessary. It appears that, when the action was brought on the note, Ehrhard consulted reputable counsel, who, after hearing the facts, advised him to defend against the note, on the theory that the transfer to Lyon was not *bona fide*. The defense was made, but was unsuccessful, and he paid his counsel the moderate fee of \$25. Ehrhard claims, and not without some cause, that he had reason to believe that it was still owned and held by the company. When the defective machine was returned by Ehrhard to the agent of the company, the note was then in the hands of the agent. Although demanded by Ehrhard, the agent failed to deliver it, but stated to

Ehrhard that he would try and get it for him. He was also informed by the same person that he had seen the note in the hands of an agent of the company a few days before it was due. In addition to these facts, the attorneys who held the note for collection sent him a notice stating: "We hold for collection against you a note for \$150 in favor of D. M. Osborne & Co." It is true that the company offered some testimony which conflicted with the theory of Ehrhard, and tended to show that he had notice of the transfer to Lyon before the bringing of the action; but upon this question the jury have made a special finding that he had no notice, until after the Lyon suit was brought, that the note had been transferred to Lyon before it became due. There was testimony upon which to base this finding, and it practically disposes of the claim made by the plaintiff in error. If no transfer had actually been made, it was the duty of Ehrhard to interpose his defense in that action. In making the defense, he acted on the advice of counsel, and, from the testimony, his doing so was reasonable, judicious, and apparently necessary. Under all the circumstances, we think the jury were justified in taking into consideration the expenses of the litigation,—expenses which were incurred in good faith, and as a legitimate consequence of the wrongful action of the plaintiffs in error.

The next ground of error assigned is that the verdict is contrary to the weight of the evidence. This is not a sufficient ground for a reversal. We are not permitted to enter upon the task of weighing conflicting testimony with a view of determining where the preponderance is. A verdict cannot be set aside in this court if there is testimony which fairly tends to support it, although the preponderance might appear to us to be against the result reached. *Railway v. Kunkel*, 17 Kan. 145. There is evidence here to establish every essential fact relied on. In fact, the testimony satisfactorily shows that the machine utterly failed to come up to the requirements of the alleged warranty. The agent from whom it was purchased, as well as the general agent of the company, both tried to remedy the defects, and both failed to make it do the work for which it was intended, and the former admitted on the witness stand that it did not work well.

The giving of the sixth and eighth instructions is a subject of complaint. The sixth instruction states the measure of damages to which Ehrhard would be entitled in case there was a breach of the warranty alleged to have been given; and the eighth states: "If the jury find, from the evidence, that the plaintiff had a right to return the machine in question, then it makes no difference whether the defendant or defendant's agent refused to receive the machine or not." The complaint is that no contract of warranty was shown, and that therefore there was no foundation for these instructions. On this question there is the testimony of Ehrhard that the local agent who sold the machine warranted that it would work well, and, if not, that the note would be returned to him upon the return of the machine. The written contract between the company and its local agent was offered in evidence, which showed that he had the authority to make the agreement of warranty which he did make. He gave Ehrhard a book containing a printed warranty which the company gave to purchasers, and which contained the stipulation that "all our machines are warranted to be well built, of good material, and capable of cutting, if properly managed, from ten to fifteen acres per day. If, on starting the machine, it should in any way prove defective, and not work well, the purchaser shall give prompt notice to the agent of whom he purchased it, and allow time for a person to be sent to put it in order. If it cannot then be made to do good work, the defective part will be replaced, or the machine taken back, and the payment of money or notes returned." Notice was given on the day succeeding the purchase that the machine failed to work, and the agents of the company endeavored to remedy the defects, as required by the warranty. After it had been demonstrated that the machine was a failure,

and it had been returned, the agent of the company agreed to procure a return of the note. All these things tend strongly to support the theory that a warranty was given, and they are certainly sufficient to authorize instructions upon that theory.

The fact that the machine was sold at a reduced price is suggested as an argument that no warranty was given. The plaintiff below accounts for this by stating that the machine was one which had stood over one year, had been exposed, and was badly weather-beaten; but that the agent claimed that, aside from this, the machine was as good as a new one. The weather-beaten appearance of the machine, and the reduced price at which it was sold, cannot overthrow the direct testimony that a warranty was given.

If, under the warranty, the failure of the machine, and its return, entitled Ehrhard to a return of the note and money paid, the subsequent action of the company or its agent in refusing to receive the machine could not defeat his right to the note and money, or to an action for damages in case they refused to surrender the same. His right to maintain this action accrued when he properly returned the machine, and demanded the return of what he had given for it; and therefore no error was committed in giving the eighth instruction.

Objections are made to the rulings of the court upon the admission of testimony and upon other instructions, but, as these were not included in the grounds stated in the motion for a new trial, they are not before us for consideration. *Nesbit v. Hines*, 17 Kan. 316; *Decker v. House*, 30 Kan. 614, 1 Pac. Rep. 584.

The judgment of the district court will be affirmed.
(All the justices concurring.)

(37 Kan. 437)

STATE v. ROBERTS and others.

(Supreme Court of Kansas. November 5, 1887.)

ALTERATION OF INSTRUMENTS—BURDEN OF PROOF.

In an action upon a recognizance, where the issue was whether the recognizance was for \$1,200 or \$1,250; and if the recognizance was for \$1,200 it was valid, but if for \$1,250 it was void; and the recognizance was introduced in evidence, which showed upon its face that it had originally been drawn for \$1,250, and it was uncertain from the face of the instrument whether the words " & fifty " were so erased as to make it a \$1,200 recognizance or not, but probably not,—it was a question for the jury to determine, upon the instrument and the other evidence, whether such words were erased or not, and, if erased, when; and it was not error as against the plaintiff, the state of Kansas, for the court to instruct the jury as follows: "(6) In this case the burden is upon the plaintiff to satisfactorily explain the alteration in the recognizance sued on in this action as to the amount of the penalty therein named."

(Syllabus by the Court.)

Error from district court, Marion county; L. HOUK, Judge.

Keller & Dean, for plaintiff in error. *Kellogg & Sedgwick*, for defendants in error.

VALENTINE, J. This was an action brought in the district court of Marion county by the state of Kansas against C. F. Roberts, as principal, and L. W. Hutchinson and others, as sureties, upon a forfeited recognizance. The only disputed questions of fact at the trial were: *First*. Was the amount of the recognizance \$1,250, or was it only \$1,200? *Second*. If it was only \$1,200, when was it changed from a greater amount to that amount,—before or after the recognizance was executed? If the amount was \$1,250 at the time the recognizance was executed, then the recognizance was void, according to a decision heretofore made with reference thereto by this court, (*Roberts v. State*, 34 Kan. 151; 8 Pac. Rep. 246;) for the district court had, previously to the execution of the recognizance, fixed the amount thereof at only \$1,200. If

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the amount of the recognizance, however, was only \$1,200 at the time the recognizance was executed, then the recognizance was valid.

The case was tried before the court and a jury, and the jury rendered a general verdict, and made special findings, as follows: "We, the jury impaneled and sworn in the above-entitled cause, do upon our oaths find for the defendants." "(1) Who wrote the bond in the suit? *Answer.* Judge Peters. (2) In what sum was the penalty of the bond as first written? *A.* Twelve hundred and fifty dollars. (3) Who changed such sum so first written? *A.* Don't know. (4) When was such change made,—before or after it was signed by defendants? *A.* After. (5) In what way was such sum in the bond changed? State the words changed, and how the changes were made. *A.* The words '& fifty' partially erased. (6) Was the erasure of the words '& fifty' in the bond, sufficiently plain and marked to attract the attention of a person of ordinarily good eyesight and ordinary perceptive faculties, and to indicate to such person that the words '& fifty' were intended to be erased? *A.* No."

The principal errors assigned are with reference to the instructions given by the court to the jury; but as to the most of them it is wholly immaterial whether they are correct or not. The jury found, upon the evidence, that the change in the recognizance was made after it was signed by the defendants; hence all instructions given by the court to the jury upon the theory that the change might have been made prior to the signing of the recognizance are wholly immaterial. As the recognizance when signed was for \$1,250, it was and is void, whether it was ever afterwards changed or not, and without reference to who changed it, or whether the change was made by the plaintiff, or by any of its agents, or entirely by a stranger to the recognizance. *Roberts v. State*, 34 Kan. 151, 8 Pac. Rep. 246.

There is one instruction, however, that requires some special comment. That instruction reads as follows: "In this case the burden is upon the plaintiff to satisfactorily explain the alteration in the recognizance sued on in this action as to the amount of the penalty therein named." As an abstract proposition of law, this instruction may be erroneous, (*Neil v. Case*, 25 Kan. 510;) but under the facts of this case we cannot say that it is. The plaintiff alleged in his petition that the recognizance was a \$1,200 recognizance, and the defendants in their answer, which was verified by affidavit, denied the same; hence it devolved upon the plaintiff to prove that the recognizance in suit was a \$1,200 recognizance. The plaintiff introduced the recognizance in evidence. In all probability the recognizance did not show that it was a \$1,200 recognizance, but, on the contrary, came nearer showing that it was a \$1,250 recognizance. The county attorney, when he commenced this action, believed it to be a \$1,250 recognizance, and alleged it to be such; and the county attorney who commenced this action was the same person who was the county attorney when the recognizance was drawn up and executed. Afterwards, and during the first trial of this case, it was disclosed that the court had authorized only a \$1,200 recognizance; hence the plaintiff so amended its petition as to make it allege that the recognizance was for only \$1,200, instead of for \$1,250, as the original petition alleged.

Now, as the recognizance itself did not show that it was a \$1,200 recognizance, but showed that it was formerly drawn up as a \$1,250 recognizance, and that it was probably still a recognizance for that amount, it devolved upon the plaintiff to show that a change had been made in the recognizance prior to its execution, and that it was really and in fact only a \$1,200 recognizance when it was executed. This is substantially what the court below charged. Of course, if the recognizance had shown upon its face that it was a \$1,200 recognizance, the instruction would have been erroneous, but we cannot say that such was the case; on the contrary, we are inclined to think that the recognizance always showed upon its face that it was in fact a \$1,250 recogni-

zance. If not, then it was so doubtful as to what it did show that the plaintiff had to show by extrinsic evidence what was intended by the parties when the recognizance was executed, and in this manner the plaintiff had to "explain the alteration in the recognizance." There was nothing on the face of the recognizance that showed that the recognizance was intended to be only a \$1,200 recognizance, and nothing that tended to show it except the partial erasure of the words "& fifty." If no extrinsic evidence had been introduced tending to show that these words were intended to be erased, and that they were attempted to be erased, before the recognizance was signed, the jury should probably have found that the recognizance was always a \$1,250 recognizance. The plaintiff attempted to show, by extrinsic evidence, that the partial erasure of the words "& fifty" was intended as an erasure, and that the same was done prior to the signing of the recognizance; but it failed. The question of erasure was for the jury, and, under the facts of the case, we cannot say that the said instruction was erroneous.

The judgment of the court below will be affirmed.

(All the justices concurring.)

(37 Kan. 445)

LEAVENWORTH, T. & S. W. RY. CO. v. FORBES.

(Supreme Court of Kansas. November 5, 1887.)

1. RAILROAD COMPANIES—INJURY TO ANIMALS ON TRACK—FAILURE TO FENCE.

In an action for damages for the killing of hogs in the operation of a railroad, where it is admitted that the railroad was not fenced where the injury occurred, and in a township where hogs were prohibited from running at large; and that, even if the railroad had been inclosed with a fence constructed as designated by section 2 of the fence law, that said fence would not have prevented said hogs from going upon the defendant's right of way: *held*, that under said admissions it was error to instruct the jury to find for the plaintiff unless they found that he contributed negligently to the injury; *further held*, that under the admissions it was immaterial whether the said railroad was fenced or not.¹

2. SAME—NEGLIGENT MANAGEMENT OF TRAIN—CONTRIBUTORY NEGLIGENCE.

Where the jury found that the injury occurred by the negligence of the railroad company and its employes in the management of its train, and that, by the exercise of ordinary care and prudence, they could have prevented said injury, *held*, that the plaintiff was entitled to recover unless by his own negligence he directly contributed to or caused the injury; and the fact that the plaintiff kept his hogs in an insecure inclosure, and thereby permitted them to escape and go upon defendant's railroad, would not be such negligence as to prevent his recovery.

3. APPEAL—FROM JUSTICE—AFTER JUDGMENT BY DEFAULT.

Where an action is brought before a justice of the peace, and the defendant makes no appearance, but permits judgment to be rendered in his absence, he is not thereby prohibited from taking an appeal to the district court; and section 114 of the Justices' Code only provides an additional remedy.

(Syllabus by Clogston, C.)

Commissioners' decision. Error to district court, Leavenworth county; R. CROZIER, Judge.

W. J. Forbes brought this action in justice's court in Leavenworth county to recover the value of certain hogs killed by the defendant, plaintiff in error, in the operation of its railway. The defendant, plaintiff in error, made default, and judgment was rendered for the plaintiff for the sum of \$60 and costs. Afterwards, and within 10 days, the defendant filed its appeal-bond, and duly prosecuted an appeal to the district court of Leavenworth county. In the district court the plaintiff made a special appearance, and moved the court to dismiss the appeal, for the reason that the judgment was rendered on default in said justice's court, and said defendant did not proceed, under section 114 of the Code of Civil Procedure, before said justice, to have the judgment set aside, and to be let in to defend; which motion was by the

¹See note at end of case.

court overruled, and excepted to by the plaintiff. The facts as shown by the evidence are substantially as follows: Plaintiff was the owner of about 40 head of hogs, and lived near the line of defendant's railway in Tonganoxie township, Leavenworth county, Kansas; that on the morning of the injury these hogs were in an inclosure where they had been kept during months previous; that some time in the morning they broke out by making a hole through the fence, and wandered into a neighboring farm through which the defendant's railway run; that about 10 o'clock in the forenoon the west-bound train on defendant's road run over and killed seven or eight of the hogs, of the value of \$60. It is conceded that hogs were prohibited from running at large in said township, and that the defendant's railway was not fenced where the injury occurred. Trial by jury in the district court, and judgment for plaintiff, defendant in error, for \$60 and costs; and the defendant brings the case here. Defendant in error filed a cross-petition on the overruling of his motion to dismiss the defendant's appeal.

George R. Peck and *A. A. Hurd*, for plaintiff in error. *Lucein Baker*, for defendant in error.

CLOGSTON, C. The plaintiff in error assigns but two errors for review: *First*, that the court erred in refusing to give the instructions asked by the defendant; *second*, that the special findings of fact were not sustained by the evidence. The special instructions asked by the defendant are as follows:

"(1) In townships where hogs are not by law permitted to run at large, a legal and sufficient fence may have its lower rail, board, or plank two feet from the ground.

"(2) If a legal and sufficient fence, as just defined, inclosing the defendant's railway in and through the township in which plaintiff's hogs were killed, as shown by the testimony in this action, would not have prevented said hogs, or any of them, from going to, on, or over the track of said railway at the place where they were killed, then no recovery in favor of plaintiff can be based, wholly or partly, on any failure to fence said railway.

"(3) Hogs which have escaped from their owner or keeper by breaking through his inclosure or otherwise, and which are roaming on the highway, or trespassing on the lands of another, are running at large within the meaning of section 46 of chapter 105 of the General Statutes of Kansas.

"(4) If you find that plaintiff's hogs, for the killing of which this action is brought, were killed while running at large in a township where the voters had not voted to be exempt from the operations of section 46 of chapter 105 of the General Statutes of Kansas, then you should find for the defendant, unless you further find that said hogs were at large without fault or negligence of plaintiff.

"(5) In a township where hogs are by law prohibited from running at large, it is the duty of those who keep hogs in a field or pen to inclose them with such a fence or barrier as will prevent their escape. If in such township they have escaped by breaking through or getting over the fence with which they were inclosed, such escape will be presumed to have been by reason of the fault or negligence of the person assuming to keep them, unless it is proven that such fence was so constructed and kept in repair that such breaking through or getting over could not have been reasonably anticipated from the condition of the fence and the size, activity, natural inclinations, and known character of the hogs so escaping.

"(6) The rules of law as to diligence and negligence apply to stock-owners as well as to railway companies. Hence if hogs were prohibited by law from running at large in the township where plaintiff's hogs were kept by him, and were killed by the defendant's railway train, the law required from the plaintiff the same degree of diligence to keep his hogs from escaping that it required from the railway company to avoid killing them when they got in

front of its train; and if the plaintiff failed to use that degree of diligence to keep his hogs from escaping, he cannot recover in this action."

We concede that instructions 1, 2, 5, and 6 state the law applicable to this case, and know of no reason why the court should not have given them to the jury. Instructions 5 and 6 we think were substantially given in the general charge by the court. As to instruction 4, it assumes that the defendant would not be liable if the hogs in question were running at large, as contemplated by section 46 of chapter 105 of the General Statutes of Kansas, even if killed by the negligence of the defendant. Had the railway added to this instruction its liability for its acts, if negligently or willfully done, then the instructions would have been applicable to this case. *Railroad Co. v. Lea*, 20 Kan. 353. This is also substantially the defect in instruction 3, refused. The fact that hogs are found at large in a township where they are prohibited by law from running at large, is not conclusive evidence that they are trespassers, as contemplated by section 46: it depends upon how they came to be at large. If by the deliberate or negligent acts of the owner, then they are to be considered as running at large; but if by accident, without fault of the owner, then they are not running at large as contemplated by said section. Instructions 3 and 4, if given, would have relieved the defendant of all liability had the hogs been at large as trespassers, or at large by the fault of their owner, notwithstanding the fact that the injury occurred by the negligence or the wanton acts of the defendant or its employees. This is not the law applicable to this case, and therefore the instructions were properly refused. See *Railway Co. v. Roads*, 33 Kan. 640, 7 Pac. Rep. 213; *Railway Co. v. Bradshaw*, 33 Kan. 533, 6 Pac. Rep. 917; *Railroad Co. v. Shaft*, 33 Kan. 527, 6 Pac. Rep. 908.

The next question is, was the refusal of the court to give the instructions that were proper and ought to have been given such error, under the facts of this case, as to warrant a reversal of this action. This action was tried, and the jury instructed, upon two theories: *First*, that the injury occurred by the negligence of the defendant, its agents and employees, in the management and operation of its trains, and by the exercise of ordinary prudence and care the injury could have been prevented; *second*, that the hogs were at large without fault of the plaintiff, and that the defendant's railway was not fenced at the place where the injury occurred. The jury was asked to find upon the first of these propositions, and their answer thereto was as follows: "Did the defendant and its servants and agents negligently run its engine and cars into and upon the hogs of the plaintiff? *Answer*. Yes." "Could the defendant and its servants and agents, by the exercise of ordinary prudence and care, have prevented the killing of plaintiff's hogs after they came upon its track? *A*. Yes."

Upon these findings of fact it is clear that the jury found against the defendant on the first proposition; that is, they found that the injury occurred by the negligence of the defendant and its employees, and that by the use of ordinary prudence and care the injury could have been prevented. If these findings were sustained by the evidence, that does away with all the other questions in this case. It then could make no difference how the hogs came to be at large; whether they broke out of a lawful inclosure without fault of the defendant, or were kept in an insufficient inclosure, and by the negligence of the plaintiff became at large, the injury occurred by the company's negligence, and this would make it liable. Under these findings, if the instructions asked for by the defendant had been given, the verdict would have been the same. Counsel, however, insist that the findings were not sustained by the evidence; but in this we think counsel are mistaken. The evidence of the witnesses for the defendant alone would justify the jury in the findings. The first witness called by the defendant was its section foreman of that section where the injury occurred. He testified that the hogs could have

been seen by the employes on the train for 700 or 800 feet before they reached the point where the injury occurred. The engineer who was in charge of the engine testified that he saw the hogs upon the track when 250 feet from the point where they were run over; that he made no effort to check or stop the train; that the hogs, when he first discovered them, were running on the track away from the engine; that a part of them left the track, and a few continued to run on the track; he whistled and opened the cylinder cocks, supposing the hogs would leave the track. The fireman who was firing on the engine testified that he saw the hogs when the engine was a quarter of a mile east of the place of injury, and the hogs were on the track; that the engineer whistled and let off steam, but made no effort to stop the train; that the train could have been stopped in a distance of 150 or 200 feet. This evidence alone was sufficient to show negligence. The hogs were running west on the track when discovered by the engineer; they were in a cut running towards the west end of it; part of the hogs were on the track, and others were on each side. He could have stopped the train before reaching the hogs, and thereby have prevented the injury. It is no excuse for him to say that he thought the hogs would leave the track; they were on the track, and some of them continued to remain on the track, and yet no effort was made to stop the train.

Counsel insists that the general charge given by the court to the jury did not state the law of this case as established by this court. The instruction referred to by counsel is as follows: "Now, on the other side, it is claimed by the defendant in this case that there was what is called a 'Hog Law' in force in this township referred to. It is said to have been an order of the board of county commissioners, properly published, prohibiting or directing that hogs should not be allowed to run at large in this county. If such was the action of the county board, that would be effective on that subject, and hogs running at large would be conclusive evidence that they were running at large contrary to law; but although that may have been conclusive evidence that these hogs were unlawfully running at large, with reference to that order of the board of county commissioners, yet unless the road of the company was inclosed with a good and lawful fence to prevent an animal from going on the railroad track, and they were killed by the railroad, the company would nevertheless be liable."

This instruction does not correctly state the law. A railroad is only bound to fence its track with a lawful fence, and, in townships where hogs are not permitted to run at large, are only required to construct the fence provided for by section 2, c. 40, Comp. Laws 1885, which provides that the "bottom rail, board, or plank shall not be more than two feet from the ground." A lawful fence may or may not be sufficient to prevent hogs from going upon the track. A lawful fence might prevent large hogs, and not small ones, from going through it. The burden of proof to establish this rests upon the railroad company, and in this case it was conceded that a lawful fence, or a fence with the bottom rail, plank, or board two feet from the ground, would not have prevented the hogs from going upon the defendant's track. This being true, it then made no difference in this case whether the defendant's road was fenced with a lawful fence or not. *Railroad Co. v. Yates*, 21 Kan. 613; *Railway Co. v. Bradshaw*, 33 Kan. 533, 6 Pac. Rep. 917; *Railroad Co. v. Lea*, 20 Kan. 353. The trial court evidently understood the law to be that the fence contemplated must be so constructed as to prevent all animals from going upon the railroad track, and so in substance instructed the jury. We do not so understand the law; but in answer to this objection we suggest to counsel that the record fails to show any objections or exceptions taken to the giving of said instruction, and, in fact, we cannot see how it would help the defendant, even if the exception had been saved; for if the court gave the jury a wrong construction of the law upon this branch of the case, and yet

correctly gave the law upon the first proposition, that the damage was caused by the negligent act of the defendant in the operation and running of the train, without fault of the plaintiff, and the jury found for the plaintiff upon this branch of the case, then it was immaterial, even if the court wrongfully instructed the jury on the other branch that counsel complains of.

The cross-petition of the defendant in error presents but the one question: Will an appeal lie from the final judgment of a justice of the peace where the defendant makes default and permits judgment to be rendered in his absence? Appeals are regulated by the statute. Section 120 of the Code of Procedure before justices of the peace, reads: "In all cases not otherwise specially provided for by law, either party may appeal from the final judgment of a justice of the peace to the district court of the county where the judgment was rendered." And section 132 is as follows: "An appeal may be taken from the final judgment of a justice of the peace in any case, except in cases hereinafter stated, in which no appeal shall be allowed: *First*, in judgments rendered on confession; *second*, in jury trials where neither party claims in his bill of particulars a sum exceeding twenty dollars." Then, by the direct terms of this statute, an appeal may be taken from a judgment not prescribed by statute; and judgments taken on default, or in the absence of a party, are not within the exception. Defendant, however, insists that section 114 of the justices' act provides a complete remedy whereby judgments rendered in the absence of a party may be opened up, and the defendant let in to defend. This is true; ample provision is there made, but the statute does not pretend to make that rule an exclusive one. It simply provides an additional remedy which may be pursued at the option of the party. And after that remedy has been pursued, a party would still have the right of appeal. Many cases might arise in which an application under section 114 would work great hardship. Affidavit must be made in that case by the party himself. Judgments are rendered frequently in the absence of parties, where it would be impossible to make the application in person under said section; but an appeal may be taken without the presence of the party, it not being necessary that he should sign the appeal-bond. This all may be done in his absence. We are well aware that some states apparently have decided this question the other way. In *Clendenning v. Crawford*, 7 Neb. 474, and *Strine v. Kingsbaker*, 12 Neb. 52, 10 N. W. Rep. 534, founded upon a statute similar to our own, it was decided that an appeal would not lie from such a judgment. In *Brayton v. County of Delaware*, 16 Iowa, 44, which was an application to strike from the files an answer filed in the district court, after an appeal had been taken from the justice of the peace, the court held that, as the defendant was in default for an answer in the justice's court, before he could answer in the district he would have to purge himself; but did not hold that an appeal would not lie. In *Long v. Sharp*, 5 Or. 438, cited; this was a case founded upon a statute which provides that no appeal shall lie in cases where default was had in the justice's court. On the other hand, in *Butler v. Heeb*, 38 Iowa, 429, it was held that an appeal would lie from the judgment of the justice of the peace rendered on default. Also in *Lauferty v. Prickett*, 50 Ind. 24, and *Hallock v. Jaudin*, 34 Cal. 167.

The court committed no error in overruling defendant's motion to dismiss the appeal. It is recommended that the judgment of the court below be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

NOTE.

STOCK—LIABILITY FOR INJURIES TO—"HERD LAW," VIOLATION OF. Under the Nebraska statute, a railroad company is not relieved of liability for stock killed at a point on its track where it is required to fence, and fails to do so, by the mere fact that the stock killed was running at large in violation of law. *Railroad Co. v. Bruckman*, 15

N. W. Rep. 197; *Railway Co. v. Sims*, 24 N. W. Rep. 388. So it is held in *Minnesota* that the fact that the stock when killed was allowed to run at large, in violation of a special law, does not constitute such contributory negligence on the part of the owner as will defeat recovery. There must be some act or omission of the plaintiff proximately affecting the question of the exposure of the animal to danger, or contributing to the accident. *Watier v. Railway Co.*, 16 N. W. Rep. 537. So, under the *Iowa* statute, it is held that the plaintiff may recover in such cases, although the defendant is without fault, unless the owner acts in such a way as to connect himself with the injury, as by driving the stock upon the track, or permitting them to escape for the purpose of going upon the track. *Krebs v. Railway Co.*, 21 N. W. Rep. 131; *Lee v. Railway Co.*, 23 N. W. Rep. 299. As to the rule, in *Kansas*, which regulates the liability of a railroad company for injuries to stock which is prohibited from running at large, see *Railroad Co. v. Riggs*, 3 Pac. Rep. 305; *Railway Co. v. Bradshaw*, 6 Pac. Rep. 917; *Railway Co. v. Johnston*, 10 Pac. Rep. 103; *Railroad Co. v. Gabbert*, 8 Pac. Rep. 218; *Prickett v. Railroad Co.*, 7 Pac. Rep. 611.

Where stock is prohibited by law from running at large, the degree of care which a railroad company is required to exercise in providing against injuries is much less than where there is no such law. *Joyner v. Railroad Co.*, (S. C.) 1 S. E. Rep. 52; *Railroad Co. v. Dunham*, (Tex.) 4 S. W. Rep. 472. See, also, *Palmer v. Railroad Co.*, (Minn.) 33 N. W. Rep. 707.

(37 Kan. 431)

CONLON v. LANPHEAR.

(*Supreme Court of Kansas*. November 5, 1887.)

LIMITATION OF ACTIONS—CONTINUOUS RESIDENCE—BURDEN OF PROOF.

Where a defendant in an action against him on an open account relies upon the statute of limitation for a defense, he must establish the fact that he has been present in person within the state three years since the date of the last item in such account before the commencement of the action. *Lane v. Bank*, 6 Kan. 74, cited and followed.

(*Syllabus by Holt, C.*)

Commissioners' decision. Error from district court, Atchison county; D. MARTIN, Judge.

Charles J. Conlon and Jackson & Royce, for plaintiff in error. *A. F. Martin and J. W. Orr*, for defendant in error.

HOLT, C. This action was tried in the Atchison district court at the March term, 1886, upon the following agreed statement of facts: "The bill is admitted, the last item of which is dated February 15, 1874. It is also agreed that Mr. Conlon himself left here in the first week in May, 1876, and went to New York for the purpose of disposing of some property, and intended at that time to return; that his family remained here until the twentieth of December, 1876, living on a homestead just west of Atchison. Mr. Conlon returned here on December 10, 1881, and remained until February 10, 1882, but did not bring his family. He then returned to New York, and he and his family returned here again March 6, 1885. Suit was commenced June 10, 1885. He has been here ever since March, 1885. He returned on December 10, 1881, for the purpose of settling up some matters with the railroad company in reference to right of way through his place. It is also agreed that during this time he had property in the jurisdiction of the court. The family remained here from the time Conlon left in May, 1876, until December 20, 1876. After returning with the family, March 6th, he has continuously resided on the homestead up to now."

There is but a single question in the case, and that is whether the statute of limitation runs against the claim of the plaintiff, the defendant in error in this court. Section 21 of the Civil Code (Comp. Laws 1879) provides: "If, when a cause of action accrues against a person, he be out of the state, * * * the period limited for the commencement shall not begin to run until he comes into the state; * * * and if, after the cause of action accrues, he depart from the state, * * * the time of his absence * * * shall not be counted as a part of the period within which the action must be

brought." The statute has reference to the absence personally of the defendant from the state. By the agreed statement of facts, he had not been in the state altogether three years since the date of the last item in plaintiff's claim before the commencement of this action. In construing the statute of limitation, general words are to have a general operation, and the fact of whether his residence was changed, or whether he had property within the state, is not to be decided in this action, but simply whether he himself was within the state more than three years, or less than three years, after the last item of the bill was dated. We think the case of *Lane v. Bank*, 6 Kan. 75, is decisive of this case. We therefore recommend that the judgment of the court below be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

(37 Kan. 408)

WARREN, by his Next Friend, etc., v. SOUTHERN KAN. RY. CO.

(*Supreme Court of Kansas. November 5, 1887.*)

CARRIERS—OF PASSENGERS—FACILITIES FOR GETTING ON FREIGHT TRAIN—NEGLIGENCE.

Where the plaintiff, a young man 19 years and 4 months old, purchases a ticket from a railway company to ride upon a freight train five or six miles, and no one instructs him when or where or how to get upon the train, or what car to get upon or into; and afterwards the train arrives at the station, and stops with the caboose near enough, and for a sufficient length of time, for the plaintiff to walk to the caboose and get upon it, but he does not do so; and afterwards the conductor gives a signal for the train to start and leave the station, and the plaintiff understands it, and the train then approaches the station, moving slowly, and the engine passes the place where the plaintiff is standing on the station platform, and the first car, which is a stock car, with no conveniences for getting upon it except an iron ladder on its side, comes immediately in front of the plaintiff, and the plaintiff without waiting for the caboose car to arrive, attempts to jump upon the stock car while it is in motion, and falls between the stock car and the station platform, and is injured: held, that the railway company is not guilty of any such negligence causing the injury as will entitle the plaintiff to recover damages therefor from the company.

(*Syllabus by the Court.*)

Error from district court, Johnson county; J. P. HINDMAN, Judge.

John T. Little and Samuel T. Seaton, for plaintiff in error. *George R. Peck, A. A. Hurd, and F. R. Ogg*, for defendant in error.

VALENTINE, J. This was an action brought in the district court of Johnson county by Frank Warren, by his next friend, W. H. Washburn, against the Southern Kansas Railway Company, for personal injuries alleged to have been caused by the negligence of the railway company. The case was tried by the court and jury, and after the plaintiff had introduced all his evidence, and rested, the defendant demurred to the evidence, upon the ground that it did not prove any cause of action; and the court sustained the demurrer, discharged the jury, and rendered judgment in favor of the defendant, and against the plaintiff, for costs; and the plaintiff, as plaintiff in error, brings the case to this court for review.

The alleged injuries were received on July 13, 1885, at about 9 o'clock in the morning, at the railway company's station in the town of Edgerton, in Johnson county, Kansas. At the time of receiving the injuries, the plaintiff was 19 years and 4 months old. He had lived in the town of Edgerton for about one year, and seems to have been well acquainted there, and with the railway company's mode of business and signals. The injuries seem to have occurred in the following manner: The plaintiff desired to go from Edgerton to Wellsville, a town on the company's railway, about five or six miles southwest of Edgerton. He knew that a freight train would soon be due, and that no passenger train would be due until about 12 o'clock. He went to the company's ticket agent at Edgerton, William Walton, and inquired of him if

the freight train was on time, and the ticket agent answered, substantially, that it was; and the plaintiff then said to the ticket agent: "Do they carry passengers on that train yet?" and the ticket agent answered: "They do;" and then the plaintiff said to the ticket agent: "Well, then, Billy, give me a ticket to Wellsville;" and the ticket agent then stamped a ticket for Wellsville, and handed it to the plaintiff, and the plaintiff paid him therefor 16 cents. This was about all that was said or done at the time. No one at any time told the plaintiff when or how or where to get on the train, or what car to get on. Soon afterwards the train came in from the northeast, and stopped with the engine standing at the water-tank, south-west of the station platform, and about 100 feet therefrom. The caboose was about 300 or 400 feet northeast from the platform. The train remained several minutes while taking in water, and then backed up about 300 or 400 feet to the east end of the yard for some switching to be done, where it remained about 20 or 30 minutes. The plaintiff after purchasing his ticket, and during all the time that the engine was taking in water, and the train backing, and the switching being done, and until the train started to leave, stood on the south-west corner of the station platform talking with a friend. Prior to this time, the company's freight trains sometimes stopped at Edgerton with the caboose at the platform, and sometimes they did not. This was all well known to the plaintiff. When the switching was all done, the conductor gave a signal for the train to start. The plaintiff understood this signal. The train then moved slowly in the direction of the platform, and the plaintiff went to the edge thereof, and when the first car, the one immediately behind and attached to the engine, came opposite to the place where he stood, he attempted to jump upon it, but fell to the ground between the car and the platform, and received the injuries of which he now complains. The car was an ordinary stock car. The principal injury received by the plaintiff was the crushing of his left foot in such a manner as to require the amputation thereof just above the ankle joint.

Do these facts show a cause of action against the railway company? In order that the plaintiff shall recover in this action it is necessary for him to show that the defendant, through its servants or agents, was guilty of culpable negligence; that this negligence caused the injuries complained of, and that the plaintiff himself was free from all culpable contributory negligence. Has he shown this? It is difficult to see how the railway company, by any negligence on its part, caused the injuries. We suppose it will hardly be claimed that the company was guilty of negligence in stopping its train at the water-tank to take in water, and in permitting the train to remain there for a few minutes; and here we might say that there was evidence introduced on the trial tending to show that, while the train was standing at that place, two other passengers for this train walked back to the caboose and got upon it in safety. We suppose it will hardly be claimed that the company was guilty of negligence in moving the train back to the east side of the yard, and allowing it to remain there for some 20 or 30 minutes, and in doing some switching in the mean time; nor will it be claimed that the company was guilty of negligence in again moving the train forward towards the station; nor can it be claimed that in this last removal of the train the company was guilty of negligence in not stopping the train with the caboose immediately in front of the station, for before the caboose had reached that point the plaintiff had attempted to jump upon the first car arriving there, and had received the injuries of which he now complains. From anything that can positively be known, the train might have stopped with the caboose immediately in front of the station, if the plaintiff had only remained where he stood on the platform ready to get upon the caboose as soon as it arrived.

We take it, however, that the principal negligence complained of is the conductor's giving a signal for the train to start and "to leave town." The plaintiff himself testified that the conductor gave such a signal, and that he

(the plaintiff) understood what it meant. The giving of this signal, however, did not cause the injuries. The injuries did not immediately flow from the giving of the signal, nor were they the natural or probable consequences thereof. The giving of the signal did not necessarily cause the plaintiff to attempt to jump upon a stock car while it was in motion, and which had no steps or other conveniences to enable persons to get upon it, except an iron ladder upon its side. Such a signal would not prevent the plaintiff from waiting where he stood on the platform until the caboose got to the point where he was standing, nor would it prevent him from attempting to get upon the caboose instead of upon the stock car; or, if that was dangerous, it would not prevent him from remaining at the station until the next train arrived, some three hours later. He knew, when he bought his ticket, that freight trains did not always or generally stop with the caboose immediately in front of the station, and undoubtedly he knew that it was not proper for him to attempt to get upon a stock car while in motion, or to ride upon or in any car of a freight train except the caboose.

The entire negligence complained of, however, is the foregoing signal, coupled with the failure of the railway company, through its agents and servants, to instruct the plaintiff when and where and how to get upon the train, and upon what or into which car to get. We do not think that the railway company is required to give any such instructions, and especially not to a young man in his twentieth year, strong and healthy and ordinarily intelligent, and one who knew as much as the plaintiff did concerning the railroad business at that particular place. Under the circumstances, we do not think it devolved upon "Billy" Walton, the ticket agent, or upon any other one of the company's agents or servants, to instruct the plaintiff how to take care of himself. He well knew that it was not the custom for passengers intending to ride upon a railroad train, even upon a freight train, to attempt to jump upon a stock car while in motion, or in any case to ride upon or in a stock car. If the railway company did not furnish sufficient facilities to the plaintiff for him to get upon the caboose, and even if it would not have done so if he had waited for the caboose to arrive at the platform where he was standing, then his remedy was to let that train pass without attempting to get upon it, and to sue the company for damages.

It is probably unnecessary to say anything with regard to the plaintiff's contributory negligence. Generally it is not *per se* negligence for a person to get on or off a railroad train in the ordinary manner, and, as people sometimes do, while the train is only slightly in motion. *Railroad Co. v. McCandless*, 33 Kan. 373, 374, 6 Pac. Rep. 587, and cases there cited. But to attempt to get upon a train in the extraordinary manner in which the plaintiff attempted to get upon the train in this case would seem to be *per se* culpable negligence. *Harvey v. Railroad Co.*, 116 Mass. 269; *Railroad Co. v. Le Gierse*, 51 Tex. 189.

The judgment of the district court will be affirmed.
(All the justices concurring.)

(37 Kan. 421)

STATE v. CARR.

(Supreme Court of Kansas. November 5, 1887.)

1. CRIMINAL PRACTICE—APPEAL—RECORDS—SUFFICIENCY OF INFORMATION.

On a criminal appeal to this court, there being no bill of exceptions saving the evidence offered on a motion for a change of venue and for a continuance, and there being no journal entries showing when, or on whose application, and under what circumstances, a great number of additional names were indorsed upon the information shortly before trial; and the record presented here being made up in the manner prescribed for bringing civil cases to this court on error,—this court will not consider any of the numerous questions discussed with reference to the matters above set forth, and will only determine, from the face of the record, the question as to the sufficiency of the information.

2. SAME—BILL OF EXCEPTIONS.

On a criminal appeal, all matters not required by statute to be of record, to be available in this court, must be embodied in a bill of exceptions, signed, sealed, and ordered to be made a part of the record.

(*Syllabus by Simpson, C.*)

Commissioners' decision.

Appeal from district court, Rice county; ANSEL R. CLARK, Judge.

On the twenty-eighth day of April, 1886, the county attorney of Rice county filed an information against the defendant, W. E. Carr, charging him with the crime of criminally libeling one John W. White. The information contained two counts, and the second is:

"I, the undersigned county attorney, in the name, by the authority, and on behalf of the state of Kansas, give information that on, to-wit, the third day of December, 1885, in the said county of Rice and state of Kansas, the said W. E. Carr, whose given name is unknown, did then and there unlawfully, falsely, and maliciously make, compose, and publish, and caused and procured to be composed and published, and did knowingly and willfully aid and assist in making, publishing, and circulating in a certain newspaper called the 'Ellenwood Express,' published and circulated in said county of Rice, in the state of Kansas, by the said W. E. Carr, the said W. E. Carr being the proprietor and editor of said newspaper on to-wit, the said third day of December, 1885, and the said W. E. Carr did on said day publish and circulate in the said county of Rice, a certain false, malicious, defamatory libel of and concerning John W. White, with the malicious intent to provoke him (the said John W. White) to wrath, and expose him to public hatred, contempt, and ridicule, and to deprive him of the benefits of public confidence, and social intercourse, which malicious and defamatory libel, so published as aforesaid by him, (the said W. E. Carr,) contained a false, malicious, mischievous, and defamatory, and libelous words and matters, according to the tenor following, that is to say:

"When the antiquated, bow-legged fossil who edits the only religious paper in the valley says that the Express [meaning the Ellenwood Express] desires to libel John White, [meaning the said John W. White,] (as if such a thing was possible,) he utters that which he as well as everybody else knows to be a lie. We said that John W. White [meaning the said John W. White] was tricky politically; and that if he were guilty of the charges stated by men who live near, and know him well, it is due his constituency that he resign, as the people did not want to be represented by a man upon whom the faintest suspicion rests. We say so still, [meaning that the said John W. White was guilty of said robbery, as stated in the first count of this information.] When Mr. White [meaning the said John W. White] shall have cleared up this early-day transaction [meaning that the said John W. White is guilty of said robbery] of business satisfactorily, it will then be in order for him to state why he attempted, once upon a time, to down a Hutchinson man for \$400, and got most gloriously left, [meaning that the said John W. White had once upon a time attempted to steal or embezzle \$400 from some Hutchinson man.] Our advice to the editor of the penny-a-line journal is to find out something about his *protege* before charging the Express [meaning the Ellenwood Express] with maligning him, [meaning the said John W. White.] A man who will do one dishonest thing is liable to do another, when an opportunity presents itself, [meaning that the said John W. White was guilty of said robbery.] When Mr. White [meaning the said John W. White] produces the evidence of his innocence, [meaning that the said John W. White is guilty of said robbery] the Express [meaning said Ellenwood Express] will see to it that its readers are made aware of the fact, and it won't be necessary for White [meaning the said John W. White] to say "Any expense incurred in relation to this matter, send me a bill of, and I will settle."

"Said libel, as aforesaid, being to the great injury and defamation of the said John W. White; contrary to the statute in such cases made and provided, and against the peace and dignity of the state of Kansas."

At the trial he was found guilty on the second count, and acquitted on the first. He was sentenced to pay a fine of \$50, and the costs, \$1,537.50. He brings the case here by appeal.

S. B. Bradford, Atty. Gen.; and *J. R. Brinkerhoff*, for the State. *G. W. Nimocks* and *B. A. Banta*, for appellant.

SIMPSON, C. In the condition in which we find the record in this case it is impossible that we should consider but one of the very many questions raised by counsel for the defendant, and urged as good reasons for the reversal. There is no bill of exceptions. The rule that on a criminal appeal all matters that by law are not required to be recorded must be embodied in a bill of exceptions, allowed, signed, and ordered by the court to be a part of the record, has been totally ignored. So far as the statutory requirements of record have been complied with, we will consider all questions arising on that part of the case; but affidavits used on an application for a change of venue or a continuance, and all other motions or applications, as well as the evidence in the cause, must, in cases of this character, be embodied in the record by a bill of exceptions. There are some other omissions that preclude us from a consideration of other questions urged. There are no journal entries showing when, and under what circumstances, the names of additional witnesses were indorsed upon the information. The record does not contain the motion for a retaxation of costs, or the ruling of the court thereon. If there was any showing made on the challenge to the array, it is not declared by this record.

The theory of counsel who prepared the appeal record seems to have been that the methods and proceedings necessary to bring civil cases on error to this court should be followed in the appeal of a criminal case. A notice is served on the county attorney to appear before the judge of the district court at chambers to settle the case. The judge certifies that the case was settled and allowed by him at chambers as being a true and correct transcript in said cause. The clerk then certifies to the transcript as being correct, but that the motion to retax costs has not yet been decided by the court. This certificate of the clerk is dated June 18th, and the record is filed in this court on the twenty-eighth day of June, 1886.

The information is by law required to be recorded. It consisted of two counts,—the first charging a criminal libel of and concerning the participation of the complaining witness in the robbery of the safe in the office of the county treasurer of Rice county; the second contained a charge that we shall hereafter specifically notice. At the trial the defendant was found not guilty on the first count, and guilty on the second count. The sufficiency of the information was challenged by a motion to quash; by an objection to the introduction of any testimony; by a motion to discharge the defendant after the state rested in chief, and by a motion in arrest of judgment.

The defendant having been acquitted on the first count, the only question remaining here is as to the sufficiency of the second count. The specific defect most strongly alleged and insisted upon now is "that it does not contain a malicious defamation of the character of the prosecuting witness." This count charges, substantially, that the defendant unlawfully, falsely, and maliciously did make, publish, and circulate in the *Ellenwood Express*, a newspaper circulated in Rice county, he being the editor and proprietor thereof, a certain false, malicious, and defamatory libel of and concerning the prosecuting witness, of the following tenor: "He said that John W. White [meaning the prosecuting witness] was tricky politically; and that if he was guilty of charges stated by men who lived near, and knew him well, it is due his constituency that he resign, as the people did not want to be represented by a

man upon whom the faintest suspicion rests. We say so still, [meaning that the said John W. White is guilty of said robbery, as stated in this first count of the information.] When Mr. White [meaning John W. White] shall have cleared up this early-day transaction, it will then be in order for him to state why he attempted once upon a time to down a Hutchinson man for \$400, and got most gloriously left, [meaning that said John W. White had once upon a time attempted to steal or embezzle \$400 from some Hutchinson man.] These, with the necessary allegations as to time, place, and averments to explain the defendant's meaning by matter previously introduced, caption, and conclusion, constitute the second count in the information.

The material allegations for an information charging such a crime, according to our statutory definition, are "that, at the time and place stated, the defendant did unlawfully and maliciously write and publish, of and concerning the person complaining, a false, scandalous, and malicious libel,"—a copy of which must be set out in the information. If the intent does not sufficiently appear, proper innuendoes must be introduced to show the meaning contended for. Where the meaning of the words are latent, or do not fully appear on the face of the publication, such meaning must be alleged, as in this case. The expression "down a Hutchinson man for \$400" is alleged to mean "rob or embezzle from a man from the city of Hutchinson." We think the second count in the information charges a public offense.

On the argument, counsel for defendant confuses the matter contained in the second count with that in the first count. The distinct offense charged in the second count is the robbery or embezzlement of \$400 from a Hutchinson man; the first charged a libel concerning the county-treasury robbery. We are not called upon to determine in this case to what extent a newspaper can comment on the acts of a state senator from the district within which the paper is published. The acts alleged to have been committed by the complaining witness in this case are not his official acts as senator, but are alleged to have been committed before his election,—in one, certainly, if not in both instances.

This is the only question we feel authorized to determine on this record, and the view we take of it compels us to recommend that the judgment be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

(37 Kan. 404)

STATE v. FISHER, Adm'r, etc.

(Supreme Court of Kansas. November 5, 1887.)

HOMICIDE—ASSAULT TO KILL—INFORMATION—ELECTION BETWEEN COUNTS.

Where an information, charging a defendant with an attempt to kill K. and O. by having D. shoot off a loaded revolver through a window in a room where they were sleeping, contains two counts,—the first averring the attempt to kill K., and the second the attempt to kill O.; and, after conviction upon both counts, the defendant was sentenced upon the first only, and a *nolle pros.* was entered as to the second: *held*, that the trial court committed no error, prejudicial to the substantial rights of the defendant, in refusing to quash the information, or compel an election, as the matters charged in the information arose out of the same transaction, and as the proof on both counts was precisely the same, and as no evidence was admitted to sustain the second count not pertinent to the first.

(Syllabus by the Court.)

Appeal from district court, Mitchell county; CLARK A. SMITH, Judge. S. B. Bradford, Atty. Gen., and A. H. Ellis, for the State. R. F. Thompson and J. R. Burton, for appellant.

HORTON, C. J. On May 8, 1886, R. D. Parker was convicted, and sentenced to the penitentiary of the state at hard labor for the term of 10 years,

for attempting to commit the offense of killing his wife, Mrs. Kate Parker. On November 10, 1886, he died in the penitentiary. This case is pending in this court as to the liability of his estate for the costs of the prosecution. The information filed in the case contains two counts,—the first averring the attempt to commit the offense of killing Mrs. Kate Parker; and the second, the attempt to commit the offense of killing her daughter, Ollie Flenner. Upon the trial, the defendant was found guilty on both counts. Sentence, however, was pronounced against the defendant upon the first count of the information only; and the second count of the information, at the instance of the county attorney, was dismissed.

Upon the trial, Frank Dunn testified on the part of the prosecution, in substance, that on the second day of March, 1886, in Abilene, Dickinson county, the defendant agreed to pay him \$24 to go to Beloit, and fire five shots from a revolver into a window in a house in that city; and that defendant showed him a diagram which located the house, and explained, by means of a window in the vicinity of the place where they were standing, just how he wanted the pistol held and the shots fired; that at the time of this conversation he told defendant he would do the shooting, and that defendant gave him the diagram, and showed him the revolver he was to use, and that he and defendant on the same evening went to the city of Beloit on the train, arriving about 7 o'clock P. M.; that upon such arrival the defendant gave him the revolver, and showed him the house and the window; and that he did some shooting in front of the windows.

Mrs. Kate Parker testified that she was the wife of defendant, and that Ollie Flenner, the girl named in the second count of the information, was her daughter, aged 7 years; that she was married to defendant in May, 1885, and lived with him until October of that year, when they separated; that at the time she married defendant she and Ollie had real estate in Beloit of the value of about \$7,000, which they had inherited from her deceased husband, George Flenner; that while defendant lived with her he wanted to control this property, and that they had trouble about such property a number of times; that defendant charged her with being criminally intimate with Dr. Guibor and other men, and with committing an abortion in his absence; that on the night of March 2, 1886, she and Ollie were sleeping in a bed in front of the window which Dunn said he was to shoot into, and in front of which he did shoot three shots from a revolving pistol given him by Parker.

The contention is that two distinct felonies were charged in the information, and therefore that the trial court committed errors in not quashing the information, or compelling an election thereon.

In our view of the case, it is not necessary to decide whether separate and distinct offenses were charged in the information. It is said, however, in 1 Bish. Crim. Pr. § 437, "that a count in an indictment charging a man with one endeavor to procure the commission of two offenses is not bad for duplicity, because the endeavor is the offense charged." If this rule applies, Parker committed but one attempt, although the act of the agent he selected might have resulted in the death of both Mrs. Parker and her daughter, if the agent had carried out the orders given.

An information may be *not pros.* after a conviction, and before judgment. In this case, the second count of the information was *not pros.* by the county attorney before judgment; thereby leaving the defendant punishable for the offense charged in the first count only. *Anon.*, 31 Me. 592; *Com. v. Tuck*, 20 Pick. 356.

One argument which lies against duplicity in a criminal pleading is that it subjects the defendant to inconvenience and danger by requiring him to prepare himself to meet several charges at the same time. Another is that the prosecution in a criminal case ought not to have the advantage of proving to the jury several acts entirely disconnected with each other, but each tending

to prove the defendant guilty of a separate offense, and thereby creating in the minds of a jury the conviction that the accused is a bad man generally, and likely to be guilty. Therefore, in a case of felony, it is the rule that, where the information or indictment charges several entirely distinct felonies, the court will either quash or compel the prosecutor to elect. But in this case, even if two offenses are charged in the information, yet as they spring out of the same transaction, and as the proof on both counts was precisely the same, no injury could possibly have accrued to the defendant. *People v. McKinney*, 10 Mich. 54.

No evidence was admitted to sustain the second count of the information not pertinent to the allegations of the first count. "On an appeal, the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties." Section 293, Crim. Code.

The defendant was not prejudiced by the refusal of the court to instruct the jury further on the question of venue. The instructions given sufficiently covered that matter. If the defendant was guilty of the attempt to kill his wife, he committed that offense in Mitchell county. The evidence fully sustains this. It is true that the defendant employed Frank Dunn at Abilene to do the shooting at Beloit, and there exhibited to him a diagram, so that he could locate the dwelling at Beloit into the window of which he was to fire; but the defendant followed up his solicitation and employment of Dunn by going with him to Beloit, in Mitchell county; by paying his railroad fare from Abilene to Beloit; by giving to Dunn, at Beloit, a loaded revolver with which to do the shooting; by pointing out the house into which the shooting was to be done; by paying Dunn \$20 after the shooting; and by directing him how to escape from Mitchell county after he had been informed by Dunn that he had done the shooting as directed, and that his wife and daughter were hurt.

There are other errors relied upon, but, after a careful examination of them, we find nothing prejudicial; therefore, the judgment of the district court will be affirmed.

(All the justices concurring.)

(37 Kan. 426)

EGGLESTON and others v. STATE *ex rel.* LEWIS.

(*Supreme Court of Kansas.* November 5, 1887.)

1. COUNTIES—PETITION FOR REMOVAL OF COUNTY-SEAT—PRESENTING TO COMMISSIONERS.

Where a petition is filed with the county clerk, and presented to the board of county commissioners while in session as a canvassing board, said commissioners would have no authority to entertain or act on the said petition, but the knowledge so received of the filing of the petition with the clerk, and what it contained, could not be disregarded by them; and the fact that the petition was not presented to the board when regularly in session as a board of county commissioners would be no excuse for them to say that the board had no knowledge of a request contained in said petition.

2. SAME—SIGNERS BOUND TO KNOW CONTENTS OF PETITION.

One who signs a petition must read and determine for himself; and it is no excuse for him, after the petition has been acted upon, to say he did not know what the petition contained. If he can read, he must do so, or be prevented from so doing; or the circumstances must be such as to show the perpetration of a fraud which, by the exercise of reasonable caution and judgment, could not have been detected; or such other peculiar circumstances as a court of equity would deem a sufficient excuse.

(*Syllabus by Clogston, C.*)

Commissioners' decision. Error from district court, Pratt county; ANSEL R. CLARK, Judge.

This is the second time this action has been ~~to~~ this court. See *State v. Eggleston*, 10 Pac. Rep. 3. When here before, the order setting aside the

temporary injunction was reversed, and the cause remanded for further proceedings in accordance with the views then expressed; and at the December, 1886, term of the district court of Pratt county, the cause came on for final hearing, and the temporary injunction was made perpetual, enjoining the county commissioners of Pratt county from canvassing the vote polled on October 1, 1885, upon the proposition for the relocation of the county-seat of that county. The facts are substantially the same as when the case was here before, and will not be repeated. The defendants bring the case here.

Hustin & Parrish and *M. P. Simpson*, for plaintiffs in error. *E. A. Austin* and *Gillett & Whitelaw*, for defendant in error.

CLOGSTON, C. At the trial the parties entered into the following stipulation: "It is hereby stipulated and agreed by and between the parties hereto, that if the names of the 332 persons which appear on Exhibits CC and DD, (to-wit, 278 on Exhibit CC and 54 on Exhibit DD,) annexed to and made a part of the plaintiff's second amended petition, or amendment to plaintiff's original petition, and which names it is agreed appeared on the petition calling an election to relocate the county-seat from Iuka to Pratt in said county, and which names also appear on the petition in evidence, praying a relocation of the county-seat from Iuka to the city of Saratoga, in said county, are retained and counted on the petition praying for a relocation of said county-seat from the town of Iuka to the said city of Pratt, then the said Pratt petition did and does contain three-fifths of the legal electors of said Pratt county, as appeared, and now appear, on the assessment rolls of the several township and city assessors of said county, at the last assessment before said petition was presented to the board of county commissioners in the year 1885, and was and is a legal petition. But if said 332 names mentioned in said exhibits, which are on said petitions, are stricken off of said Pratt petition, and not counted thereon by reason of the following clause, which appears in said Saratoga petition, to-wit: 'We further petition your honorable board to erase and strike off our names from any and all petitions coming before your board, other than this one petition, praying a removal of said county-seat to any place; hereby revoking any and all petitions on this subject heretofore signed by us,'—then the petition praying for a relocation of the county-seat from the town of Iuka to the city of Pratt did not, and does not, without said names, contain three-fifths of the legal electors, as appears on the several assessment rolls of the several township and city assessors of said county, next before the presentation of said petition to said board of county commissioners in the year 1885, and was not, and is not, a legal petition."

This stipulation eliminates all questions of fact except one: Did the Pratt petition contain the requisite number of names to authorize the county commissioners to order the election? Plaintiff below gave in evidence the Saratoga petition, which, when compared with the Pratt petition, showed that 332 petitioners had signed their names on both petitions. The Saratoga petition was dated August 19th, and the Pratt petition was filed with the board on or before August 13th. In the absence of other proof, a petition will be presumed to have been signed at or after its date. This establishes the fact that the Saratoga petition was signed last; therefore the request therein contained was the last expression of the petitioners to the county commissioners. The defendants, to destroy the effect of the request contained in the petition, to have their names taken off from all other petitions relating to the removal of the county-seat, attempted to show that the Saratoga petition was not presented to the board of commissioners, and that at the time of calling the election they did not know that that petition presented to the board contained that request. This claim, if true, would have been a complete answer; but at the trial it was claimed by the plaintiff that the Saratoga petition was presented to the board, while in session as a board of canvassers, by Mr. White-

law, representing the Saratoga petition, and that he read the petition to the board, and urged them to take action thereon. This was established by some four witnesses, and, on the part of the defendants, denied by the board of county commissioners, county clerk, and several others. This, then, became a disputed question, and was submitted to the court, who found for the plaintiff. This settles this question here, for, where there was evidence offered tending to sustain the findings of the court, it will not be disturbed here. It is not for this court to again weigh the evidence. It may be that on this question the preponderance was with the defendants, but the trial court had better opportunities of learning the truth, as the witnesses were before the court, and the appearance and demeanor of witnesses on the stand may be such that greater weight should be given some witnesses than others.

Again, to avoid the effect of the request contained in the petition, the defendants produced John Stewart as a witness, and asked him the following questions: "I will ask you if you signed a request to have your name taken off the Pratt petition at any time?" "State if it was represented to you at the time you signed the Saratoga petition that it also contained a request asking your name to be taken off the Pratt petition?" Which were objected to by the defendant as being immaterial, and the objections were by the court sustained, and plaintiff excepted.

Defendants also called as a witness Alfred Fox, and propounded to him the following questions: "Did you ever request the county commissioners to take your name from the Pratt city petition, or authorize any one to make that request for you?" "Did you ever at any time sign the Saratoga petition that contained a written request to have the county commissioners strike your name from the Pratt city petition?" "If you ever authorized the county commissioners in writing, or authorized them to strike your name from the Pratt city petition, or authorized any other person to do so for you, you may state when it was?" Which were objected to, and the objections sustained by the court; to which the plaintiff excepted.

Defendants then offered to prove by said witness and 331 others the following: "The defendant offers to prove by Alfred Fox and 331 others, whose names appear on Exhibits CC and DD, attached to plaintiff's second amended petition, the following facts, viz.: That they did not know at the time they signed the Saratoga petition, or at any time on or before September 1, 1885, that the Saratoga petition contained the words following, to-wit: 'We further petition your honorable board to erase and strike off our names from any and all petitions coming before your board, other than this one petition, praying for the removal of said county-seat to any place; hereby revoking any and all petitions on this subject heretofore signed by us;'—or that said petition contained words to the same effect; and that they did not request the commissioners, or board of county commissioners, in writing or otherwise, to strike their names from the Pratt city petition, or authorize any other person to do so for them." Plaintiff objected to the introduction of this evidence, for the reason that it was incompetent, irrelevant, and immaterial, and the court sustained the objection. The court, in sustaining said objection, stated to the plaintiff as follows: "The court does not refuse to allow the defendants to prove any conversation had or anything done in relation to the Saratoga petition between these witnesses and the persons who represented the petition; nor does the court refuse to allow any witness to testify regarding any signature on the Saratoga petition which purports to be the signature of the witness."

Plaintiffs in error now insist that the exclusion of this evidence was error. We think not. The question propounded to the witness was in terms asking for a conclusion, and not for a fact. They might show the facts how, and under what circumstances, they signed the petition, and then it was for the court to determine whether such circumstances were a sufficient excuse for

not having read and known what they were signing. This the court was willing they should do. One who signs a petition must read and determine for himself; and it is no excuse for him, after the petition has been acted upon, to say, "I didn't know what the petition contained." If he can read, he must do so, or be prevented from so doing; or the circumstances must be such as to show the perpetration of a fraud which, by the exercise of reasonable caution and judgment, could not have been detected; or such other peculiar circumstances as a court of equity would deem a sufficient excuse.

Plaintiffs insist that the presentation of a petition to the board, while in session as a board of canvassers, is not a sufficient presentation to the board of county commissioners. This, perhaps, is true, so far as any action on the petition could be taken by the board while in session as a board of canvassers. The board, in this instance, acted correctly. They did not meet to transact the ordinary business of the county, and their refusal to entertain or act upon the Saratoga petition was right and proper; but the knowledge they then received that such a petition was filed with the clerk of the board, and that it contained a request to have certain names thereon taken off from all other petitions asking for an election for a relocation of the county-seat, could not be disregarded, whether it reached them while acting in one capacity or another. It was a fact that they knew, and, when the board met, it was no excuse for them to say that a knowledge of this petition, and what it contained, came to them while acting as a board of canvassers. A desire to ascertain the true will and wish of the people of that county on the question then before them, was their first duty; their preference for a county-seat, afterwards. It is recommended that the judgment of the court below be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

(10 Colo. 357)

LULU & WHITE SILVER MIN. CO. v. NEVIN and others.

(Supreme Court of Colorado. November 1, 1887.)

1. ESTOPPEL—BY RECORD—DISMISSAL OF SUIT.

Plaintiff had brought suit for an injunction to restrain defendants from working certain mines which plaintiff then claimed to own absolutely, under a certain conveyance. This action was dismissed with plaintiff's consent. *Held*, that he was not estopped from bringing a suit under the same conveyance as a mortgage, claiming payment thereunder, and in default of payment, foreclosure, and sale.

2. MORTGAGE—STRICT FORECLOSURE.

Plaintiff prayed a foreclosure of a mortgage, by a sale of the mortgaged premises. The court rendered a decree of strict foreclosure. *Held*, that under the provisions of Code Colo. §§ 234, 263, relating to foreclosure and sale of mortgaged property, a mortgage cannot be foreclosed without a sale of the mortgaged premises under a decree of foreclosure.

Commissioners' decision. Appeal from district court, Clear Creek county. *Montgomery & Waybright*, for appellant. *T. J. Cantlon* and *C. C. Post*, for appellee.

ISING, C. On the fourteenth and fifteenth days of July, 1880, the defendants Robert W. Nevin, James S. Nevin, Ann B. Ross and Oliver P. Ross conveyed to Isaac Taylor and Charles C. Miles, by warranty deeds, certain mining claims situated in Clear Creek county, Colorado, and procured one Henry Thompson to convey to said Taylor and Miles, by warranty deed, one of said mining claims.

On the fifteenth day of July, 1880, the following agreement was entered into:

"Article of agreement made and entered into this fifteenth day of July, A. D. 1880, by and between Isaac Taylor and Charles C. Miles, of Peoria county,

Illinois, of the first part, and Robert W. Nevin, James S. Nevin, Oliver P. Ross, and Ann B. Ross, of Clear Creek county, Colorado, of the second part, witnesseth, that the said parties of the first part, for and in consideration of the covenants and agreements hereinafter set forth, to be kept and performed by said parties of the second part, agree as follows, to-wit: To notify parties of the second part that they, the parties of the first part, will either accept the undivided one-half of certain lode mining claims situate in the county of Clear Creek, state of Colorado, known as the 'Lulu Lode' and the 'White Extension West Lode,' on Red Elephant mountain, Downieville mining district, or that the said parties of the first part will not accept the undivided one-half of said real estate. Should said parties of the first part agree to accept the undivided one-half of said premises, then, and in that event, the said parties of the first part hereby agree to convey the undivided one-half of said premises to said parties of second part in proportion as follows: To Robert W. Nevin, the undivided one-fourth ($\frac{1}{4}$) of the White extension west lode; to James S. Nevin, the undivided one-fourth ($\frac{1}{4}$) of the White extension west lode; to Robert W. Nevin, the undivided one-sixth ($\frac{1}{6}$) of the Lulu lode; to James S. Nevin, the undivided one-sixth ($\frac{1}{6}$) of the Lulu lode; to Oliver P. Ross, the undivided one-twelfth ($\frac{1}{12}$) of the Lulu lode; to Ann B. Ross, the undivided one-twelfth ($\frac{1}{12}$) of the Lulu lode. To pay said parties of the second part the sum of eight thousand (\$8,000) dollars, to be paid out of the first net proceeds of said parties of the first part's interest in said lodes, the said sum of money to be paid to said parties of the second part as their interest may appear. The notice above mentioned to be given by parties of the first part to said parties of the second part must be given in writing, and must be given within ninety (90) days from the date of this agreement. Should parties of the first part elect not to retain the undivided one-half ($\frac{1}{2}$) of said premises, and notify parties of the second part of such election as aforesaid, then, and in that event, the said parties of the first part hereby agree to convey said premises to the said parties of the second part in such proportions as their interests may appear, upon the payment by said parties of the second part to said parties of the first part of the sum of twelve thousand dollars, (\$12,000,) payable within ninety days from the date of the last-mentioned notice, with interest thereon at the rate of ten per cent. per annum, interest to accrue from the date of this instrument. The said parties of the second part, for and in consideration of the foregoing covenants and agreements, hereby agree to and with said parties of the first part as follows: To pay, or cause to be paid, to said parties of the first part said sum of twelve thousand (\$12,000) dollars within the ninety days last above mentioned, and upon failure so to do within the time specified, time being of the essence of this agreement, then said parties of the second part release, relinquish, waive, sell, quitclaim, and hereby do release, relinquish, waive, sell, and quitclaim to said parties of the first part, all right, title, equities, interests, or demands of, in, and to the above-mentioned premises.

"Witness the hand and seals of the parties hereto this fifteenth day of July, A. D. 1880.

ISAAC TAYLOR.	[Seal.]
"CHARLES C. MILES.	[Seal.]
"ROBERT W. NEVIN.	[Seal.]
"JAMES S. NEVIN."	[Seal.]

On the sixth day of October, 1880, Taylor and Miles notified said defendants, in accordance with the terms of said agreement, that they elected not to retain the undivided one-half of said premises, but had elected to take from said defendants the sum of \$12,000, with interest, and tendered deeds of conveyance for said claims as provided for in said agreement. Defendants did not then pay, and have not since paid said sum of \$12,000, and interest, or any part thereof. On May 11, 1881, Taylor and Miles conveyed said premises to the plaintiff by quitclaim deed.

Plaintiff in its complaint alleges that the said sum of \$12,000 was loaned to said defendants by Taylor and Miles; and that the deeds from defendants and Thompson were given as security for the payment of said sum, with interest at 10 per cent. per annum, within 90 days from the date said sum should be demanded by Taylor and Miles; and pray that said deeds may be adjudged and decreed to be a mortgage, for a foreclosure of the mortgage, and sale of the mortgaged premises, and for judgment against said defendants for any deficiency.

Defendants in their answer deny that Taylor and Miles loaned them \$12,000, or any other sum; allege that plaintiff corporation was created for the express purpose of acquiring the said mining claims, and not for the purpose of purchasing or dealing in mortgages, and set up the agreement above set out; and allege that the conveyance to plaintiff by Taylor and Miles was not intended to assign or transfer to plaintiff any claim which Taylor and Miles may have had against defendants for said sum of \$12,000, nor any rights or lien which Taylor and Miles may have had for the recovery of payment thereof.

For a second defense, defendants allege that, on June 14, 1881, plaintiff commenced an action against defendants, praying a perpetual injunction against them, restraining them from working the Lulu mine, and based its claim for such injunction upon its rights to possess said claims, under the conveyance thereof by Henry Thompson; that defendants answered the complaint in said action, admitting the conveyance by Thompson and themselves to Taylor and Miles, and alleging that said conveyances were made as a mortgage, to which answer plaintiff replied, denying that said conveyances were made as a mortgage, and alleging that said conveyances were absolute and without condition, verbal or written. Said suit was voluntarily dismissed by the plaintiff, August 15, 1881. Taylor and Miles testified in said case that they did not purchase one-half of said Lulu mining claim, but that they made an absolute purchase of the whole of said claim from Henry Thompson, with an agreement from defendants.

Plaintiff's replication to defendants' answer alleges that the conveyance to it by Taylor and Miles did purport, and was intended to assign, and did assign and transfer to plaintiff, any and all claim said Taylor and Miles may have had at the time of said transfer against defendants for said sum of \$12,000, and interest, as well as any and all right and lien which they had at the time of said transfer for the recovery and payment of said sum and interest; and that plaintiff has the same right and title to said debt, and to the enforcement thereof, that Taylor and Miles had, or could have had, under the conveyances to them by defendants and Thompson.

Trial to the court, and decree June 28, 1883, that plaintiff is entitled to recover of the defendants Robert W. Nevin, James S. Nevin, Oliver P. Ross, and Ann B. Ross the sum of \$12,000, and interest; that said defendants pay said sum to plaintiff, or its solicitors, on or before nine calendar months from July 25, 1883, with costs of suit; that in default of such payment, the title to the premises rest in plaintiff and its assigns, and the clerk of the court to certify the substance of the decree; and that certificate may be recorded, and the same shall be evidence of the extinguishment of defendants' right and title to the premises; and that said debt of \$12,000, and interest, shall from that time be wholly extinguished; that if defendants pay said sum, and interest, before the expiration of nine months, the plaintiff, within 30 days from the date of such payment, to reconvey to said defendants said premises, and appointing a commissioner to make such conveyance, in case of the failure of the plaintiff so to do. Defendants appeal.

The first, second, and fourth assignments of error are based upon the ruling of the court in admitting the testimony of the witness Hitchcock in relation to the transfer by Taylor and Miles to the plaintiff of a claimed indebtedness due from defendants; and the third assignment of error is based upon

the ruling of the court in permitting the witness Hitchcock to explain what he meant by speaking of Taylor and Miles as trustees, in his cross-examination by defendants. It appears from the evidence that the title to the premises described in the deeds from defendants and Thompson to Taylor and Miles was taken by Taylor and Miles as trustees, in trust, for the parties who, on the twenty-fourth day of March, 1881, as incorporators, organized the plaintiff corporation. The quitclaim deed from Taylor and Miles to plaintiff was made in execution of such trust. The real parties in interest in the transaction between defendants and Taylor and Miles, were the incorporators of the plaintiff. There was no error in the rulings of the court upon these questions.

The facts set up by defendants for a second defense do not constitute an estoppel. The statements contained in the complaint, relied on as an estoppel, are not statements of matters of fact, but a statement of a legal conclusion drawn from facts. In the case set up the plaintiff and defendants in that suit each drew their conclusions from the same facts, and the plaintiff said the deeds conveyed an absolute title, and defendants then said that the deeds and agreement constituted a mortgage. There is no admission of a fact here to create an estoppel. *Thayer v. Arnold*, 32 Mich. 336, 341.

It is set up on defendants' answer, and urged in appellants' argument, that the plaintiff corporation is not authorized by its articles of incorporation to purchase mortgages. The question does not arise upon the facts of the case. The whole transaction, relating to these mining claims, shows the purpose of entering into it to be the acquirement of mines for the purpose of operating the same by such corporation. The deed from Taylor and Miles to plaintiff was made to effectuate the objects of such organization, and, under the circumstances of this case, there can be no question but that plaintiff was empowered by its articles of incorporation to do just what it did do.

Upon all questions of fact affecting the merits of this case there is no dispute. The deeds from defendants and Thompson to Taylor and Miles and the agreement between defendants and Taylor and Miles must be construed together as one instrument in determining the rights of the parties thereunder. The plaintiff claims that the transaction between Taylor and Miles and the defendants was a loan by Taylor and Miles to defendants of the sum of \$12,000, and that defendants made the deed to Taylor and Miles, of the Lulu lode, and the White extension lode, as security for the payment of said loan. We think that the deed and agreement taken together show a loan and mortgage. The plaintiff prayed a foreclosure of this mortgage, by a sale of the mortgaged premises, but the court rendered a decree of strict foreclosure, and upon this point appellants say that the decree should not be sustained, because it is not prayed for, and because there are no facts stated in the complaint which would warrant the court in decreeing a strict foreclosure, and because it is contrary to the established practice and principles of courts of equity to grant decrees of strict foreclosure, unless a clear case therefor be made in the pleadings, and is well established by the proofs. The relief demanded does not limit the plaintiff in respect to the remedy which he may have. The court will disregard the prayer, and rely upon the facts alleged and proved, as the basis of its remedial action. Pom. Rem. §§ 71, 83, 580, and cases cited; *Kayser v. Maugham*, 8 Colo. 232, 6 Pac. Rep. 803.

The facts alleged and proved clearly entitled the plaintiff to a decree of foreclosure and sale. To warrant a decree of strict foreclosure, where the practice permits such a foreclosure, the evidence should show that the interests of both parties require it. The bill of exceptions does not purport to contain all the evidence, and does not contain any evidence upon this question. This court cannot review the findings of the court below, upon which the decree is based, unless the bill of exceptions brings up the evidence upon the findings to be reviewed; and when this is not done, this court will assume

that the evidence given was sufficient to justify the decree. The decree in this case was made, and the argument upon the appeal based, upon the assumption that, under proper circumstances, the practice in this state permitted a strict foreclosure of a mortgage. We do not think a mortgage can be foreclosed without a sale of the mortgaged premises under a decree of foreclosure. Section 263 of the Code of 1883 provides that "a mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property, without foreclosure and sale, and the fact of a deed being a mortgage in effect may be proved by oral testimony; but this section shall not apply to trust deeds with power of sale." The "foreclosure and sale" must be a foreclosure and sale provided for in section 234 of the Code. This is rendered clear by the exception of trust deeds from the requirements of section 263, which leaves no basis for a claim that foreclosure may be by sale without decree. The judgment should be reversed, and the court below directed to enter a judgment under the provisions of section 234 of the Code, and in accord with the views herein expressed.

We concur: MACON, C.; STALLCUP, C.

BY THE COURT. For the reasons assigned in the foregoing opinion the judgment of the district court is hereby reversed, and the cause remanded, with directions to enter judgment in accordance with the views expressed in said opinion.

(10 Colo. 326)

POLK v. MOOK.

(*Supreme Court of Colorado.* October 27, 1887.)

APPEAL—CONFLICTING EVIDENCE.

Where the evidence on the trial was conflicting, the judgment will not be reversed on the ground of insufficient evidence to support it.

Commissioners' decision. Error to El Paso county court.

J. C. Cochran, for plaintiff in error. *E. J. Hooke*, for defendant in error.

MACON, C. In December, 1882, Polk, plaintiff in error, sued defendant in error, Mook, before a justice of the peace of El Paso county, for \$300. The justice of the peace gave judgment for defendant, and plaintiff appealed to the county court. In the latter court Polk recovered judgment against Mook for \$25. and costs. In February, 1883, Polk sued out execution from the county court, after the issuance of which Mook paid the judgment and costs into the county court, and moved that the plaintiff, Polk, be required by the court to enter satisfaction of said judgment upon the records of said court, and upon his failure so to do, that the county court enter such order, and also praying that the execution be recalled. On the hearing of said motion defendant, Mook, offered in evidence the receipt of the county judge, E. A. COLBURN, for the judgment and costs, and the plaintiff, Polk, gave in evidence an assignment by himself to one J. B. Cochran and others, of the said judgment. The court sustained said motion so far as to recall said execution, to which the plaintiff, Polk, excepted, and is in this court on error to the ruling of the court on said motion, and also to the judgment rendered at the trial.

This court, on motion, struck out of the record all that part which related to the action of the county court in the proceedings after the rendition of the judgment, and there is nothing left for review here except the propriety of the judgment itself. As the evidence in the county court was conflicting, we are not warranted in disturbing the judgment, and the same ought to be affirmed.

We concur: STALLCUP, C.; RISING, C.

BY THE COURT: For the reasons assigned in the foregoing opinion the judgment of the county court is affirmed.

(10 Colo. 402)

STEVENS v. ANDREWS.

(*Supreme Court of Colorado.* November 11, 1887.)

SET-OFF AND COUNTER-CLAIM—CLAIM FOR RENT—PLEADING—JUDGMENT ON PLEADINGS.

Plaintiff sued on a due-bill for money borrowed, and for five dollars for work and labor. Defendant admitted owing three dollars for labor, claimed that the due-bill was for money on deposit with him, and for counter-claim alleged that plaintiff occupied a certain dwelling-house by his permission, and had never paid for the same, but did not allege any right or interest in the house entitling him to demand rent. Plaintiff waived his claim for more than three dollars for labor. Held, that a demurrer to the counter-claim was properly sustained, and that plaintiff was entitled to a judgment on the pleadings.

Appeal from district court, Ouray county.

This action was commenced by the appellee, Andrews, against the appellant, Stevens, to recover the sum of \$155.82, borrowed money, evidenced by a due-bill executed by Stevens, and payable to Andrews on demand, dated September 26, 1881, credited with \$51.50, leaving \$134.32 due Andrews, as he alleges. For second cause of action Andrews claims \$5 due him for work and labor. Stevens, in his answer, denies owing Andrews any borrowed money; says the due-bill was given for money remaining in his hands on deposit. Admits that he owed the plaintiff for work and labor done in the sum of \$3. For a counter-claim against the plaintiff, the defendant alleges that the plaintiff occupied a certain dwelling-house by permission of the defendant from the second day of July, 1881, until the eighth of November, 1882. That the use of said premises for said period was reasonably worth five dollars a month, or the total sum of \$142.50. That the plaintiff has never paid the same, and admits judgment for the sum of \$35.18 with interest. The plaintiff demurred to that part of the answer setting up a counter-claim, which demurrer was sustained by the court. The defendant elected to stand by his answer, and the plaintiff having waived his claim for more than three dollars, the amount admitted to be due him by defendant's answer for work and labor, thereupon the court rendered judgment for the plaintiff on the pleadings. The defendant, Stevens, appeals to the supreme court.

Enos Miles and Wm. Story, for appellant.

ELBERT, J. The demurrer to that portion of the answer setting up a counter-claim was properly sustained. The answer did not allege or disclose any right, title, or interest in the defendant to the house alleged to have been occupied by the plaintiff, entitling him to demand or recover rent for the same.

The answer of the defendant respecting the due-bill sued upon did not put in issue any material fact respecting it, and the plaintiff having waived his right to recover more than was admitted by the defendant to be due the plaintiff on his claim for work and labor, the court did not err in entering judgment upon the pleadings.

The judgment of the court below is affirmed.

(10 Colo. 366)

CITY OF PUEBLO v. GRIFFIN.

(*Supreme Court of Colorado.* November 11, 1887.)

1. MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—DAMAGES FOR PERSONAL INJURIES—PLEADING AND PROOF.

Plaintiff sued for damages for personal injuries caused by a defective sidewalk, entailing permanent disability, expense for medical services, and loss of time in his

business. He was allowed to prove that he was a restaurant keeper, and that by doing the work of three men in his business his monthly profits were from \$75 to \$100. *Held* that, as the complaint was for general damages only, it was error to permit plaintiff to show the profits of his business arising from his peculiar habits and industry.

2. APPEAL—ADMISSION OF INCOMPETENT EVIDENCE—PRESUMPTION.

Where in an action for damages for personal injuries there was an averment of general damages only, and plaintiff was allowed to prove special damages, the court cannot assume that the jury were not influenced by the evidence improperly admitted.

Commissioners' decision. Appeal from district court, Pueblo county.

Chas. E. Gast and *C. C. Stein*, for appellant. *Stone & Anderson* and *C. A. Lott*, for appellee.

MACON, C. This was an action by appellee against appellant for the recovery of damages for personal injuries occasioned by a defective sidewalk in the city of Pueblo. In his complaint appellee alleged that the sidewalk was in a dangerous condition, to the knowledge of the city, and that in passing along it he received injuries which crippled him permanently, causing great bodily and mental suffering, and entailing an expense of \$50 for medical services, with loss of time in his business. Appellant answered, and put in issue all the material allegations of the complaint. On the trial appellee showed that at the time of his injuries he was keeping an eating-house in Pueblo, and, against appellant's objection, was permitted to show that he performed the labor of three men in his business, by reason of which his monthly profits therein amounted to from \$75 to \$100, clear of expense. Appellant duly excepted to the admission of this evidence. The jury returned a verdict against appellant for \$1,500. A motion for a new trial was filed by appellant, and overruled, to which ruling exceptions were duly taken, and an appeal to this court. Only one error is relied upon here, that based upon the admission of improper evidence.

The objection to the admission of the evidence should have been sustained by the court below. The complaint is one for general damages only; such as the law will imply from the act or injury itself. The distinction between general and special damages is well understood in legal practice, and has frequently been defined by this court, as well as the pleadings applicable to the two classes of damages. The object of pleading being to apprise the opposite party of the nature of the claim or defense against him, as well as its extent, it is uniformly held that a statement of the injuries, with an averment of a sum as the damage, will authorize the recovery of such damages only as naturally and ordinarily follow from such injuries; but if from any peculiarity in the circumstances or situation of the injured party other loss accrued to him thereby, such peculiarity must be alleged and proven, to justify the recovery of such damages. In *Tucker v. Parks*, 7 Colo. 62, 1 Pac. Rep. 427, this court say: "Referring now to the extent of the recovery, we remark that damages may be general or special; and that, while an averment simply specifying the amount claimed, as in this complaint, is sufficient for the recovery of general damages, it is insufficient to warrant the recovery of special damages. Where it is sought to recover such damages as are not the usual and natural consequences of the wrongful act complained of, the rule is that they must be specifically set forth, that the defendant may have notice of the facts out of which they are claimed to have arisen, and that he may not be taken by surprise on the trial." A large array of other cases to the same effect might be cited, but the rule is so clearly stated in the case referred to that it is unnecessary so to do.

The testimony admitted, over the objection of appellant, went to show that from the peculiar habits, skill, and industry of defendant in error, he was able to earn more than if he had conducted his business on a more expensive

scale, and had done the work of one man only, and hired two others, which in his business he states it was usual to do; but by dispensing with the labor and expense of two men his profits were from \$75 to \$100 per month. Under his general averment, plaintiff might have shown what his business was, and its extent, together with his general ability to earn money. But it was inadmissible for him to show the profits of his business as a measure of damage. Proof of profits as a measure of damage, in cases in which they are recoverable, must be specially averred. In this case the profits of plaintiff's business, as shown by him, were not the result of the labor of plaintiff alone, but were at least in part composed of other elements, and from the uncertainties and fluctuating nature of such business could not be the basis for the estimation of damages in a case like this.

The point made by the defendant in error, that though there may have been error in admitting this testimony, yet the verdict might well have been rendered as one for general damages, and upon that ground would not have been excessive, is unsound. We cannot assume that the verdict was not influenced by the evidence given in the case, and certainly not that the jury were more circumspect in acting on the evidence than the court was in admitting it. For this error, the judgment of the district court must be reversed.

We concur: RISING, C.; STALLCUP, C.

BY THE COURT. For the reasons assigned in the foregoing opinion the judgment of the district court is reversed, and the cause remanded for a new trial.

(74 Cal. 180)

In re Estate of CROZIER, Deceased. (No. 12,022.,

(*Supreme Court of California.* November 29, 1887.)

WILL—CONTEST—EVIDENCE—NEW TRIAL.

In an action to revoke the probate of a will on the ground of unsoundness of mind of the testator, the contestant offered in evidence a part of the great register of the county to show that the age of the testator was not what he had stated it to be in the will. The evidence was admitted over the objection of the defendant. *Held*, that this was error, and, under the rule that all error is presumed to work injury, it is sufficient ground for granting a motion for new trial.

Commissioners' decision. Department 2.

Appeal from superior court, San Joaquin county; W. S. BUCKLEY, Judge. *James A. Louttit*, for contestant. *J. C. Campbell*, (*S. D. Woods*, *A. L. Levinsky*, and *D. S. Terry*, of counsel,) for respondent.

BELCHER, C. C. James Crozier died on the seventh day of November, 1881, in the city of Stockton. He left a will made the day before his death, in which the respondent, William C. Daggett, was named as sole legatee and executor. The will was admitted to probate, and in due time Jane Crozier, the mother of decedent, commenced this proceeding to have the probate of the will revoked upon the ground that at the time of its execution the decedent was of unsound mind. The case was tried before a jury and the findings upon the special issues submitted were in favor of the contestant. The respondent then moved for a new trial upon the ground that the evidence did not justify the verdict, and for errors in law occurring at the trial and excepted to by him. After argument, the court granted the motion, as appears from the record, "on the ground of errors which occurred during the trial, and not for insufficiency of or conflict in the evidence," and the appeal is from that order. It does not appear what the supposed errors were which induced the court to grant the new trial, nor is it important that we should know. If any errors, prejudicial to the respondent, were committed, the order appealed from can-

not be reversed by this court. *Thompson v. Felton*, 54 Cal. 554; *McCarthy v. Loupe*, 62 Cal. 300.

Counsel for both sides have presented very elaborate briefs in which the testimony is reviewed, and the numerous rulings of the court are discussed. It is unnecessary to speak of many of these rulings. Most of them were undoubtedly correct, but we cannot say that of all of them. For example: In the will, the age of the testator is stated to be 65 years. Cutting, who drew the will, testified that Crozier told him that was his age, but did not tell him when he was born. Without objection the respondent introduced in evidence a copy of the great register of San Joaquin county, which showed the age of Crozier to have been 63 on the twelfth day of April, 1879, the date of his registration. In rebuttal the contestant offered in evidence a part of the great register of the same county, which reads as follows: "1,165. Crozier, James; age, fifty-two; country of nativity, Scotland; occupation, gardener; local residence, O'Neil; proved fifteen years' residence and loss of certificate; date of registration, February 14, 1867; sworn; register number, 3,232." This offer was objected to by the respondent on the ground that the offered evidence was immaterial and irrelevant, and not in rebuttal, but the objection was overruled and the evidence admitted. We think this ruling erroneous. The evident purpose of introducing the evidence was to throw doubt on the validity of the will, and, so far as we can see, it may have had its desired effect. There was no evidence to show when Crozier was born, but the argument in support of the ruling is, in substance, that he must have known and sworn to his age when he was registered in 1867; that as he is shown by the entry to have been 52 years old then, he must have been about 67 years old when he died; and that as he stated his age to be 65 and not 67 when he made his will on the day before he died, that fact tended to show weakness or unsoundness of mind, and was rightly submitted to the jury, "so that they might properly determine whether at that time he had mental capacity sufficient to dispose of his property, remember the claims of those dependent upon him, and the nature of the business he was then transacting." The argument is evidently unsound both in its logic and law. Crozier may have made an affidavit showing his age, and the other facts entitling him to registration, but he did not make the entries upon the register and may never have seen them. They were therefore irrelevant, and, in our opinion, wholly inadmissible for any purpose.

But it is said that the error, assuming that the ruling was erroneous, was an immaterial one, and a new trial should not have been granted on account of it. The rule is that every error is presumed to work injury to the party against whom it is committed, unless it clearly appears that no injury could have resulted. Here we cannot say that the respondent was not prejudiced by the erroneously admitted evidence. There were several other rulings upon the admission of evidence, and particularly upon the admission of certain testimony of the experts, the correctness of which was doubtful, but we do not think it necessary to speak of them particularly.

It follows that the order appealed from should be affirmed.

We concur: HAYNE, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

(74 Cal. 164)

Ex parte DIMMIG, on Habeas Corpus. (No. 20,367.)

(*Supreme Court of California.* November 22, 1887.)

CRIMINAL PRACTICE—ISSUE OF WARRANT—JURISDICTION OF MAGISTRATE.

Penal Code Cal. §§ 811-813, provides that when an information is laid before a magistrate of a crime committed, he must take the depositions of the informant

and his witnesses, if any; that the depositions must set forth facts tending to prove the guilt of the accused; and that, if the magistrate is satisfied therefrom of the commission of the offense, and that there is reasonable ground for believing the accused guilty, the magistrate must issue a warrant of arrest. - *Held* that, under these provisions, a magistrate has no jurisdiction to issue such warrant without evidence of such guilt, and that an affidavit alone, in the form of an information, containing no evidence, is not sufficient to support such warrant.

In bank. On *habeas corpus*.

Proceedings in police judge's court of San Francisco; HORNBLLOWER, Judge. *John D'Arcy, H. B. Miller, and Otto Tum Suden*, for petitioner. *Joseph Kirk*, for the People.

By THE COURT. Sections 811, 812, and 813 of the Penal Code are as follows:

"811. When an information is laid before a magistrate of the commission of a public offense, triable within the county, he must examine on oath the informant or prosecutor, and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them.

"812. The deposition must set forth the facts stated by the prosecutor and his witnesses, tending to establish the commission of the offense, and the guilt of the defendant.

"813. If the magistrate is satisfied therefrom that the offense complained of has been committed, and that there is reasonable ground to believe that the defendant has committed it, he must issue a warrant of arrest."

Under these provisions a magistrate has no jurisdiction to issue a warrant of arrest without some evidence tending to show the guilt of the party named in the warrant. The original information may be sufficient, though made only upon information and belief, if followed by the deposition of the complainant or some other witness, stating facts tending to show the guilt of the party charged. Of course, where there was some evidence upon which the magistrate acted, we would not interfere. It may be also true that the original information might be treated as a deposition, and in such view, if it contained positive evidence of facts tending to show guilt, it might be sufficient as a basis for the issuance of a warrant. But a mere affidavit in the form of an information, containing no evidence, and followed by no deposition stating any fact tending to show guilt, is insufficient to support a warrant. The liberty of a citizen cannot be violated upon the mere expression of an opinion under oath that he is guilty of a crime. *Swart v. Kimball*, 43 Mich. 443, 5 N. W. Rep. 635; *Blodgett v. Race*, 18 Hun, 132; *In re Balcom*, 12 Neb. 316, 11 N. W. Rep. 312; *Ex parte Burford*, 3 Cranch, 448; *People v. Smith*, 1 Cal. 9; *People v. Heffron*, 53 Mich. 529, 19 N. W. Rep. 170; *Ex parte Haynes*, 18 Wend. 612; *Loder v. Phelps*, 13 Wend. 46; *People v. Barnes*, 66 Cal. 594, 6 Pac. Rep. 698.

Such being the case here, the petitioner is discharged.

(74 Cal. 175)

GARFIELD v. WILSON and another. (No. 11,925.)

(Supreme Court of California. November 29, 1887.)

1. PUBLIC LANDS—SWAMP LANDS—RIGHT TO PURCHASE.

Plaintiff and defendants were contestants for the purchase of a tract of swamp land. Plaintiff offered a certified copy of his application, which purported to have been sworn to by him before a commissioner of the United States circuit court for California. The commissioner was not authorized to administer the oath. *Held*, that plaintiff's application was null and void.

2. SAME—RIGHT TO CONTEST PURCHASE.

Plaintiff and defendants made applications for the purchase of the same swamp land, and the contest was referred to the superior court of Tulare county. On the trial, plaintiff failed to establish any right to purchase the land. *Held*, that he could still contest the right of the defendants to purchase the land.

3. SAME—TRIAL—ISSUES AND FINDINGS.

Plaintiff and defendants were applicants for the purchase of the same tract of swamp land, and defendants alleged that the land had been segregated to the state by the United States for more than six months before their applications were filed. The only proof before the court was a map of the township in which the land was situated approved by the United States surveyor general on October 14, 1884. Their applications were filed in May and June, 1884, and they commenced suit on October 1, 1885. The finding of the court was that the land had been segregated for more than six months before the commencement of the action. *Held*, that the finding did not meet the issue, and was insufficient.

Commissioners' decision. Department 2.

Appeal from superior court, Tulare county; WM. W. CROSS, Judge.
Chas. E. Wilson and C. A. Webb, for appellants. *Lambertson & Taylor*, for respondents.

BELCHER, C. C. This action was commenced to determine a contest between the parties as to the right to purchase from the state a certain section of swamp and overflowed land in Tulare county. The defendant Wilson filed in the office of the surveyor general of the state his application to purchase the north half of the section, on the fifteenth day of May, 1884. The defendant Turner filed his application to purchase the south half of the section on the fourth day of June, 1884. The plaintiff filed his application to purchase the whole section on the twelfth day of June, 1885, and, on demand made by him, the contest was referred to the superior court of Tulare county for adjudication.

At the trial the plaintiff, to show his right to purchase the land, offered in evidence a certified copy of his application, which purported to have been sworn to by him before a commissioner of the United States circuit court for California. This was objected to by counsel for defendants, on the ground that it was not sworn to before an officer authorized to administer oaths, and the objection was sustained, the plaintiff reserving an exception.

It is admitted that the ruling was proper in view of the decision of this court in *Winder v. Hendricks*, 56 Cal. 464, but we are asked to reconsider that case and to now hold that a commissioner of the United States circuit court is competent to administer oaths under the laws of this state. Without following the argument of counsel on this point, it is enough to say that, in our opinion, the conclusions reached in the case referred to were correct, and should be reaffirmed here. It follows, therefore, that judgment was properly entered in the court below, that the plaintiff's application was null and void, and he had acquired no right to purchase the land in question from the state.

But though the plaintiff had no right to purchase the land, and even if he had not sought to purchase it, he could still contest the right of the defendants to purchase it. *Tyler v. Houghton*, 25 Cal. 26; *Thompson v. True*, 48 Cal. 605. And when the contest was referred to the court below for adjudication, that court acquired jurisdiction to hear the case, and it became its duty to determine as to the rights of each of the parties.

The question then remains, did the defendants show themselves entitled to purchase the land? In cases of this kind the settled rule is that each party must make out his own case, and to that end must allege and prove that the land is subject to sale by the state, and that he has complied with all the requirements of the statute authorizing its purchase. *Lane v. Pferduer*, 56 Cal. 122; *Dillon v. Salonde*, 68 Cal. 267, 9 Pac. Rep. 162; *Gilson v. Robinson*, 68 Cal. 539, 10 Pac. Rep. 193; *Plummer v. Woodruff*, 11 Pac. Rep. 871. And if neither party makes the necessary showing, then judgment should be entered that neither of them is entitled to make the purchase. *Mosely v. Torrence*, 12 Pac. Rep. 430.

In his answer to the complaint each defendant alleged that the land which he sought to purchase was swamp and overflowed land, which was granted

to the state by the act of congress of September 28, 1850, and had been segregated as swamp and overflowed land by authority of the United States for more than six months when his application was filed. These averments raised material issues, for, under the provisions of the Code, since 1874, no application to purchase swamp land has been authorized until after the land has been segregated as such by authority of the United States. Pol. Code, §§ 3441, 3443, 3445.

When the defendants offered in evidence their applications to purchase the land, they were objected to by the plaintiff, on the ground, among others, that it was not shown that, at the time when the affidavits and applications were made and filed, the land had been segregated to the state by authority of the United States, and the objections were overruled. No proof was offered by the defendants to show that the land had been segregated as swamp and overflowed land, and none was before the court, except a certified copy of the plat of the township in which the land is situated, which was introduced by the plaintiff. That plat was approved by the United States surveyor general on the fourteenth day of October, 1884, and under the decisions of this court that date must be treated as the date of the survey. *Finney v. Berger*, 50 Cal. 248; *Medley v. Robertson*, 55 Cal. 396. Running across the plat, from a point on the north line of section 4 to the south-west corner of section 25, is a line marked "Shore Line of Tulare Lake, in 1855," and west of that line, and nearly parallel with it, is another line marked "Shore Line, in 1880." On the margin of the plat are entries showing the number of acres in the "area of public land surveyed in 1854," and of swamp land surveyed in 1880 and 1884. But there was nothing to show that any map or plat of the township, or of any part of it, except the one introduced by the plaintiff, was ever approved or made. The section in controversy lies west of the "Shore Line, in 1880;" and, conceding that the defendants could use the plaintiff's plat, still we are unable to see any evidence that that section was segregated as swamp land before the fourteenth of October, 1884, when the plat was approved.

The court found that all the land in controversy was swamp and overflowed land, and was granted to the state by the act of congress of September 28, 1850, entitled "An act to enable the state of Arkansas and other states to reclaim the swamp lands within their limits." It further found that the said land had been segregated to the state of California as swamp and overflowed land for more than six months prior to the commencement of the action. The action was commenced on the first day of October, 1885, and six months prior to that date would be April 1, 1885. As the defendants' applications were filed in May and June, 1884, the finding evidently did not meet the issues, and was insufficient.

In our opinion, therefore, the judgment against the plaintiff, and the order denying him a new trial, should be affirmed; and the judgment in favor of the defendants should be reversed, and as to them, the cause should be remanded for a new trial.

We concur: FOOTE, C.; HAYNE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment against the plaintiff, and the order denying him a new trial, are affirmed; and the judgment in favor of defendants is reversed, and as to them the cause is remanded for a new trial.

(74 Cal. 156)

PFEIFFER v. REGENTS OF THE UNIVERSITY OF CALIFORNIA. (No. 11,772.)

(Supreme Court of California. November 18, 1887.)

1. TENANCY IN COMMON—RIGHTS OF CO-TENANTS—CONVEYANCE BY CO-TENANT—RESERVATION OF EASEMENT.

Plaintiff and defendants and others were tenants in common in a certain tract of land. In 1870 defendants conveyed their undivided interest, but reserved the right

to use the water on a certain portion of the land. In 1875 the land was partitioned, and to plaintiff was assigned that portion of the land on which was the water. *Held*, that the defendants, as tenants in common, could not by reservation in their deed create an easement or servitude on the common land as against their co-tenant.

2. PARTITION—By JUDICIAL PROCEEDINGS—PARTIES—GRANTEE FROM A CO-TENANT OF AN EASEMENT.

Defendants and others were tenants in common of a certain tract of land. Defendants conveyed away their undivided interest, reserving a right to use water. A co-tenant also granted them the right to take water from a portion of the tract occupied by him. *Held*, that neither the reservation nor the grant gave the defendants such an interest in the land as entitled them to be made parties to an action for partition.

In bank. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

L. E. Bulkely, for appellant. *Mastic, Belcher & Mastic*, for Laura Pfeiffer. *Flournoy, Mhom & Flournoy*, for respondents. *Jarboe, Harrison & Goodfellow*, amici curiæ.

MCFARLAND, J. This is an action to quiet title to a certain piece of land; to enjoin defendant from diverting any water from said land; and to recover damages for past diversion of such water. The action was tried in the court below without a jury, and judgment went for defendant. Plaintiff appeals from the judgment, and from an order denying her motion for a new trial.

The material facts in the case—omitting certain deraignments of title and other matters which need not be recited here—are these:

1. In 1865 plaintiff became the owner in fee of a certain undivided interest in "2,900 acres or thereabouts" of mountain or hill land in Alameda county, California. This land was a part of the Rancho San Antonio, granted by the Mexican government in 1823 to Louis Peralta, and confirmed to his sons and grantees by a patent of the United States government, dated February 10, 1877. Plaintiff continued to be the owner of said undivided interest until the year 1875, when a certain partition suit entitled *Le Roy v. Gwinn et al.* was instituted in the proper district court for the purpose of terminating the co-tenancy of the various owners of undivided interests in said land, and apportioning it among said owners in severalty. A judgment was rendered in said partition suit on the twenty-first of August, 1875, by which the particular land described in the complaint in this present action, and which is designated as "Plot O," was set off in severalty to plaintiff. She was put into possession of said plot O by the sheriff, and has been in possession ever since, except so far as her possession has been interrupted by defendant as hereinafter stated.

2. On August 10, 1864, Owen Simmons and wife, being also the owners in fee of an undivided interest in said 2,900 acres of land, conveyed the same to the College of California, a corporation, who remained the owner thereof until June 1, 1870, when it conveyed said undivided interest to the defendant herein, the regents of the University of California. At the time of said conveyance by Simmons and wife to the College of California, said Simmons was in the actual occupancy of that part of said land described in the complaint, which contains the springs of water about which this litigation has arisen, although he was only an owner, as tenant in common with others, of an undivided interest in the whole tract of 2,900 acres, which fact was well known to the college. After the conveyance to the college, the latter remained in occupancy of said piece of land until its conveyance to the defendant on June 1, 1870. This particular part of the land was wet and springy. It has several springs on it, which usually sunk into the ground within short distances from their sources. In 1866 the college commenced to clear out two of said springs; and within a year or two, by excavations, etc., it developed a stream of water, which by means of flumes, pipes, reservoirs, etc., it con-

verted and conveyed entirely away from said undivided lands onto other lands held by said college in severalty. The college, and its successor, the defendant, continued to so divert and convey said water from 1866 until after the judgment in said partition suit in 1875, without any interference or complaint by any of their co-tenants. In developing this water, and in erecting works for its diversion, the college and the defendant expended about \$17,000. After the judgment in partition, which set off this piece of land in severalty to plaintiff, she protested against any further diversion of the water by defendant, demanded payment for it, etc. She commenced this action within a day of the expiration of five years after the issuance of the patent.

3. On the twenty-eighth day of November, 1870, the defendant executed to Mary E. Brayton a conveyance of all its interest in said undivided tract of 2,900 acres of mountain. Said conveyance also describes three other tracts of land not involved in this controversy, and has in it the following clause: "Excepting and reserving out of and from this conveyance, and out of the premises firstly, secondly, and fourthly above described, the right of the water arising upon or flowing across the same, so far as it shall be needed for the University of California, and the right to enter upon said land for the purpose of constructing and laying the necessary pipes, and making the same available, the same to be exercised in such manner as not to interfere with the use and occupation of the land for cultivation, and to do no damage to the crops thereon." Mary E. Brayton afterwards conveyed to H. G. Livermore, who was made a party to said partition suit, and had set off to him, a certain part of said 2,900 acres, designated as "Plot H." The word "fourthly" in said clause of reservation refers to said undivided interest in said 2,900 acres.

4. There is another fact which must be here stated, because, while it has no direct reference to the land or water described in the complaint, it has a bearing on the question: Who were necessary parties to the partition suit? Z. B. Heywood, being the owner of an undivided interest in said tract of 2,900 acres, and having entered upon the occupancy of a certain part of it called "Ramsey Ranch," on the fourth day of September, 1860, executed a deed to the president and board of trustees of the College of California, by which he gives, grants, bargains, sells, and quitclaims to them "the exclusive right in perpetuity to enter upon my land known as the 'Ramsey Ranch,' being a portion of the Rancho San Antonio in the county of Alameda, California, and thereon to collect and take away, with the reservations hereinafter mentioned, the waters of the various springs which open into and along the gulch and ravine, and its branches that debouch at or near the point where the present road crosses the boundary line between sections 83 and 84, as laid down in Kellersberger's map; and also of the said springs above said ravine that rise to the southward of and run past and near my present farm-house, and for the purposes aforesaid to take, hold, use, occupy, and clear up so much of said land as may be proper and necessary for collecting said waters in basins or reservoirs, or for flooding by dams, and for canals and conduits, and the laying of pipes; and the right at all times to enter upon so much of said lands as their convenience may require for all the purposes aforesaid, and for repairs or viewing the same, and the right to protect said waters from waste or damage by such works, and in such manner as they may judge best." The reservations referred to are not material. Heywood remained owner of said undivided interest until the commencement of said partition suit; was made a party thereto; and had set off to him in severalty a part of said 2,900 acres designated as "Plot P," said plot P including the said Ramsey ranch. On the twenty-sixth day of November, 1869, the said president and board of trustees of the College of California conveyed to "the state of California, represented by the regents of the University of California," all the rights and property (if any) which were conveyed to the former by said deed of September 4, 1860, executed by said Heywood as aforesaid. Neither

the state of California nor the defendant was made a party to said partition suit.

5. The defendant continued to divert water from said plot O, from the time plaintiff became several owner thereof until the trial of this present action, and to convey the same to its university lands, which never were part of said 2,900 acres of mountain land. The court below finds that for three years and ten months immediately preceding the trial, the defendant so diverted and used 10,000 gallons per day, in addition to water sold by it to others, for which it received \$4,804; but it is not found how much plaintiff was injured by such diversion. It appears from the findings that defendant has taken the water from only two springs on said land, and that there are several other springs on the land which seem not to have been developed or used in any way by plaintiff.

Upon these facts the court below rendered judgment for defendant upon the sole ground—as stated in the first finding—that by the reservation in said deed from the defendant to Mary E. Brayton, and by said deed of the College of California to the state of California, represented by the regents of the University of California, conveying to the latter the rights conveyed to the former by said Z. B. Heywood as aforesaid, the defendant and the state of California acquired and retained such interests in said 2,900 acres of land as made them necessary parties to said suit for partition; and that, not having been made such parties, the judgment in said suit setting off said plot O in severalty to plaintiff was and is void as against the defendant.

In taking this view of the case we think that the court below erred. It is not necessary to discuss the question whether, if respondent had been the sole owner of the land at the time of its deed to Mrs. Brayton, the reservation would have left in respondent a mere personal privilege or right in gross, or an interest in the land itself capable of partition. At the time of the execution of said deed, respondent was the owner of only an undivided interest in the land as tenant in common with the appellant and others; and, as such tenant in common, it had no power to convey to a stranger, or to reserve to itself, after parting with the fee, the right to divert water entirely away from said land. A tenant in common cannot create an easement or servitude upon the common land. In *Goddard*, on the Law of Easements, on pages 93 and 94, the result of the authorities on the subject is correctly stated as follows: "So the grantor must be the sole owner of the fee. One joint owner or tenant in common cannot create an easement in the common estate as against his cotenant—though probably he would be himself estopped to dispute a grant thus made. For the same reason one tenant in common cannot, when conveying his own interest in the common property, create by reservation a personal and separate easement over the same for the benefit of his adjoining separate property." In *Boston F. Co. v. Condit*, 19 N. J. Eq. 394, it was held that "a grantee of the right to dig ores from one tenant in common cannot call for a partition of the premises." See, also, 3 Kent, Comm. (11th Ed.) 554; *Freem. Co-Tenancy*, § 198; *Adam v. Iron Co.*, 7 Cush. 361; *Marshall v. Trumbull*, 28 Conn. 183.

We do not understand counsel for respondent as denying this to be the rule clearly established by the general authorities, and they cite no cases to the contrary. But they argue that, logically, the rule ought to be different in this state on account of certain decisions made by this court (about another matter) in *Stark v. Barrett*, 15 Cal. 361; *Gates v. Salmon*, 35 Cal. 576, and some other cases which follow them. It was quite customary at one time for individual tenants in common of large Mexican grants to convey, or to undertake to convey, their interests in particular parts of the common land by metes and bounds, called "special locations;" and the decisions last above referred to simply held—*First*, that the grants of such special locations were good as against naked trespassers; and, *second*, that they were not absolutely

void as against the co-tenants of the grantor, but were taken subject to the co-tenants' right of partition of the whole tract, and might be lost to the grantee when such partition took place. These decisions are admitted to have been in conflict with many authorities of high standing, and were based no doubt, to some extent, on equitable considerations growing out of particular circumstances; and they should not be pushed further than the limits of their express terms. But there were no questions about *easements* in those cases. Whatever interest the grantor undertook to convey was *all* his interest or estate in the *whole* land described in the conveyance. There was no attempt to create or reserve a right to dig for minerals in the land, or to cut wood on it, or to take water from it, or to have a way over it,—no attempt to divide up the very *body* of the land and distribute it around. There is nothing, therefore, in those decisions that alters the well-established rule as above stated, which determines the main point in the case at bar.

Of course, the deed from Heywood to the College of California, and the deed from the latter to the respondent, or the state of California, are upon the same footing with the "reservation" in the deed from respondent to Brayton. Neither the respondent nor the state of California had an estate or interest in the land, and neither was a necessary party to the suit for partition.

The defenses founded on appropriation, acquiescence, estoppel, and the statute of limitations were not maintained. The findings on those issues, as we understand it, were all in favor of appellant, and respondent has not appealed.

Our conclusion is that upon the findings judgment should have been rendered for appellant according to the prayer of her complaint, except as to damages, about which there is no finding. But as appellant now waives all claims for damages, there appears to be no necessity for a new trial. The judgment is therefore reversed, and the superior court is directed to enter judgment for plaintiff according to the prayer of the complaint, without damages.

WE CONCUR: SEARLS, C. J.; THORNTON, J.; MCKINSTRY, J.; SHARPSTEIN, J.

(15 Or. 363)

FOSTER v. SCHMEER.

(Supreme Court of Oregon. November 7, 1887.)

EQUITY—REFORMATION OF CONTRACT OF PARTNERSHIP—PARTIAL FAILURE OF PROOF.

A contract of partnership was made in writing, but showed upon its face, and when taken in connection with the business undertaken, that it did not express the full agreement between the parties. Upon a suit for accounting, defendant asked that the contract be reformed, but did not so fully plead the particulars of the contract which he alleged was intended, nor present such cogent proof of such contract, as would entitle him to the relief demanded, but held that those points which it was evident had been omitted from the writing should be added thereto, and a decree given in accordance with the facts proved.

Appeal from circuit court, Multnomah county; L. B. STEARNS, Judge.
A. F. Sears, Jr., for appellant. Strobe & Beach, for respondent.

THAYER, J. This appeal comes here from a decree of the circuit court for the county of Multnomah. The appellant commenced a suit in that court against the respondent for an accounting after dissolution of copartnership theretofore existing between said parties. The contract of copartnership is alleged in the complaint to have been under and in pursuance of certain written articles signed by them, and of which the following is a copy:

"This agreement made this first day of March, 1886, between John Foster and P. Schmeer, both of Multnomah county, Oregon, witnesseth: That the said Foster and Schmeer have hereby agreed to carry on and conduct jointly, a milk or dairy business, in said county, under the following terms and conditions, to-wit: The said Schmeer shall supply at his own cost and expense, one-half the number of all the cows necessary for said business; also pay for one-half of all the feed that may have to be bought; and for all articles, implements, or supplies required for carrying on the said business. The proceeds of said business shall be divided equally between the said Foster and Schmeer, at such times and in such a manner as to them seems proper. This agreement to be and remain in force for the term of one year, from the first day of March, 1886. It is further mutually agreed that upon the termination of this agreement the said Foster may repurchase the six cows he sold to said Schmeer at the same price he received from said Schmeer, to-wit, the sum of one hundred and eighty dollars.

"Witness our hands and seals this seventh day of August, 1886.

"PETER SCHMEER. [Seal.]

"JOHN FOSTER. [Seal.]

"Witness: A. M. STANSBERRY."

It is further alleged in the complaint that by virtue of said agreement the parties entered upon said business therein referred to; that appellant complied with all the conditions of the agreement upon his part; that he had advanced considerable sums of money, and furnished feed on account of the copartnership business largely in excess of his share as a partner; that said advances amounted to over \$300 more than his proportion, and that the respondent had refused to enter into any accounting or repay his share of the advances.

The respondent filed an answer to the complaint denying that he entered into any copartnership with appellant under said agreement or any agreement, except an agreement in the dairy and farm business, and denied all the other material allegations of the complaint. And for further answer and counterclaim alleged that the said agreement was erroneous in that, by mutual mistake of the parties thereto, they omitted to state, as was their intention, that the partnership was formed for the purpose of carrying on a farming business as well as a milk business; that the respondent was to put in the trade and good-will of a milk business, then possessed by him, together with his knowledge of said business, also the use of three horses, one-half interest in a milk-wagon, and in 50 milk-cans; that appellant was to furnish, as his share of the capital stock, the use of one-half of all the cows needed in said business, the use of his farm on Columbia slough, the use of three horses, one-half interest in a milk-wagon and 50 milk-cans, and pay for one-half of all feed and one-half of all articles, implements, and supplies that would have to be bought for carrying on said milk and farming business, and that in order to make said agreement conform to the actual intentions of the parties, it was necessary that the same should be reformed and amended so as to include said matters, and that in pursuance of said last-mentioned agreement the parties entered upon said business. There followed an allegation that the parties, during the continuance of said business, had, down to the first of January, 1887, accounted at or near the end of each month for the business transacted during the month preceding, at which time they divided equally between them the excess of cash receipts over the disbursements, and that the last of such settlements was of the business done in the month of December, 1886. Also, of an allegation of the purchase of six cows, by appellant of respondent, for \$180, and that he had not paid for them, and that the appellant was in possession of one Buckeye mower of the value of \$75, and potatoes of the value of \$250, all being the property of the said copartnership; also, that the firm dug a well on appellant's farm, and furnished appliances for drawing water therefrom, at a

cost of \$80, and that appellant refused to pay said money or account for said partnership property retained by him, and claimed as relief an accounting of said partnership business since December 31, 1886. No reply to the answer was filed, but a stipulation was entered into by and between their attorneys in their behalf to stand in the place of such reply, and of which the following is a copy: "(1) Admitting that at the expiration of any partnership that existed between the parties, the plaintiff purchased of defendant six cows for the sum of \$180, and has paid no part of said sum. (2) Admitting that plaintiff has in his possession one mower, the property of plaintiff and defendant, of the value of \$60. (3) Admitting that plaintiff has possession of a well that cost, with the appliances, \$80, one-half of which sum was paid by each party. (4) Denying specifically each and every other allegation contained in the answer of defendant herein." The case was referred to a referee to take the testimony and report it to the court, together with his findings of fact and conclusions of law thereon.

The main controversy in the testimony was whether the use of the farm was to be included in the partnership business. The appellant seemed inclined to concede that the use of a part of the farm was to be included, such as the barn, the use of the house and fixtures, the pasture, and he admits that he consented to the raising of grain thereon for the stock, but claims allowance for the hay that was raised and fed to the animals, and emphatically denies that the partnership included the potatoes. There was also a controversy about a horse that had been bought, worth \$25. I am inclined to think, however, from the testimony, that the horse belonged to the appellant, at least half of it. The respondent testified that "he bought out a half interest in Rankin's business for \$200, and was to have the other half interest at the same price whenever he wanted it; that he went back to Rankin in about ten days and told him that he would give him \$200 for the other half of the business and the mare thrown in; that Mr. Foster told him that he should buy the other half interest for him; that he told Mr. Foster that he could buy it for \$200; that that was the agreement when he bought the first half, to pay \$200, without the mare, for the other half of the business. Mr. Foster told respondent to buy it for him, and he bought it and paid Rankin \$200; that he got the mare also; the mare had no connection with the business." But the mare did have connection with the business. Respondent having been employed by Foster, the appellant, to buy out the half interest from Rankin, appellant was entitled to the benefit of his bargain. The respondent had no right to speculate in that way when acting for appellant. The respondent should be charged \$12.50, on account of that transaction.

The referee found that the contract set out in the complaint was entered into by mutual mistake of the parties thereto, and that it was erroneous in that it did not provide, as was the intention of the parties, that the partnership was formed for the purpose of carrying on a farming business, as well as a milk business; that the appellant was to put in his share of the capital stock; among other things, the use of his said farm. He also found that the respondent, since the first day of January, 1887, had collected of the moneys due said firm the sum of \$258.55, and paid out on account thereof, \$156.70, leaving a balance in his hands due the firm of \$101.85. That the appellant purchased the six cows, as admitted in the stipulation which constituted the reply, for \$180, for which he had not paid respondent. That appellant sold of the property belonging to the partnership, 90 sacks of potatoes, for which he received \$123.16. Found that the expenses of digging the well, etc., were \$80, and that he retained the mowing-machine which was worth \$60, and was indebted to the firm in that sum on account thereof; and, as conclusions of law, that the respondent was entitled to a decree reforming the contract of copartnership in accordance with the findings of fact, and for the sum of \$260. This was made up, I suppose, by charging the appellant—

The price of the cows, - - - - -	\$180 00
One-half of the money for the potatoes, - - - - -	61 58
One-half of the expense of the well, - - - - -	40 00
One-half value of the mower, - - - - -	30 00

Amounting to, - - - - -	\$311 58
And crediting him with one-half the \$101.85 collected, viz.: - - - - -	50 92

Leaving, - - - - - \$260 66

There are two questions in the case to be considered: *First*, had the respondent a legal right, under the allegations and proofs, to have the contract set out in the complaint reformed? and, *second*, if reformed, what changes was the respondent entitled to have made therein? The pleader did not, as I consider, properly allege the facts so as to entitle a party to have, in a strict sense, a contract reformed. He would have to allege more than that it was erroneous in certain particulars, and for what purpose the partnership was formed. He would ordinarily have to set out the terms of the contract as the parties made it; what they each undertook and agreed to do; and show why its terms happened to be left out when it was attempted to be reduced to writing, or how terms not agreed upon came to be inserted.

This case stands, however, upon somewhat different principles. The relief sought here was to supply what the parties through inadvertence and mistake had omitted.

Reforming a written contract on the grounds of mistake is the exercise of the ordinary jurisdiction of a court of equity. That court, however, has always required in all cases coming under that head strong and convincing proof of the mistake. It never undertakes to make contracts for parties; it leaves them to do that for themselves; but where it is shown that there has been a mistake, that, if not corrected, it would operate to the prejudice of a party, and that it did not occur through the party's carelessness or negligence, it will correct it.

The parties having deliberately signed an instrument in writing setting forth what they have agreed upon, cannot, however, expect a court to find that their agreement was different from what they have so declared it to be, without clear, cogent proof that such is the fact, and a reasonable explanation as to how they failed in not having the writing express the true agreement. If this case depended upon the oral proofs alone, I should be of the opinion that the respondent had not shown himself entitled to have the written agreement reformed. But an inspection of the agreement shows it to be incomplete. It does not show what the appellant was to do in carrying on the partnership business, or that he was to do anything, except what might be inferred therefrom; and the circumstances under which the parties were situated, and their mode of dealing, afford strong proof that the farm referred to was to be used as an incident of the business they engaged in. I do not think that the evidence in the case warrants the court in finding that the parties agreed to carry on the farming business; their business was, I am satisfied, confined to the milk or dairy business; but that they were to have the benefit of the appellant's farm, in order to carry on the milk or dairy business, is very evident. I have no doubt but that was the understanding between them; they were to use the barn; the pasture land, the plow land for grain, and the meadows. The respondent was to occupy a part of the house, have the benefit of the fruit and garden, beyond question; all their acts indicate that. The cows were kept there; the well was dug to supply water required in carrying on the business: the meadows were sown with plaster; a mower was procured and the plow land cultivated at their joint expense; but that the absolute use of the farm was to belong to the partnership, is not established by the proof. All that was raised upon the farm not necessary to the

conduct of the dairy business, under my view of the evidence, belonged to the appellant individually. If it had been intended that farming was to constitute a principal business of the partnership, it would have been stated no doubt in such a way to the scrivener that he would have included it in the writings; but, considered only as incidental to the dairy business, it was probably not mentioned so distinctly as to enable him to remember it. He remembered the dairy business, and, probably after he had expressed the terms on which it was to be conducted, concluded he had earned the half dollar the appellant paid him for doing the writing. He was engaged in the real estate business, and no doubt was disturbed frequently while drawing up the articles. It would have been better for both parties, if they had left their matter in parol. Their going to an inexperienced person to have a contract of that character drawn, could hardly fail to get them into difficulty.

I think the decree upon the accounting should be changed by adding to the appellant's credit \$12.50, on account of the mare referred to, and by discharging the item of \$61.58 on account of the potatoes. I think the potatoes belonged to the general farming business, and were not included in the dairy matter. This will reduce the amount due from appellant to \$186.58, instead of \$260.66. The decree appealed from will therefore be modified in that particular; in all other respects will be affirmed. Neither party is entitled to cost of appeal, but each to pay one-half of the clerk's fees of this court.

(15 Or. 371)

LILLIENTHAL and others v. A. P. HOTALING Co. and others.

(Supreme Court of Oregon. November 7, 1887.)

ATTACHMENT—PRIORITIES—SETTING ASIDE LEVY FOR FRAUD.

One Caravita was in failing circumstances. He gave to H. his notes for \$3,232, upon which an action was begun, and judgment by confession entered for about \$3,600. Defendants also had a claim of \$1,015.25 against Caravita. H. levied on Caravita's stock of goods, and defendants attached, and thereafter plaintiffs also attached. Defendants and H. made an agreement to sell the goods, valued at about \$4,000, H. to take the goods and give defendants a note for their claim. Plaintiffs brought suit to set aside the attachments of defendants and the levy of H. The latter was set aside, on the ground that the notes were given to defraud creditors. Plaintiffs claimed that their attachment—because they had exposed this fraud—should take precedence of the attachment levied by defendants, on the equitable ground that they had uncovered fraud, and made available to *bona fide* creditors additional funds of the debtor. *Held*, that they were not entitled to such relief, and as no evidence appeared to indicate fraud on defendants' part, the attachment of the latter was properly sustained.

Appeal from circuit court, Multnomah county; L. B. STEARNS, Judge.
Williams, Ach & Wood, for plaintiff. Alex. Bernstein, for respondents.

THAYER, J. It appears from the facts in the case that on the twentieth day of October, 1886, one Fanny A. Holder commenced an action in said circuit court, against one Vincent Caravita, upon three promissory notes executed to her by Caravita. And that on the twenty-second day of October, 1886, she recovered a judgment therein by confession against Caravita for the sum of \$3,232, with interest thereon at the rate of 10 per cent. per annum, from said twentieth day of October, 1886, \$375 attorney's fees, and the costs and disbursements of the action. That, on the same day of the rendition of said judgment, execution was issued thereon, and a levy made by virtue thereof, upon Caravita's property, consisting, principally, of a stock of liquors and cigars in the city of Portland. That on said twenty-second day of October the respondents, the A. P. Hotaling Co., a private corporation, G. Ginnochio & Co., Frappoli, Berges & Co., and E. Goslinsky & Co., severally commenced actions in said circuit court against Caravita, and in each of said actions an attachment was issued and levied upon said property on the day of the commencement of said actions, but subsequent to the levy of the Holder execu-

tion. That the appellant also, on said twenty-second day of October, commenced an action against Caravita, in which an attachment was issued and levied upon said property, but subsequent to the levy of the said execution and of the attachments of the respondents. The several claims upon which the actions in favor of said respondents and appellants were commenced appear to have been valid claims arising out of the sale of articles made by them, respectively, to the said Caravita. Judgments were duly recovered upon each, upon the third day of November, 1886, and an order of sale of the attached property taken in each of the cases, and an execution was duly issued upon each of said judgments, and levied upon the said property. The judgments in favor of the respondents are comparatively small, aggregating only \$1,015.25, while that of the appellant amounted to \$6,606.16. The property was entirely insufficient to satisfy all the claims; that it amounted in value to less than \$4,000.

The appellants, evidently, were convinced that Mrs. Holder's claim was a sham, and that her judgment recovered thereon was fraudulent, and requested the said respondents to unite with them in a suit to set it aside, which they refused to do. It appears that the said respondents' claims were placed in the hands of Alexander Bernstein, Esq., an attorney at law, and their attorney herein, for collection, and that Mrs. Holder's pretended claim was represented by J. M. Bower, Esq., also another attorney at law, who conducted the proceedings for Mrs. Holder as her attorney in commencing the action, and in obtaining the judgment in her favor against Caravita. The property was advertised for sale upon the Holder execution for the ninth day of November, 1886. It appears that on or about the third day of November, 1886, and after the appellants had requested said respondents to unite with them in a suit to set aside the Holder judgment, Mr. Bernstein called upon Mr. Bower in regard to the business, and the two went to Holder's place of business, where they met Mrs. Holder's husband, Joseph A. Holder, and made arrangements that the amount of the said respondents' judgments, and of the said Holder's judgment, should be bid for the property at the sale thereof, and that if any one bid more than that they would let such bidder take the property, and the said judgment would be paid out of the proceeds. If not, Bernstein was to bid in the property for the amount mentioned, and transfer it to said Joseph A. Holder, provided he would give a note for the amount of the said respondents' claims, and secure it by a chattel mortgage on the stock and fixtures. That in pursuance of that arrangement an instrument in writing was drawn up by Mr. Bower, and signed by Mr. Bernstein, of which the following is a copy:

"PORTLAND, OREGON, ninth November, 1886.

"Received of Joseph Holder and Fanny A. Holder a note of even date herewith for one thousand and thirty-one dollars, made and executed by said Joseph Holder and Fanny A. Holder, payable to my order at the Portland National Bank, and payable four months after date. Said note is given to pay the following claims and judgments, exclusive of costs and expenses taxed:

A. P. Hotaling Co. vs. Caravita,	-	-	-	-	\$175 25
Ginnocchio & Co. vs. Same,	-	-	-	-	215 75
Frappoli, Berges & Co. vs. Same,	-	-	-	-	188 00
E. Goslinsky & Co. vs. Same,	-	-	-	-	452 00

\$1,031 00

—And in case the sale of the stock of V. Caravita is sold for cash, I agree to deliver the said Holders their note, and they to pay cash the full amount thereof. And in case I become the purchaser by giving to the sheriff receipts for judgments against said Caravita, I agree to deliver the same to said Holders forthwith upon said Holders giving a chattel mortgage on the said stock, securing said note and such other claims as may rank equally with said note.

"ALEX. BERNSTEIN, Attorney at Law."

On the fifth day of November, 1886, the appellants commenced their suit against the said Caravita, Fanny A. Holder, the said respondents, and the Napa Valley Wine Co., and James Zanello. The last-named defendants, the Napa Valley Wine Co. and James Zanello, were impleaded on account of some subsequent interest or claim they had upon the property, but they took no part in the litigation. The object and purpose of the appellants' suit was to set aside and annul the Holder judgment, and restrain its enforcement, and decree their lien by virtue of their attachment to be a prior lien to any and all liens of the other creditors of the said Caravita, and that their judgment be first satisfied out of the proceeds of the sale of the attached property. There is no allegation in the complaint against the legality of the said respondents' said judgments, or which is calculated in anywise to impeach them. They allege, however, that they had requested said respondents to join with them as plaintiffs in the suit, but that the former had refused to do so, and, wherefore, they were made defendants therein. An answer was filed on the part of Fanny A. Holder, by Messrs. McDougall & Bower, and Alexander Bernstein, as her attorneys; also upon the part of the said respondents by said Alexander Bernstein, their attorney. Said answers were filed separately. The answer of Mrs. Holder contains denials of knowledge or information sufficient to form a belief as to the appellants' claim, and of the proceedings alleged in the complaint to have been had thereon, and denies positively that her action against Caravita was instituted against him collusively or fraudulently, or with the intent to hinder, delay, or defraud creditors of the said Caravita, or any one else, and the answer of the said respondents contains similar denials of said claim and the proceedings had thereon; also the same character of denials of the alleged collusion and fraud, and affirmative allegations as to the issuance of their attachments and their priority to that of appellants.

The circuit court granted an order in the suit restraining further proceedings upon the Holder judgment during the pendency of the suit, which the said respondents by their attorney, said Alexander Bernstein, subsequently and on the ninth day of November, 1886, moved the court to modify. The said motion was founded on the pleadings and proceedings in the suit, and was supported by certain affidavits made on behalf of said respondents. The modifications sought, and which the said affidavits were made to obtain, were to the effect that the sheriff might be permitted to accept the bids of the judgment creditors on their judgments prior to the appellants' judgment, or that, upon the plaintiffs in the suit filing an undertaking, an injunction order of the court issue, according to law and the regular practice of the court, restraining the sheriff from proceeding with the sale under the execution of the said Fanny A. Holder, or of the execution of any of the other defendants in the suit, until the issues in the suit were heard and determined.

The appellants, some time after said respondents' answer was filed, filed a reply thereto, in which they denied the priority of the respondents' attachments, and set up affirmatively that said respondents had been fully paid their claims, also that they and the Holders had conspired and confederated together for the purpose of defrauding the creditors of Caravita, and appellants especially, and had agreed to place all possible obstacles in the way, to prevent the collection of appellants' said judgment against Caravita; and that since the commencement of the suit herein, and before the filing of their answer herein, the said respondents, in pursuance of said confederation, collusion, and alleged agreement, have received from the said Fanny A. Holder and Joseph A. Holder a promissory note in full of the said claims against said Caravita, and did agree, at the time of the receipt thereof by them, to hinder and delay the appellants in the collection of their demands.

The case was referred to a referee to take and report the evidence, and his findings of fact thereon, and conclusions of law. The referee, after taking the testimony, found that the said three promissory notes executed by Cara-

vita to the said Fanny A. Holder, and upon which the said judgment was recovered, were without consideration, and were given, and the judgment obtained thereon, with intent to hinder, delay, and defraud the creditors of said Caravita, and that said judgment was wholly fraudulent and void. He also found that the judgments of the said respondents were valid judgments; that none of them had been paid; that neither of said respondents had conspired or confederated to defraud any of Caravita's creditors, nor been guilty of any fraud, and that each of them had a lien on said attached property prior in time to any lien thereon of appellants; which report having been confirmed by the said circuit court, the decree appealed from was entered.

The appellants' counsel contend that the refusal of said respondents to unite with them in the suit to set aside the judgment in favor of Fanny A. Holder against Caravita, the arrangement entered into between said respondents and Joseph A. Holder, through their respective attorneys, as before mentioned, and attempted modification of the order staying proceedings, are evidences of a conspiracy between the said respondents and the Holders, to defraud the appellants; that it was an attempt to use said judgments for a fraudulent purpose, and to delay the appellants in the collection of their claim; that the execution by Joseph A. and Fanny A. Holder of their promissory note to said Alexander Bernstein, as shown in the writing signed by him, operated as a payment of the respondents' judgments. Said counsel also claim that the appellants are entitled to have their judgment preferred to that of the said respondents for having instituted the suit, uncovered the fraud of Caravita and Mrs. Holder, and removed an obstruction which stood in the way of the collection of any of the judgments.

It is claimed by the respondents' counsel that the appellants cannot avail themselves of the benefit of the matters charged in the reply, as they were not alleged in the complaint, and I think there is much force in the claim. The complaint, impliedly at least, admits the validity of the judgments referred to, and makes no attack whatever upon their verity. A plaintiff in an action or suit must recover, if at all, upon his complaint. The facts constituting his cause of action or suit must there be stated; a reply can serve him no purpose except to controvert or avoid new matters set up in the answer. The old rule, that every pleading on the part of the plaintiff subsequent to the declaration, and on the part of the defendant subsequent to the plea, could only be used to fortify, respectively, the declaration and plea, is still in force, in principle; and it matters not what may be alleged in a reply; if the complaint fails to state a cause of suit, the plaintiff will not be entitled to any relief.

The appellants' claim to priority of lien, on account of their having commenced and prosecuted their suit, is based upon the rules of law which obtains where equitable assets are discovered by suit in the nature of a creditors' bill, and made applicable to the satisfaction of a judgment, where they could not have been reached by the ordinary means provided by law.

This is not that kind of case. Here an equitable obstruction has been interposed in the way of the appellants' and respondents' collection of their claims, which had become a lien by law upon the property, having priority in right by reason of their priority in time. As between the appellants and said respondents, the latter's judgments were first in time, and they acquired a legal lien by virtue of the levy of their attachments. The levy of the Holder execution was prior to both, and the appellants had more interest in getting it out of the way than the respondents had. The latter may in fact have had no interest in having the Holder judgment set aside. They certainly did not if the property would bring a sufficient sum at the sale to pay Holder's judgment and their own. I do not think this is a case where the appellants can gain a priority as claimed. The rule alluded to never extended to the displacement of a legal existing lien. *McKinney v. Bank*, 104 Ill. 180. It only

gave the plaintiff the first right on account of his superior vigilance, when in all other respects the parties stood equal. The appellants' claim to priority upon that ground must therefore be denied, and if the rules which govern pleadings, in the respect before referred to, are enforced, it will dispose of their claim upon the other ground.

Independent of that, however, I cannot see how said claim can be maintained. The said Caravita, who had been engaged in the liquor and cigar business, failed, leaving insufficient assets to liquidate his liabilities, and a race of diligence between his creditors, of course, was commenced. He had executed the fraudulent notes upon which action was commenced before his creditors had notice of his failure, but they were not tardy when they ascertained the fact of his having failed, and doubtless looked only to the collection of their respective claims. The claims of the said respondents were small, and they were justified in endeavoring to secure them with as little expense as possible, and their attorney, Mr. Bernstein, evidently thought that the better and less expensive course would be to make the arrangement he did with Mr. Bower, to have the property sell for enough to pay the claims he represented in excess of the Holder judgment. He received the note of Holder and his wife for the amount of said claims, and agreed to bid the amount of his clients' judgments and the Holder judgment, for the property at the sale, and, if it were struck off to him, to let Holder have it, and take a mortgage on it to secure the note; and I have no doubt but that the said respondents were anxious that this plan should be carried out.

If, however, such arrangement was calculated to defeat or delay the appellants in the collection of their claim, and was entered into for that purpose, it would be void. But whether the court would in that case have the power to destroy or postpone the said respondents' liens upon the property under and by virtue of the levy of their attachments, I do not undertake to determine, as I do not believe the testimony and proofs warrant such conclusion. In the first place, the arrangement could not affect the appellants' rights, did not, in any way, impair their remedy in the collection of their claims, and, in the second place, the respondents had no apparent motive in depriving the appellants of any legal right to which they were entitled, and proof of their entering into the arrangement they did through their attorney did not establish the existence of such motive on their part. Nor did the execution of the note by Holder and wife to Bernstein, for the amount of their respondents' judgments, constitute a payment of the judgments. It was a conditional affair, and was not to have effect unless the property was sold and bid in by Bernstein, which condition never happened. It is insisted that the agreement to turn the property over to Joseph A. Holder, in case Bernstein bid it off, was in fraud of appellants' rights, but I do not understand why Bernstein would not have had the right to do with it as he pleased if he bought it, nor how the appellants would have had any further interest in the property, after it was sold on the execution. The respondents may have had information that the Holder claim was fraudulent, but, if they had, they were not required to raise the question. They had the right to waive it if they saw fit.

I have examined the several matters complained of by the appellants, and am not able to discover any grounds for changing the decree appealed from. The brief filed herein on their behalf exhibits an intensity of feeling upon the part of counsel who prepared the same, and perhaps the circumstances of the case were such as to have inspired it, but the facts fail to show that a fraudulent use was made of the respondents' said judgments, or that there was any conspiracy between the respondents, or those who represented them, to hinder, delay, or defraud the said appellants, or that they were defrauded in any particular.

The decree appealed from must therefore be affirmed.

(15 Or. 380)

SCOGGIN, Adm'r, v. SCHLOATH and Wife.

(Supreme Court of Oregon. November 9, 1887.)

1. FRAUDULENT CONVEYANCES—INADEQUATE CONSIDERATION—PRESUMPTION.

A deed expressing the nominal consideration of \$100, for the conveyance of property admitted to be worth \$2,000, is constructively fraudulent against the creditors of the grantor.

2. SAME—PAROL EVIDENCE TO SHOW LARGER CONSIDERATION THAN NAMED IN DEED.

Evidence to show that a larger consideration than the one named in a deed was in fact paid for the land conveyed is admissible.¹

3. SAME.

It was attempted to prove that a grantor named in a deed having a nominal consideration of \$100 specified was in debt to the grantee in a much larger amount, for which sum the deed was actually given; but the evidence was very unsatisfactory as to the account upon which the indebtedness was claimed, and was indefinite as to amounts, settlements, etc. *Held*, that there was not sufficient proof to sustain the deed as against creditors, and it should be set aside, and the \$100 repaid to the grantee, with interest.

Appeal from circuit court, Multnomah county; L. B. STEARNS, Judge.

Tanner, Snow & Carey, for appellant. *Caples & Mulkey*, for respondents.

STRAHAN, J. In this case the appellant sues as administrator of the estate of Thomas Sherlock, deceased. The object of this suit is to set aside, and to have declared void, for fraud, a certain deed of conveyance made by Thomas Sherlock, in his life-time, to the respondent Dora Schloath. This suit was commenced, and is prosecuted, by the order of the county court of Multnomah county, Oregon, made pursuant to sections 1167 and 1168, Hill's Code. The complaint alleges, among other things, that plaintiff is administrator of said estate; and that claims aggregating something near \$1,000 have been duly presented and allowed against said estate; and that there are no available assets applicable to the payment of said claims; and the costs and expenses of administration; that Thomas Sherlock in his life-time was seized of 160 acres of land situated on Sauvie's island, in the state of Oregon; that he died on the twelfth day of April, 1886; that on the fifteenth day of July, 1885, he executed to the defendant Dora Schloath a deed conveying to her said land, for the consideration of \$100. The complaint further shows that said Sherlock was, during the last two years of his life, addicted to the excessive use of intoxicating liquors, and had become weak in mind and body, and dependent entirely on the Schloaths for care and attention, and for advice as to the management of his property; that the Schloaths, taking advantage of his situation and condition, by the exercise of undue influence, and with the intent to hinder, delay, and defraud the creditors of said Sherlock, induced, persuaded, and compelled him to execute the deed in question for the nominal consideration of \$100, which in fact was never paid; and that said property was of the value of \$2,500.

The answer denies the allegations of the complaint, and then alleges that, on or about the fifteenth day of June, 1885, the said Thomas Sherlock and Dora Schloath had an accounting and settlement of all their affairs and business transactions, upon which said accounting and settlement it was found, and ascertained, and mutually agreed upon that said Thomas Sherlock was justly and truly indebted to said Dora Schloath in the full sum of \$2,000, for board and lodging, and for money loaned and furnished said Sherlock, and that, in consideration of said sum of \$2,000, and the further sum of \$100 then and there paid him, the said Sherlock made, and delivered the deed in question. The reply presents an issue as to the new matter in the answer.

¹The recital in a contract of a money consideration paid does not exclude parol evidence of an additional consideration. *Bolles v. Sachs*, (Minn.) 33 N. W. Rep. 362, and note.

An examination of the evidence leads us to the conclusion that Thomas Sherlock drank to great excess during the last two or three years of his life, and that, for some time before his death, his physical as well as his mental organization was greatly impaired, and that his mind had become so weak that he had no power to resist the importunities of those by whom he was surrounded. But although much evidence was given on this branch of the case, it is unnecessary to consider it in this place, for the reason that there is another question presented by this record which is fatal to the validity of the deed in question. The consideration expressed in the deed is \$100. The property conveyed is admitted to be worth \$2,000 by the defendants, and its real value, according to the evidence, is probably somewhat greater. The debts which the plaintiff represents were in existence at the time of the conveyance. Therefore, as against existing creditors, the deed was constructively fraudulent.

The consideration must be regarded as nominal. Counsel for the defendants seem to realize that this result must follow unless they can support the deed by showing that there was in fact a further and additional consideration to that expressed in the deed, and which is sufficient if shown to be *bona fide*. The proof offered tends to prove that, about the time of the execution of the deed, Dora Schloath and Thomas Sherlock had a settlement, and that in that settlement Sherlock acknowledged himself to be indebted to her in the sum of nearly \$4,000, mainly for board and lodging, and for a few items of money loaned; that this was all the property Sherlock had, and that Mrs. Schloath agreed to take it at \$2,000, in full payment and satisfaction of her claim. The evidence on this point, however, does not seem satisfactory, for reasons to be more fully stated hereafter. It may be observed now, however, that no reason is shown why this account was not paid sooner. Sherlock was in business, and appears to have had money and property, and it does not appear that he was unable to pay it. Furthermore, at the time of this alleged settlement Sherlock was close up to the border line of imbecility, brought about, as appears, by the excessive use of strong drink. This circumstance, which taken alone is not enough to overthrow his deliberate deed, requires us to carefully examine the facts now offered to support it. But it is claimed on the part of the appellant that if this deed is impeached for fraud, actual or constructive, it is not competent to support it by proving a consideration other or different from that expressed in the deed, and this view seems to be supported by respectable authority. *Murphy v. Bank*, 16 Ala. 90; *Linam v. Reeves*, 68 Ala. 90; *Houston v. Blackman*, 66 Ala. 559; *Galbreath v. Cook*, 30 Ark. 417; *Carmack v. Lovett*, 44 Ark. 180; *Glenn v. McNeal*, 3 Md. Ch. 349; *Ellinger v. Crowl*, 17 Md. 361. These authorities, it must be admitted, tend very much to support the plaintiff's contention. But after a careful consideration of the authorities, I am inclined to think the better reason as well as authority is the other way. The better rule appears to be that if the consideration expressed in a deed is natural love and affection, it cannot be shown to have been executed for a valuable consideration; or if voluntary, or on consideration of marriage, and the like, it cannot be shown that the consideration was a moneyed one. This would be proving by parol that the consideration was different *in kind* from that expressed in the deed, and, upon well-considered authority, is not allowable. But where the consideration is a moneyed consideration, there appears to be no reason for rejecting evidence tending to prove that a larger or additional sum was, in fact, paid. *Cunningham v. Dwyer*, 23 Md. 219; *Credle v. Carrawan*, 64 N. C. 422; *McKinister v. Babcock*, 26 N. Y. 378; *Fellows v. Emperor*, 13 Barb. 92; *Tyler v. Carlton*, 7 Me. 175; *Howell v. Elliott*, 1 Dev. 76; *Bank v. Brown*, 2 Hill. (S. C.) 426; *Glenn v. McNeal*, 3 Md. Ch. 349; *Mayfield v. Kilgour*, 31 Md. 240; *Hinde's Lessee v. Longworth*, 11 Wheat. 199.

Returning now to the evidence offered of an additional consideration to that expressed in the deed, we are prepared to consider it purely as a question

of fact; and, viewing it in the light of all that is offered to support it, and of the surrounding circumstances, there seems to be much reason for holding the evidence insufficient. No items of account were kept against Sherlock. The claim extends over a period of 15 years. The parties had many financial transactions, and settlements of their affairs, during that time. In the absence of any evidence whatever as to what items were included in such settlements, it is to be presumed that every item of account then existing between the parties was included. *Matasee v. Hughes*, 7 Or. 39. In addition then to the evidence necessary to establish the account the defendants must also overthrow this presumption by the introduction of evidence. And upon this point the record is entirely silent. But this is not all; the defendants are unable to give a connected, straightforward, consistent statement of their dealings with Sherlock during the time covered by this account, and yet all the matters in dispute appear to be peculiarly within their knowledge. The entire course of business and dealing between the parties and Sherlock, it must be admitted, are against this claim. No charges were made against him, or accounts kept of the items now claimed; no one was present at the alleged settlement but the defendants and Sherlock, and his condition is shown to have been such that, to say the least, it is very doubtful if he fully comprehended or understood what was said or done. The deed itself was executed in Schloath's saloon, and one of the witnesses was his bar-keeper, and it was written at his suggestion, and by a scrivener employed by Schloath for that purpose.

Upon the whole case, there is such a cloud of doubt and uncertainty hanging around the transaction, and the evidence offered of this pre-existing debt is so unsatisfactory, that we must hold the deed in question to be constructively fraudulent as to the existing creditors of Sherlock. It will therefore be set aside as to these creditors, the property will be decreed to be sold, and out of the proceeds Dora Schloath will be first paid \$100, with interest at 10 per cent. per annum, from the fifteenth day of July, 1885, the date of the deed, and the residue will be turned over to the plaintiff to be applied in due course of administration.

(15 Or. 320)

PIKE v. KENNEDY and others.

(Supreme Court of Oregon. November 15, 1887.)

1. SUMMONS—PUBLICATION—AFFIDAVIT THAT DEFENDANT HAS PROPERTY IN STATE.

An order of publication of a summons in foreclosure proceedings was based upon an affidavit stating that the mortgagor and his wife, to secure the payment of a certain note, executed a mortgage to persons named upon lot 8, in block 183, in Couch's addition to the city of Portland, in Multnomah county, Oregon, the property described being the property which was mortgaged. Held, that it sufficiently appeared from the affidavit that defendants had property in the state of Oregon, as is required by Dedy's Code Or. § 55, subd. 3, and § 56, to appear before an order for publication of summons is made.

2. SAME—AFFIDAVIT THAT DEFENDANT CANNOT BE FOUND IN STATE.

Before an order for publication of summons will be made, an affidavit therefor must be filed, showing that defendant cannot, after due diligence, be found in the state, or it must appear that such facts exist as show that diligence would be of no avail; but an affidavit which states "that defendants reside at Walla Walla, in the territory of Washington, which is their post-office address, * * * that personal service cannot be made upon said defendants, or either of them, for the reason that defendants have departed from this state and remained absent therefrom for more than six consecutive weeks, and now reside at Walla Walla," is sufficient.

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge. *Williams & Williams* and *W. Scott Beebe*, for appellant. *Gearin & Gilbert* and *Dolph, Bellinger, Mallory & Simon*, for respondents.

LORD, C. J. This was an action in ejectment to recover lot 8, in block 183, in Couch's addition to the city of Portland, Oregon. The plaintiff bases his

right to recover upon the invalidity of certain proceedings in a foreclosure suit, which, he claims, rendered the decree therein void. That suit was for a foreclosure of a mortgage executed by the plaintiff, Pike, and his wife, to Klosterman Bros. upon the property sought to be recovered in this action. It is admitted that if the decree is void, the title to the land in controversy never passed out of the plaintiff by force of that proceeding, and that he is entitled to recover in the present action. The invalidity insisted upon arises out of an order for the publication of a summons, and the specific objections are (1) that it does not appear from the affidavit upon which the order of publication was based that the defendants had any property in the state of Oregon. The provisions of the Code as to this requirement are found in section 55, subd. 3, and § 56, Deady's Code. The affidavit shows that the plaintiff, Pike, and his wife, to secure the payment of a certain note, particularly described, executed a mortgage to Klosterman Bros. upon "lot 8, in block 183, in Couch's addition to the city of Portland, in Multnomah county, Oregon," the property described in and for which the present action is brought. These facts show, so to speak, by the mouths of Pike and wife, as alleged in the affidavit, that they did have property in the state, and had voluntarily created a lien upon it, and that they agreed that, if the debt secured by the mortgage was not paid when due, the realty described might be sold in discharge of the indebtedness. In *Belmont v. Cornen*, 82 N. Y. 257, the affidavit for an order of publication in a foreclosure suit, as here, was as follows: "That this action is brought to foreclose a mortgage made and executed by the said defendants, Peter P. Cornen, and Lydia, his wife, to the said plaintiff, to secure the sum of \$60,000, with interest on real property in the city and county of New York, in this state." These facts do not allege property in the defendants and within the state. (2) The second objection is more serious and difficult of disposal. It is in effect that it does not appear from the affidavit that the defendants could not be found within the state, or that any diligence had been used to ascertain their whereabouts, or where they were at the time the affidavit for the order of publication was made. Our Code provides that "when service of the summons cannot be made, as prescribed in the last preceding section, and the defendant, after due diligence, cannot be found within the state, and when that fact appears by the affidavit to the satisfaction of the court or judge thereof, * * * such court or judge thereof shall grant an order that the service by publication of a summons, in either of the following cases: * * *

(3) When the defendant is not a resident of the state," etc. Deady's Code, p. 152, § 55. This provision is like section 139 of the New York Code, from which it was taken. The construction of this provision of our Code has been the subject of much judicial discussion, and its meaning is not clearly expressed. In an early case, *Vernan v. Holbrook*, 5 How. Pr. 4, PARKER, J., said: "The proceeding is authorized, when it shall appear that the defendant, after due diligence, cannot be found within this state. The meaning of this section is not clearly expressed, but I do not think it was intended that an attempt must be first made to serve process where the defendant is a non-resident. The fact of non-residence is evidence that the defendant could not, after due diligence, be found within the state, and so it was held in *Raudon v. Corbin*, 3 How. Pr. 416." But in *Wortman v. Wortman*, 17 Abb. Pr. 70, it was held that the fact of non-residence of the defendant is insufficient to authorize an order for the publication of a summons; SUTHERLAND, J., saying "that it must appear by affidavit, to the satisfaction of the court or judge, that the person on whom the service of the summons is to be made cannot, after due diligence, be found within the state; for the section of the Code containing such requirement assumes that though the defendant be a non-resident, yet that perhaps he may be found within the state, and plainly contemplates that some effort shall be made to find and serve the defendant within the state, though he or she be a non-resident." This case decides specifically that non-residence

of the defendant is insufficient, and does not dispense with effort to find the defendant within the state, and the later decisions adhere to this conclusion. In *Carleton v. Carleton*, 85 N. Y. 314, the affidavit for an order of publication was as follows: "The defendant has not resided within the state of New York since March, 1877, and deponent is informed and believes that the defendant is now a resident of San Francisco, Cal.," and the court, by MILLER, J., said: "The appeal presented involves the question whether an affidavit showing non-residence, without proof where the defendant actually was at the time, makes out a case within the provisions of section 139, herein cited. The affidavit states that the defendant has not resided in the state for some time, and on information and belief it is not known where he does reside. There is no statement, however, that due diligence has been used, or that any effort whatever has been made to find him, and that he cannot be found within the state. It is a simple allegation of non-residence, from which fact the court is asked to infer that due diligence had been used. The Code evidently meant to require proof that defendant could not be found after due diligence." He then proceeds to remark that the proof furnished does not establish such diligence; that it is a well-known fact that many persons who are residents of one state have places of business in another, and that they are frequently in the latter state, pass most of their time there, and could be readily found if due diligence was used for that purpose; that non-residence of itself is not a sufficient ground for granting the order, and that, therefore, the proof of the fact alone furnishes no sufficient reason for the judicial conclusion that due diligence had been employed to find the defendant within the state. Judge MILLER then proceeds to make this distinction: "Cases," he says, "may arise where the proof of residence in a distant state at the very time, and of an absolute location there, would be so strong and conclusive as to render it entirely apparent that no act of diligence would be of any avail; and if the affidavit here had stated positively and distinctly that the defendant was at the time not only a resident of the state of California, *but was then actually living in that state*, there would be ground for claiming that due diligence would be unavailing. But the affidavit is not specific and certain as to the fact that the defendant ever, although a non-resident, might not be found within the state by the use of due diligence, and hence was insufficient to confer jurisdiction." The italics are mine, and intended to note that, in the opinion of the court, proof as to where the non-resident defendant actually was at the time, would excuse any effort to serve at another place. In *Kennedy v. Insurance & Trust Co.*, 101 N. Y. 488, the court, by MILLER, J., had occasion again to examine this subject, and to re-examine the views expressed in *Carleton v. Carleton*, *supra*, and said: "It will be seen that in the case cited (*Carleton v. Carleton*) the affidavit as to residence is upon information and belief, and does not show positively and distinctly that the defendant was a non-resident. Considerable stress is laid upon this fact, and in the opinion it is said: 'Cases may arise,' etc.," quoting what we have last quoted from that opinion, and then concludes the review of that case as follows: "It would thus seem that where the proof of non-residence is clear and conclusive, and that the defendant is living out of the state, and in a distant state, there may be strong reasons for holding that proof of due diligence is not required, and a different result arrived at." These are the latest authoritative expressions of the court upon the subject-matter under consideration, and the result reached may be thus summed up: That the statute requires proof that the defendant cannot, after due diligence, be found in the state, or proof of such a state of facts as will show that diligence would be of no avail in effecting a service within the state.

The affidavit in the case now under consideration is as follows: "That said defendants reside at Walla Walla, in the territory of Washington, which is their post-office address. * * * That personal service cannot be made upon said defendants, or either of them, for the reason that said defendants

have departed from this state, and remained absent therefrom for more than six consecutive weeks, and now reside at Walla Walla." As we have seen, non-residence is not of itself sufficient to authorize the order for publication, because that alone is not inconsistent with the idea that the defendant may be in the state doing business, although his residence is in another state, and hence would not relieve of the necessity or requirement of due diligence. But the allegation of non-residence, in connection with the fact additionally alleged, that he was actually living in the resident state, would be ground for claiming that due diligence would be unavailing.

The allegation of non-residence is specific and certain in the affidavit; the defendants reside at Walla Walla, Washington Territory, and that is their post-office address. But this is not enough, and the inquiry now is whether the further statement, taken in connection with the averment of non-residence, "that personal service cannot be made on the defendants for the reason that they have departed from the state, and remained absent therefrom for more than six consecutive weeks, and now reside at Walla Walla," show such a state of facts as render it apparent that no act of diligence would be of any avail to find them within the state. It seems to me that these averments taken together are legal evidence tending to show, at least, not only non-residence, but actual absence from the state at the time when the affidavit was made. The word "now," in its ordinary acceptation, means "at this time," or "at the present moment," or "at a time contemporaneous with something done."

It relates to the actual existence of the fact at the time and place mentioned. The averment that the defendants "now reside at Walla Walla," means at this time, or at the present moment they live or reside at that place, that is to say, that when the affidavit was made they were then actually living in Walla Walla. It is intended to emphasize the fact of actual presence at the place of residence, at the time alleged, and is the reason why the affidavit says that personal service cannot be made upon them within the state.

When taken together, these averments show, positively and distinctly, that the defendants were not only residents of Washington Territory at that time, but that personal service could not be made on the defendants in this state, because they had left the state, and were then and at that time residing in Walla Walla. Here, then, the proof shows where the defendants were at the time the affidavit was made for the order, the identical matter which was wanting in the affidavit in *Carleton v. Carleton*, *supra*; and was thus fatal to its sufficiency. The law requires proof that the defendant cannot be found, after due diligence, or proof of such a state of facts as show that diligence could avail nothing to effect service upon them within the state. When proof of such a state of facts is made to appear to the satisfaction of the court or judge, within the principle and reasoning of the cases cited, the purpose of the law is answered, and its requirements observed. It may be admitted that the affidavit is illy constructed, and upon appeal might be subjected to some criticism, but if it is not entirely defective, the order upon which it is based should certainly not be set aside in a collateral proceeding. The rule upon this subject is thus stated: "When the proof has a legal tendency to make out a proper case, in all its parts, for issuing the process, then, although the proof may be slight and inconclusive, the process will be valid until set aside by a direct proceeding for that purpose." *Miller v. Brinkerhoff*, 4 Denio, 118; *Staples v. Fairchild*, 3 N. Y. 41, 46.

We find no error, and the judgment of the court below is affirmed.

(15 Or. 220)

LAKIN v. OREGON PAC. R. CO.

(Supreme Court of Oregon. June 13, 1887.)

1. RAILROAD COMPANIES—NEGLIGENCE OF EMPLOYEES—ENGINE IN CHARGE OF STRANGER.

Plaintiff was injured by a collision of an engine with a train of cars. The engine was in charge of one who had been placed thereon to "learn the road" by a station agent who had no authority to hire men. He had been left in charge of the engine by the regular engineer, whose duty it was to attend the engine. He was working in connection with the regular employes of the railroad company. The company claimed that the person in charge had no authority to move the train, and it was therefore not liable. *Held* that, conceding the fault to be in the person handling the engine, yet the company was liable, by virtue of the fact that he was left by its employes in charge of the engine.

2. SAME—CONTRIBUTORY NEGLIGENCE—PASSENGER BOARDING TRAIN BEFORE CALL FOR STARTING.

It appeared that plaintiff, who was injured by a collision on a railroad, had left a train of cars which were stopped for dinner, and had returned to a proper place therein before the other passengers had returned and boarded the train. *Held*, that it was not contributory negligence for her to board the train previous to the call for starting.

3. SAME—ACTION FOR INJURY—PLEADING—EVIDENCE.

In an action against a railroad company for damages from a collision caused, as alleged, "by the negligence of the defendant and its servants," it is not error to allow the plaintiff to testify as to the construction of the cars, to show how the accident occurred; nor is it error to admit testimony of the engine's "leaking steam," where the judge afterwards instructed the jury that that fact has no bearing on the question of negligence as charged.

4. SAME—EMPLOYEES—SCOPE OF EMPLOYMENT—INSTRUCTIONS.

Where a question arose as to the liability of a railroad company for a collision caused by moving an engine, and the court charged that "if the locomotive was moved by the servants or agents of the company, whether within the scope of their employment or not, the company is responsible for all their acts." *Held*, that as there was no possibility under the evidence of finding that the employes were not acting in the scope of their employment, the charge was not prejudicial.

Appeal from circuit court, Benton county; R. S. BEAN, Judge.

John Kelsay and J. J. Walton, for respondent. *John Burnett and L. Flinn*, for appellant.

THAYER, J. This appeal is from a judgment of the circuit court for the county of Benton recovered in an action in said court, brought by the respondent against the appellant on account of damages for personal injuries received while a passenger upon the appellant's line of railroad, *en route* from Yaquina City to Corvallis, in said county, alleged to have been occasioned through the appellant's negligence. The case was tried in the circuit court by jury, and resulted in a verdict for the respondent for the sum of \$1,650. The grounds of the appeal are alleged errors in the rulings of the court made during the trial, and in the instructions given to the jury. The following is the *gravamen* of the complaint: "That while the plaintiff was such passenger at or near the station called 'The Summit,' on the line of said railroad, a collision occurred by running the engine or locomotive of said railroad against the passenger cars while said passenger cars were detached from said engine or locomotive, and while the said passenger cars were standing on the track of said railroad, with such force that the said plaintiff was precipitated forward and thrown down on said cars, whereby the plaintiff was badly wounded, bruised, and injured about her person, and put in imminent danger of her life; and plaintiff was for a long time confined, and unable to attend to her usual business, and is yet, and has sustained permanent injury, and was obliged to, and did, pay large sums of money for doctoring and attendance, to-wit, the sum of \$300; that the said collision was caused by the neg-

ligence of the defendant and its servants." This was denied by the answer, and the following matter alleged therein: "That on the thirty-first day of August, 1885, near the Summit station, on the railroad mentioned in the complaint, in Benton county, Oregon, the defendant was causing a train of cars to pass over said railroad from Yaquina City to Corvallis, Oregon, upon which train the plaintiff was a passenger, and that at said Summit station said train was halted and stopped for dinner, and that while said train was so stopped and halted to enable the passengers to get dinner at said Summit station, one C. E. Blackburn, who was at said time not in the service or employ of the defendant, wrongfully, and without the authority or consent of said defendant, detached, and caused the locomotive to be detached and uncoupled from the passenger cars, and moved said locomotive along the track some distance from said passenger cars, and that in attempting to return said locomotive to its place and connect the same to the said passenger cars the collision mentioned in the complaint happened, and not otherwise; and that the same happened without the consent or knowledge of the defendant or its servants, or either of them, and that said Blackburn, at said time, was not in the employ of the defendant, and never had been, and that his act in uncoupling said train and separating locomotive from the passenger cars, and in attempting to return the same to its place, and in causing said collision, was without the knowledge or consent of the defendant, and the same was wrongful on the part of said Blackburn." The answer also alleged that plaintiff contributed to the alleged injury by leaving the cars of defendant while they were stopped, and returning to them while the engine was detached, without the knowledge of the defendant or its servants, and carelessly and negligently entered said cars before she was notified or requested so to do, and before the alleged collision occurred; and by so doing contributed to said injury, and that said alleged injury would not have occurred but for the said carelessness and negligence of said respondent.

This reference to the pleadings shows pretty conclusively that the relevant testimony in the case was confined to narrow limits. The general facts evidently are not controverted. It may reasonably be inferred from the pleadings that the respondent was a passenger upon the appellant's train of cars as alleged in the complaint; that the train stopped near the Summit station upon the line of the road; that the locomotive was there detached and run out on the line of the road to a point beyond the Summit towards Corvallis; was then run back to be coupled to the passenger cars again, and, in the act of effecting such purpose, produced a collision which resulted in the injury of the respondent. It is claimed upon the part of the appellant, as will be seen from the portion of its answer to which reference has been made, that it was nowise responsible for the collision mentioned, but that it was produced by the wrongful intermeddling of said C. E. Blackburn with the company's locomotive-engine and train of cars. The appellant denies any negligence in the affair upon the grounds, I suppose, that the act was not its act, but the act of an interloper, with whom the company had no relations whatever. This, and the alleged negligence of the respondent, seem to be the main grounds of the defense to the action. Both of the grounds were mainly matters of fact for the jury to determine. If the injury was occasioned by the wrongful acts of a stranger, the railroad company ought not to be held responsible for it, unless the company in some way countenanced the acts so as to make them its own. There was evidence in the case tending to show that said Blackburn was employed as engineer, and sent out on the train upon which the accident occurred by one Fordyce, to learn the road between Yaquina City and the Summit.

Charles Meeker, the locomotive engineer on the train, testified that he got orders from the train dispatcher, Mr. Fordyce, to take Blackburn upon the engine "to learn him" the road between the two places; and Blackburn himself swore that he was sent out by Mr. Fordyce from Yaquina City as engi-

neer at said time; that he supposed Mr. Fordyce to be acting as train dispatcher, or superintendent, or something of that kind, he did not know what; that at the time the instructions were given, Fordyce was at Yaquina City in the railroad office; that a great many persons were present at the time buying tickets; that Meeker was there. The instructions were that Blackburn should get on the engine No. 2, with Meeker, the engineer, and proceed to the Summit; that upon arriving at the Summit he was to take charge of No. 2 engine, and work with it there until Meeker returned from Corvallis; Meeker was to take another engine run by a man by the name of Brown, and proceed to Corvallis; that when he, Blackburn, arrived at the Summit, he would receive his running orders; that after receiving from Fordyce the instructions he got on the engine with Meeker. He further testified, in substance that after getting upon the engine they left Yaquina, and ran along with the train to Chitwood water-tank; that after leaving there, Meeker asked him to take the engine and run it; that he took hold of the engine, and Meeker went back on the train among the passengers; that after running along to within two or three miles of Nashville, Meeker came back, and he, Blackburn, asked him to take the engine; the former said, "No, you are doing well, go ahead." Meeker finally resumed running the train, and after they got to the Summit there was some conversation about dinner, between Meeker, the fireman, and some one; that Meeker got off the car and mingled with the people, and he, Blackburn, remained on the engine some time; a few minutes after, a man he thought was Mr. Rader came upon the engine, and a little later the brakeman also came to the engine; that one of these men went along the engine, pulled the pin (coupling pin) out, gave witness the signal to go ahead; witness asked him where to, and he said "to get dinner;" witness asked him if it was all right with Charley, referring to Meeker, and he said "Yes, Charley said go along and get dinner." He then came in the engine and passed through the pilot hole, and as he went out he put his foot against the throttle, and opened it; that witness took charge of the engine and went across the Summit for dinner. After dinner the parties started back with the engine to where the train was. The other parties had got aboard before witness did, and the engine was moving back when he returned to it from dinner; that when he got on the engine the fireman had charge of it, and he said: "You take charge of it while I put in some wood." That witness did so, and shut off steam; that they were backing up the engine, and, as customary, the witness turned his back to the throttle to observe his way back; that he saw before going a great ways that the tender brake was not sufficient to hold the engine, that when he shut the steam off, he dropped the lever down into the corner, and controlled the engine with the lever until he got within a short distance of the train; that at times, in going down grade, the fireman would work his brake a little, and that would give the engine a little start, and witness would fetch it up with the lever again; but at no time till near the train, did he have occasion to throw the lever over across the center; that by bringing the lever up beyond the center it would have a tendency to keep the engine under control; when near the train, he saw the brakeman had worked round the tender ready to make the coupling; that he called out three cars, or four cars, he did not remember which; the engine was then under control; just as he called "three cars," or "four cars," witness was under the impression that the brake was let off; that at any rate the engine shot right back on him; that any one who could handle an engine knows what that means; that witness did not have the spring down into the notch; that when the engine shot back on him it pulled him down into the corner; that he turned the other way and attempted to throw the lever over on the forward motion, and when he threw the lever up towards the center the engine was moving very fast; and when he brought the lever to the center he could not throw it over, and then discovered, through the cylinder cock, that "she" was leaking steam—could

hear it sucking through the cylinder cocks. This narration includes the circumstances immediately preceding the collision. There was a fireman, and, I would infer from the bill of exceptions, two brakemen aboard the engine at the time of the occurrence, though it is not certain that there was more than one of the latter.

Mr. Wallis Nash, a vice president of the road, was called as a witness on the part of the appellant, and testified that the only one who had power to employ persons was Henry V. Gates; that the extent of Mr. Fordyce's authority was station agent at Yaquina, and that he was also acting under Gates' authority as telegraph operator in carrying Gates' orders to the train-men; that he had no other authority whatever over the men, except to execute Mr. Gates' orders.

Mr. Gates was also called as a witness for the appellant, and testified to the same effect, and further testified that Blackburn had no authority to go out on the train at the time referred to. The witness testified upon his cross-examination that Fordyce was the material agent; that as that agent he had charge of all supplies on the road; that he was station agent, and had a station agent's authority; outside of that he had no authority whatever; had no authority to employ any person.

This in effect is all the evidence shown by the bill of exceptions as to Blackburn's connection with the affair, and his relation with the railroad company.

Upon the other ground of defense, the alleged contributory negligence upon the part of the respondent, the evidence contained in the bill of exceptions is very meager, and no statement is made in the bill of exceptions that there was evidence given upon that point that is not mentioned therein. Roy Rober, a witness on the part of the respondent, testified that he was upon the train at the time of the occurrence. In answer to a question as to what position on the car Mrs. Lakin was sitting at the time, he stated as follows: "I remember distinctly. She was sitting with her back partly to me, and sitting—the seats were with the backs together lengthwise in the cars—nearly to the end; perhaps 18 inches, or perhaps 2 feet, from the end of the car. The benches stand that near to the end. She sat back from the end, I think at least four or five feet, with her back towards the bay from whence she came, her face towards the engine, and the child with its face towards the engine, and with its arms probably over the seat, and with its feet upon the seat, and in that position when it struck; because I noticed the engine when it struck, and she was thrown from there between the cars." The bill of exceptions contains the following: "The testimony in this case, in addition to that hereinbefore mentioned, tended to show that when the train stopped for dinner at the Summit a portion of the passengers remained on the cars to eat lunch; that Mrs. Lakin so remained on the cars; that soon after the cars stopped she went off to take her little girl to a water-closet, and she was off about five minutes, and then she returned, and was eating her lunch when the accident occurred." The other evidence in the case showed that when the engine struck against the cars it was moving very fast, and that the concussion was severe. I do not see anything in the bill of exceptions that would have warranted the jury in finding that the respondent was guilty of contributory negligence in the affair. It does not even hint at any act or omission upon her part that concurred in producing the injury complained of. She paid her fare to the said company, and took passage upon said train of cars, and was careful and prudent in her conduct, so far as anything to the contrary is shown. Nothing, therefore, can be claimed from that ground of defense.

As to the former ground, the injury being the result of the wrongful act of Blackburn and not from any negligence of the company, very little more can be claimed than from the latter. The evidence referred to tends to show that Blackburn was requested by Mr. Fordyce, the station agent of the company at Yaquina, to go aboard of the train and learn the route preparatory to his

taking charge of the engine and operating it as engineer; that he did so; went in company with Meeker, the regular engineer, who was directed by said agent to teach him the road; that he was aboard the engine when it was detached from the train; went with it to where the employes of the railroad company took dinner, and returned upon it; that when it started back he was requested by the fireman to take charge of it, which he did, and in connection with the fireman and brakeman endeavored to manage the engine as it was backed down towards the train in order to be coupled onto it. It is conceded on the part of the appellant that Fordyce was in its employ, but it was claimed that the only one who had power to employ persons was Henry V. Gates; that the extent of Fordyce's authority was that of station agent at Yaquina, and was also acting, under Gates' authority, as telegraph operator in carrying Gates' orders to the train-men; that he had no authority whatever over the men except to execute Mr. Gates' orders. Granting that this was as claimed, and that Mr. Gates had not empowered Mr. Fordyce to employ Blackburn, or to direct Meeker to take him upon said train at the time mentioned, and yet I fail to see how that is to relieve the company from liability. Blackburn was aboard the engine, serving the company at the request, and with the acquiescence, of its servants and agents; and if the accident occurred through his special neglect or want of skill in the management of the engine, which does not appear at all, the company would be just as liable. Every employe of a railroad company is, to a limited extent, its agent; and what difference can it make whether the negligence which occasioned the injury resulted from the negligence or wrong of Blackburn, as *de jure* engineer, or from the negligence or wrong of Fordyce in placing him in the position of engineer? The latter was a regular employe of the company, and deputed to execute the orders of Gates. Blackburn evidently had no reason to believe but that Fordyce had been empowered to employ him, and his going aboard of the engine, and doing what the testimony tended to show he did do, was no intrusion. No one will pretend that it showed him to have been a trespasser in acting the part he did. Whether he was legally employed or not, so long as he acted in subordination to the agents of the company, the liability of the latter to the respondent was not affected. Its obligation to her was to carry her safely and properly; the mode of performance of its duty was through the means of agents and servants; and if it failed to fulfill its obligations in consequence of their wrong it became responsible for the injury that was thereby occasioned. How is the public to know whether an engineer aboard a train of cars has been legally employed or not? or what difference does it make so long as he is there, acting in such capacity, and the company, through its regular agents and managers, acquiesces in it? The conductor is supposed to have been there, and he is said, by a great many authorities, to be *pro hac vice*, the company. He must have countenanced all that Blackburn did, up to the time of the collision. If the latter had forcibly taken possession of the engine and occasioned the collision, and the agents and employes of the company been unable to prevent it, the latter would not have been liable for the consequences. But no such affair as that is shown by the facts, and we must conclude that the merits of the case are with the respondent, unless error crept into it through the admission of testimony, the rulings at the trial, or in the charge of the court to the jury.

The appellant has assigned numerous grounds of error. As classified under general heads, they consisted in permitting the respondent, when on the stand as a witness, to describe the condition of the cars upon which the passengers were transported, and the manner in which she was injured; in admitting the testimony of Blackburn as to the boiler leaking steam; and in returning the answer made to the inquiry of the jury, that, "if the locomotive was moved by the servants or agents of the company, whether within the scope of their employment or not, the company is responsible for all their

acts." The appellant's counsel claim that the evidence in regard to the condition of the cars, and of the boiler leaking steam, was objectionable on the grounds that it tended to prove negligence on the part of the company in failing to provide suitable means of conveyance of passengers, and safe appliances and machinery, when those matters had not been counted on in the complaint. The allegation in the complaint is that the collision occurred by running the locomotive against the passenger car; "that said collision was caused by the negligence of the defendant and its servants." It is perhaps questionable whether the respondent had, under that allegation, the right to prove at the trial the unsuitability of the cars used by the appellant to transport passengers, or the defectiveness of the engine or boiler in the particular referred to, as a ground for a recovery in the action. It might reasonably be claimed that, by a fair construction of the complaint, the negligence alleged therein referred to some act or omission of the appellant's servants in the management of the engine at the time it was backed down to the passenger cars to be coupled to the train; but there certainly could have been no error in the respondent's describing how the cars were constructed, in order to show the particular manner in which she had received the injury. I cannot see any objection to that, nor how the fact that the passengers were in an open car, with the seats arranged in a particular way, could have prejudiced the appellant with the jury, as its counsel seem to think it did. The respondent knew how the car was arranged when she went into it, and probably long before; and if she thought it was not such a one as the appellant ought to furnish, she would have objected to riding in it. Its defects were visible, if it had defects, and she took the risk incident thereto. The evidence in regard to "the steam escaping," came in incidentally in the testimony of Blackburn, as a part of his narrative of the affair; neither of these matters were sought to be made a ground of negligence, and the court instructed the jury especially not to consider the latter as such. I do not see how anything more could reasonably be claimed, and am satisfied that no error is shown from those matters.

The inquiry of the jury, to which the answer before referred to was given by the court, was whether "in case the jury find that the employes of the company, that is the fireman and brakeman, moved, or permitted the engine to be moved, without the consent of the engineer, the company was liable for any damages that might arise from such moving." The answer that the company, under the circumstances, was responsible for all their acts was correct. The court, however, to make it stronger, probably, included in the answer the words, "whether within the scope of their employment or not." That left the inference that the fireman and brakeman might not have been acting within the scope of their employment, if they moved, or permitted the engine to be moved, without the consent of the engineer. If it were possible that the acts of the fireman and brakeman in the matter referred to could have been without the scope of their employment as it related to the respondent, the instruction would have been erroneous; and it was inaccurate as given under any view. The court, however, was entirely excusable in committing the inaccuracy, as there has been a contrariety of decisions upon the point that are calculated to confuse any one. But for a fireman, brakeman, or any other of the employes of a railroad company, having charge and management of a train of cars employed in transporting passengers from and to given places, to get out of the scope of their employment concerning such passengers, would be to get out of the employment of the company by dissolving their relations to it as servants. The error in attempting to excuse common carriers from liability on account of an injury resulting to a passenger has arisen from a misapplication of the old principle that the master is not liable for the malicious acts of his servant. When a servant goes outside of his employment, and wantonly inflicts an injury upon a third party to whom

the master owes no duty, it may well be said that the servant was a principal in the affair; that he was acting for himself in that matter, and was not a servant. But where the master obligates himself to transport a person from one place to another safely and properly, and to protect him from injury from any source that human judgment and foresight are capable of providing against, and the master intrusts the performance of the duty he has so undertaken to discharge to his employes, he becomes responsible for their acts, whether negligent or malicious, and they continue in the line of their employment until their relation with the master is dissolved. The specified duty of an employe in such a case may be very limited, but the scope of the employment is as broad as the obligations the master has assumed. The distinction here indicated, as to when the master is liable for the acts of his servant, has often been overlooked by both counsel and courts. The counsel in this case has cited a number of authorities, apparently without having observed it.

In *Jewell v. Railway Co.*, 55 N. H. 84, the first case they cite, the defendants were under no obligations to the plaintiff: there, the plaintiff went to the defendant's depot to get certain freight, consisting in part of a crate of crockery; it was pointed out to him by Monneghan, the defendant's employe. Two men were at work for Monneghan in the company freight house; assisted the plaintiff to load the freight, except the crate of crockery, upon his wagon. When it came to loading the crate of crockery, one of the men called upon Monneghan to assist in putting it upon the wagon. He did so, and, in loading it, injured the plaintiff in consequence of the crate striking against his shoulder, and for which the action was brought against the company. Held that if the consignee of goods accepts a delivery at a place or in a manner different from what a common carrier is liable by law to deliver them, the business of removing them becomes from that time his business, and the carrier cannot be held liable for the acts or omissions of those employed to do the work. It was upon that principle that the new trial was granted in the case, the trial court having refused an instruction prayed by the defendant's counsel covering it. The gist of the decision is that pointing out the freight to the plaintiff in the freight house, and his accepting it there, ended the defendant's obligation to the consignee, and what Monneghan and the other persons did in loading it upon the plaintiff's wagon was beyond the scope of their employment, simply because it was an act the company had not contracted to do. Its service was completed when the freight was delivered, either in the freight house or elsewhere, and when its employe undertook to do something beyond that, he got outside of the course of his employment.

In the case of *Railroad Co. v. Wetmore*, 19 Ohio St. 110, cited by appellant's counsel, the distinction in question was only referred to. The court said, at page 133 of the case, that, "in order to withdraw this case from the operation of the general rule, and hold the company responsible on the ground of its contract with the plaintiff as a passenger, it is necessary to maintain that the company, in requiring the plaintiff to apply to its servant for the purpose, and as the only means, of getting his baggage checked, impliedly undertook to vouch for and warrant the good conduct of the servant towards the plaintiff while the two were engaged in transacting the business. Whether this position is tenable, we do not find it necessary in the decision of the case now before us to express a definite opinion. The case was not tried on this theory in the court below, nor has this phase of the question been argued here. But if such rule of liability could be applied against the company, it would necessarily impose the reciprocal duty upon the plaintiff to so demean himself towards the servant as not, by misbehavior, to provoke a personal quarrel between them." The court concluded that "the evidence of the company on the trial tended strongly to prove that the plaintiff, by his importunate conduct and abusive language towards the servant, provoked a personal quarrel between them; that the assault was the result of this quarrel, and that the

blow inflicted by the servant was an act of personal resentment." And that "if these facts had been found by the jury, the wrongful act of the servant in striking the plaintiff could not be regarded as authorized by the master, nor as an act done by the servant in the execution of the service for which he was engaged by the master."

Isaac v. Railway Co., 12 Daly, 340, another case cited, seems to be in line with that of *Railroad Co. v. Wetmore*, though I believe the distinction alluded to was there entirely overlooked, although the defendant in the case was under an obligation to the plaintiff, she being a passenger upon the street railroad car, and its servant, the conductor thereof, having thrown her from the car with great violence out upon the pavement, whereby she was seriously injured. The other authorities cited by said counsel are cases where the master owed no special duty to the party injured by the servant's act. The decisions in the Ohio and New York cases above referred to would have been entirely sound, no doubt, if the obligation the defendant in each of the cases was under to the plaintiff therein, before suggested, had not existed. But in view of such obligations I am unable to discover how a common carrier of passengers is exempted from liability for the misuse occasioned by the parties designated by the carrier to perform the latter's duty in transporting such passengers, whether it result from the malice and violence, or ordinary negligence, of such parties.

I indorse fully the language of Chief Justice RYAN in *Craker v. Railway Co.*, 36 Wis. 669, where, after referring to the liability of principals for willful and malicious acts of agents, he says: "But we need not pursue the subject, for, however that may be in general, there can be no doubt of it in those employments in which the agent performs a duty of the principal to third persons as between such third persons and the principal. Because the principal is responsible for the duty, and if he delegate it to an agent, and the agent fail to perform it, it is immaterial whether the failure be accidental or willful, in the negligence or in the malice of the agent; the contract of the principal is equally broken in the negligent disregard or in the malicious violation of the duty by the agent. It would be cheap and superficial morality to allow one owing a duty to another to commit the performance of his duty to a third person without responsibility for the malicious conduct of the substitute in performance of the duty. If one owe bread to another, and he appoint an agent to furnish it, and the agent, of malice, furnish a stone instead, the principal is responsible for the stone and its consequences. In such cases, malice is negligence. Courts are generally inclining to this view, and this court long since affirmed it."

The same doctrine is maintained in *Goddard v. Railway*, 57 Me. 202, and is there supported by citations to a large number of authorities; and this court, in *Sullivan v. Railway & Nav. Co.*, 12 Or. 405, 7 Pac. Rep. 508, indorsed it. The fireman and brakeman, if they moved the engine, or permitted it to be moved, without the consent of the engineer, were still within the scope of their employment. At least the company was responsible for any consequences attending the affair, occasioned by their negligence or that of any person permitted to be on the engine assisting in its management; and therefore the remark of the judge, "whether within the scope of their employment or not," could have done no injury.

As to whether there was negligence or not in detaching the engine from the train, running it over the Summit, and backing it down to the train in the manner shown by the testimony given at the trial, was a question for the jury. Under the facts shown, I think the jury were authorized in finding negligence, and that the judgment appealed from should be affirmed.

Having been of counsel, STRAHAN, J., took no part in the hearing or deliberations in this case.

PETITION FOR REHEARING.

(November 10, 1887.)

THAYER, J. I have examined the petition for a rehearing filed herein, and am unable to discover therefrom any good reason for changing the former opinion expressed in this case. The petition, in fact, is but an extended argument upon the questions already considered, and I would deem it unnecessary to indicate any further view, were it not for certain language which appears in the petition of which the following is a copy: "If the principles are to be applied to the extent indicated in the opinion, they carry the law of agency to the extent not heretofore enforced or declared in any case within our knowledge, and which as it seems to us must tend to a very great extent to render the transactions of business by means of agents impracticable, for the reason that under the doctrine of this case the master or principal is rendered powerless, he is at the mercy of his employes who may as *his agent*, but without his authority, or knowledge, or consent, by leaving the line of their employment, do wrongful acts enough to bring bankruptcy and ruin to the master or principal."

I supposed the position of the court would be understood, from what has already been announced as its views upon that question; but counsel seem to overlook the principle upon which the opinion was based. It is simply this. A common carrier of passengers undertakes to transport them safely, and with reasonable dispatch. That is an obligation the common carrier takes upon himself, or itself, when he or it engages to carry passengers *for hire*. If that obligation is broken, the carrier is liable, whether the breach results from the negligence, misconduct, or malice of the persons the carrier employs to perform the obligation.

The question whether the agent kept within the line of his duty, or got out of it, is unimportant. A conductor, brakeman, or other employe upon a passenger train of cars, is employed to perform certain duties; but whether he keep within the line of his duty or not, has nothing to do with the company's liability to a passenger, if injured through the fault of such employe.

A railroad engineer would have no right to get drunk, or act recklessly, or maliciously, while running a train of cars. If he did so, he might be said, in one sense, to be outside of his line of duty; but who would undertake to exonerate the company from liability for an injury to a passenger occasioned by any of such acts? A person who takes passage upon a train of cars contracts with the company that he shall receive good treatment while in transit. Under such circumstances, could it reasonably be contended that the company would not be liable, if its agents or servants were wantonly to inflict abuse upon such passenger? No court would stop to inquire whether the agent or employe was outside of his line of duty or not; it would make no difference whether he acted from honest motives or maliciously; the effect would be the same. The obligation of the company would be violated, and its liability attach. So with the obligation to transport passengers safely. It may be violated as well by the malicious acts as the negligent acts of its employes, and the question of their being within or beyond their line of duty in such cases cannot be considered.

The rule is different, of course, where the act of the agent affects a party to whom the company owes no duty. There the character of the act, as to its being negligent or malicious, becomes important. That a master is not ordinarily liable for the malicious acts of his servant is an old and well-settled principle, and the reason of the rule is that the servant becomes a principal when he commits such acts; he is then outside of his line of duty. But in a case like the one under consideration, the master cannot shield himself from liability upon any such grounds. The liability there, arises out of another principle, which was attempted to be explained in the opinion delivered.

The exception to the proof as to the kind of car the respondent was in when the collision occurred between the cars and engine is insisted upon as error with more pertinacity than consideration. The point is merely technical at most. If the position of the appellant's counsel were correct, they have very little to complain about. They were certainly not taken by surprise in the proof; it was not a matter that could be sprung upon them and they not prepared to meet. The proof related to an open, visible, notorious fact, which they were as well prepared to disprove, no doubt, at one time as another. How could it have been important to apprise the appellant that the respondent would prove the style and arrangement of the car. The former knew that it was an open car, that the seats were arranged lengthwise, and that the ends were entirely open; or, if that were not the fact, they could have disproved it by its employees who had control of the car, and by hundreds of others upon very short notice. The fact was of such a character that the appellant could not have been misled in consequence of the proof. The counsel for the appellant seem to think that it was entitled to all the immunity of a prisoner under indictment. The claim that this proof tended to establish another and different ground of liability, to my mind, is wholly absurd. Proving the mode in which the car was constructed established no liability. The appellant had a legal right to run cars of that character upon its road, and the respondent took all the risk incident thereto when she engaged passage upon them. It is not like a case where cars are defective and occasion a casualty in consequence thereof; they were perfect as designed. If the respondent had engaged passage in a closed car, an ordinary passenger coach, and the company had placed her in an open flat car, there might have been grounds for liability in case of accident. Using such kind of car under the circumstances this one was employed did not, however, create any liability, and the fact as to its mode of construction and arrangement was only important as an effect, and not as a cause. Its proof was competent in order to show how the injury was received, and to disprove the charge of contributory negligence, and it evidently was admitted upon that ground.

There are no sufficient grounds for a rehearing, and the motion will therefore be denied.

(15 Or. 385)

WEBER v. ROTHCHILD, impleaded, etc.

(*Supreme Court of Oregon.* November 9, 1887.)

FRAUDULENT CONVEYANCES—BONA FIDE PURCHASER—CONSIDERATION UNPAID.

Plaintiff brought suit against her husband for divorce and alimony, and against W. to set aside an alleged fraudulent conveyance from the husband to him, and to subject the property to the payment of the alimony. W. defended as a *bona fide* purchaser. The consideration of the deed was \$2,500, and the property conveyed was worth \$8,000 or \$9,000. W. on the same date of his alleged purchase gave a bond agreeing to reconvey within a given time for \$3,000, and stating that a material part of the consideration for his conveyance was his agreement to reconvey. It also appeared that the husband had given abundant cause for a divorce, and that shortly after he became aware that his wife had discovered his conduct he made this conveyance. *Held*, (1) that the consideration was so inadequate as to raise a presumption of want of good faith in W.; (2) that it was necessary for his answer and evidence to show that he was a purchaser for value and without notice, and that plaintiff was not obliged to prove the negative of these facts in the first instance; (3) as it did not appear that W. had paid the consideration, the conveyance conceded to be fraudulent on the grantor's part should be set aside, as a mere obligation to pay would not sustain it; (4) that the bond created a trust in W. for his grantor's benefit.

Appeal from circuit court, Multnomah county; E. B. STEARNS, Judge.

H. T. Bingham and Cornelius Taylor, for respondent. Emmons & Emmons and Joseph Simon, for appellants.

STRAHAN, J. The objects of this suit were—*First*, to obtain a dissolution of the marriage existing between plaintiff and the defendant Emil Weber, the

care and custody of the children born of said marriage, alimony, and one-third of the real property of the defendant Weber; and, *second*, to set aside and annul, as fraudulent, a certain deed made by the defendant Emil Weber to the appellant Rothchild of certain property in Multnomah county. The deed included the house and lot in the city of Portland, where Weber and his wife had resided for a number of years, the furniture therein, and a piece of farm land in Multnomah county. The plaintiff obtained a decree in the court below in accordance with the prayer of her complaint, and for \$5,000 alimony, and the conveyance to Rothchild was set aside as fraudulent. From so much of the decree as annuls this deed Rothchild has appealed to this court, and the only questions presented here for our consideration are those between the plaintiff and Rothchild.

After the evidence had all been taken in the court below, and before final decree, the court allowed the complaint to be amended so as to conform the pleading to the facts proved. This amended pleading does not affirmatively appear from the record to have been served on Rothchild, nor was it necessary, nor did he file an answer to the same. The new matter inserted in the amended pleading related entirely to the causes of divorce relied upon by the plaintiff, and did not affect the transaction between the defendants as to this property. In addition to this, Rothchild appeared and filed exceptions to the referee's report, and, so far as appears, his answer to the first amended complaint must have been treated as an answer to the second amended complaint, and it has been so treated in this court. It has not been suggested that there is anything in the plaintiff's amended complaint that is not as fully met by this appellant's answer to the first amended complaint as he desired to meet it, and we cannot see that any injury will result to any party by so treating it. In addition to this, no objection appears to have been made in any form in the court below to the state of the pleadings, but it is made here for the first time. We will therefore, for the purposes of this case, treat the answer of Rothchild as an answer to the plaintiff's second amended complaint.

The complaint alleges, substantially, that on the third day of November, 1886, the defendant Weber left his place of abode in Portland, Oregon, and absconded, and secreted himself at Denver, Colorado, for the purpose of avoiding the service of a summons in this cause; that he then had in money about \$10,000, which he withdrew from Ladd & Tilton's bank, in the city of Portland, and that just prior to his departure from this state he fraudulently assigned and transferred the real and personal property in controversy to the defendant Rothchild, for the purpose of hindering and delaying the plaintiff in the prosecution of her suit for a divorce against Weber, and defeating any decree that might be made therein; that the consideration was inadequate, and that said Rothchild did not purchase said property in good faith, but accepted the conveyance thereof with an agreement that he would reconvey the same to Weber, or such person as he should designate, when thereto requested, and that said Rothchild holds the same in trust for Weber.

The separate answer of the appellant denies the fraud charged, and then alleges that on or about the third day of November, 1886, he purchased the property in controversy in good faith from the defendant Weber, for and in consideration of the full sum of \$2,500, paid to said defendant Weber by this defendant. The answer then alleges that the only agreement which the defendant Rothchild made with Weber respecting said property was in writing, a copy of which is then set forth in the answer *in hæc verba*. This agreement bears even date with the deed, and in effect binds Rothchild in the penal sum of \$10,000, to be void if he shall perform the conditions specified in said writing on his part to be performed. This agreement recites a money consideration of \$2,500, and it is then further stated in said writing, in substance, that a material part of the consideration for said conveyance is

the agreement "on my part to resell and reconvey all of said real property, and every portion thereof, to said Emil Weber, upon the payment to me by him of the full sum of \$3,000 in gold coin of the United States, at any time within the period of one year from the date of this instrument, and to execute a good and sufficient deed of conveyance for all of the said real property conveying the *same title and interest* therein which I have received from said Emil Weber, upon such payment by him of said sum of \$3,000 within said year; and whereas I hereby agree to and with the said Emil Weber to execute said deed of conveyance, and reconvey all of said real property to him, upon the foregoing consideration." Said agreement further obligated said Rothchild to execute a deed of conveyance upon the payment of \$3,000 within one year, conveying the title to all of said real property, "free from all incumbrances placed thereon, or suffered to be placed thereon, by myself or my grantees or assignees to said Weber."

We do not care to recapitulate the facts touching the relations between Weber and his wife for some time prior to the second day of November, 1886, as they are disclosed by this record. It suffices to say that they furnished ample causes for a divorce in favor of the plaintiff, and that these facts appeared to have come to the knowledge of the plaintiff not long prior to that time, and the defendant Weber also became aware about that time that his wife had acquired a knowledge of the facts upon which this suit is founded. The facts and circumstances leave no doubt in the mind of the court that the conveyance to Rothchild was made and designed by Weber to defeat the plaintiff in the recovery of any part of his (Weber's) property, or of alimony in her contemplated suit for a divorce. But it is argued by counsel that, however fraudulent may have been his acts, Rothchild must remain unaffected, unless the evidence proves that he had knowledge of such fraudulent intent, and participated in it. This is undoubtedly true, if Rothchild's acts were in good faith. But here two material facts appear which, under all the circumstances, are of so cogent a character that they seem to call upon him for an explanation; in other words, that he should show that he paid a valuable consideration for the property, and that he did it without notice. The first is that he made the contract set up in his answer, which, in the absence of any explanation, may well be regarded as creating a secret trust for Weber's own use and benefit; and the second is that the only evidence offered on the subject tends to prove that the property in controversy was, at the time of the conveyance, of the value of from \$6,000 to \$8,000. In addition to this, the rental value and use of the property in Portland alone, as shown by Mr. Rothchild's affidavits filed in this cause and used upon his motion to dissolve the injunction herein, is \$75 per month. Estimating the value of this property according to the income which it is capable of producing, it ought to be worth, at the very least, from \$6,000 to \$7,500, which, added to the value of the farm, (\$1,500,) also included in the deed, and we have an aggregate value of from \$8,000 to \$9,000. To sell this property for \$2,500 was too great a sacrifice. The price alleged to have been paid was so entirely inadequate as to have put a prudent man on inquiry. But without placing the decision of this case on the ground suggested, there is another question presented which deserves attention. It is the purchaser for value and without notice from a fraudulent grantor who is protected under the statute. Does the defendant's answer show him to be such purchaser? To constitute a good defense facts must be alleged showing that the purchaser paid a valuable consideration for the property; that at the time of the payment he had no notice of the outstanding equity, or, as in this case, of the fraudulent intent of his grantor, and that he acted in good faith. The same elements that were necessary to constitute a good plea in bar in this class of cases under the former equity practice are necessary to make a good answer under the Code. The Code has only abolished forms; it has not destroyed substance. The answer must

therefore "aver that the person who conveyed or mortgaged to the defendant was seized in fee, or pretended to be so seized, and was in possession if the conveyance purported an immediate transfer of the possession at the time when he executed the purchase or mortgage deed. It must aver a conveyance, and not articles merely; for if there are articles only, and the defendant is injured, he may sue at law upon the covenants in the articles. He must aver the consideration for, and the actual payment of, it; a consideration secured to be paid is not sufficient." Story, Eq. Pl. § 805. Further: "The plea must also deny notice of the plaintiff's title or claim previous to the execution of the deed and payment of the consideration; and the notice so denied must be notice of the existence of the plaintiff's title, and not merely notice of the existence of a person who could claim under that title. * * * But the notice of fraud must also be denied generally, by way of averment in the plea; otherwise the fact of notice or of fraud will not be at issue. * * * " Story, Eq. Pl. § 806. Tested by these rules, the defendant's answer seems wholly wanting in substance to present the question sought to be litigated here. It is true there is no reply to the defendant's answer sent up in this record; but the answer being wholly lacking in substance, it is conceived that no reply was actually necessary. The failure to reply only admits material facts that are well pleaded. It is the *bona fide* purchaser for value, in good faith, and without notice, who is entitled to the protection of a court of equity as against the person sought to be defrauded by the conveyance.

And this brings us to the examination of a very important question in this case, and that is this: Is the plaintiff required to prove a negative by showing that the defendant did not pay a valuable consideration? or, having shown the fraudulent intent and purpose of the grantor, may he stop and require the grantee to prove that he paid value in order to protect his title? Here the defendant Rothchild has alleged facts in one part of his answer tending to show that he is a *bona fide* purchaser for value, without notice, of this property, but he has offered no evidence whatever on these issues. The plea of a *bona fide* purchaser for value, as here alleged, is an affirmative defense interposed by the defendant, and in this connection it is not perceived that it differs from other affirmative defenses. The party having the affirmative of the issue must offer evidence to support it.

Another rule of law, equally elementary, which is frequently applied in such cases, is that when a fact is peculiarly within the knowledge of a party he must furnish the necessary evidence of such fact. In speaking of a conveyance found to be fraudulent on the part of the grantor in *Tredwell v. Graham*, 88 N. C. 208, the supreme court of that state said: "The deed itself, though evidence conclusive as to all matters between the parties, furnishes no evidence of the truth of the matters contained in its recitals as against strangers; for as to them it is strictly *res inter alios acta*. *Claywell v. McGimpsey*, 4 Dev. 89; *Griffin v. Tripp*, 8 Jones, (N. C.) 64. If voluntary, the law pronounces it fraudulent as to creditors, and he who took it must have had notice of that fact. As said by PEARSON, C. J., in *Cansler v. Cobb*, 77 N. C. 30, when a grantor executes a deed with intent to defraud his creditors, the grantee can only protect his title by showing that he is a purchaser for a valuable consideration, and without notice of the fraudulent intent on the part of his grantor." And in *Callan v. Statham*, 23 How. 477, it is said: "As they aver the payment was a transaction between themselves, and the principal part of a note held by the vendee, which he surrendered, the evidence in respect to which is therefore exclusively within their own knowledge, it would have been more satisfactory if they had given some proof in support of the answers, especially when there were other accompanying circumstances tending to excite distrust and suspicion as to the *bona fides* of the deed."

So, also, in *Moshier v. Knox College*, 32 Ill. 155, the same rule was applied in a similar case. The court said: "But apart from all this, the appellees

ought to retain this decree, because it is shown the indebtedness was for the purchase money of the premises, and appellant has not shown he was a *bona fide* purchaser for a valuable consideration, paying his money at the time, on the faith of the title so purchased. It was incumbent on the appellant to show not only that he had a conveyance for this land, legal in form, but that he actually paid for the land. It is not sufficient that he may have secured the payment of the purchase money; he must have paid it in fact before he had any notice of the appellee's equitable title. This is an essential element in the equity, which must exist in order to support appellant's claim, which he attempts to uphold. If he has not paid the purchase money, no wrong is done him by taking from him a legal title which cost him nothing." And the same principle is stated and applied in *Sewing-Machine Co. v. Zeigler*, 58 Ala. 221; *Zimmer v. Miller*, 64 Md. 296; *Venable v. Bank*, 2 Pet. 107; *Zelnicker v. Brigham*, 74 Ala. 598; *Purkitt v. Polack*, 17 Cal. 327; *Brown v. Texas Cactus H. Co.*, 64 Tex. 396; and the principle is stated as elementary in *Bump, Fraud. Conv.* 53.

There is another objection I think equally fatal to the defendant's claim. The writing which the appellant set up in his answer was made by him at the same time of the execution of the deed; at least they both relate to the same subject-matter, bear even date, and are between the same parties. We must therefore hold, especially in the absence of any evidence to the contrary, that they were executed at the same time, and taken together they constitute one entire transaction. Taken together, then, their effect was to create a trust in favor of Weber. This effect becomes distinctly manifest when the terms of the bond are considered. It is therein declared that "one of the inducements, and a material part of the consideration for said conveyance, is the agreement on my part to resell and reconvey all of said real property, and every portion thereof, to said Emil Weber, upon the payment to me by him of the full sum of \$3,000," etc. The meaning of this clause evidently is that the right to purchase was a part of the consideration for the deed, and in this way a valuable right or interest was reserved to the grantor, and this of itself would render the deed fraudulent and void. *Sims v. Gaines*, 64 Ala. 392.

It follows from the views expressed that there was no error committed by the court below, and its decree is affirmed.

LORD, C. J., concurs in the result.

(15 Or. 404)

BUDD v. MULTNOMAH ST. RY. CO.

(Supreme Court of Oregon. November 15, 1887.)

CORPORATION—FRANCHISE—ESTOPPEL TO CLAIM.

Plaintiff procured a charter for a street railway, and induced others to invest in the enterprise, and formed the defendant company to construct and operate the railway, and the company did build it and operated it and collected fares. At the time the company was incorporated it was verbally agreed between the plaintiff and the other shareholders that the company should own and use the franchise for its own use. Plaintiff was a director and superintendent of the company, and brought this action, claiming exclusive right to the franchise, and to recover damages, on account of the unlawful disturbance by the defendant of the plaintiff's rights, by operating said railway to the exclusion of the plaintiff. Held, that the plaintiff could not set up his own acts as superintendent and director as the wrong committed by the defendant of which he complained, and that he was precluded by his acts and acquiescence from complaining that defendant's acts were wrongful.

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge. *H. T. Bingham* and *McDougall & Bower*, for appellant. *B. Killen* and *J. C. Moreland*, for respondent.

STRAHAN, J. This is an action to recover damages against the defendant, at the rate of \$1,000 per month, from and after the twenty-third day of

October, 1882, for the alleged unlawful disturbance, by the defendant, of the plaintiff, in the use and enjoyment of a certain franchise granted by the city of Portland to the plaintiff. The franchise set up in the complaint is the right and privilege to lay down and maintain an iron railroad track or tracks, and to operate street railways within the city of Portland, upon certain streets mentioned in the ordinance making the grant. The grant is made to D. E. Budd, and such other person or persons as he may associate with himself therein. The complaint alleges compliance with the terms of the ordinance on the part of Budd. The manner of such compliance is fully alleged. It is stated that on or about June 14, 1882, this plaintiff and others duly incorporated themselves under the name of the Multnomah Street Railway Company, and, as such corporation, *they* purchased the materials, constructed a line of street railway in accordance with the terms of said ordinance No. 3,477, and in such manner as to comply with the terms and requirements of said ordinance; * * * "and thereafter they procured street-railway cars of the kind required by said ordinance, and placed them upon the lines of said railway, provided horses for drawing the same, and placed the said railway and cars in complete order and condition for operating the same, in the manner and subject to all the terms, restrictions, and conditions in said ordinance No. 3,477 contained and required; that the plaintiff procured the construction of said street railway, and the obtaining of said horses and purchase of said cars, as aforesaid, by the Multnomah Street Railway Company, but he never assigned the whole or any portion of said right and privilege granted to him by ordinance No. 3,477 to defendants; that plaintiff never assigned the whole or any portion of the franchise or privilege granted to him by said ordinance No. 3,477 aforesaid, nor has he even associated with him any person or persons whatever, in the use and enjoyment of the same; and ever since said June 12, 1882, he has been, and now is, the sole owner of said franchise, and of all the rights, privileges, and immunities lawfully pertaining thereto, or existing thereunder." It is then alleged, in substance, that on the twenty-third day of October, 1882, the plaintiff was the sole and exclusive owner of the right of carriage and conveyance of passengers thereon and over the same for hire in the railway cars aforesaid. Nevertheless the said defendant, the Multnomah Street Railway Company, not being the owner of said franchise and privilege, or of any interest therein, and not being associated with the plaintiff therein, but well knowing the premises, and contriving to disturb and injure the plaintiff in the peaceable and lawful enjoyment and use of his said franchise of operating said street railway, and carrying passengers thereon for hire, on the said twenty-third day of October, 1882, and continuously thereafter, ever since, to the present time, injuriously, unlawfully, and against the will of the plaintiff, has claimed the street railway and cars and horses as its own, and has possessed itself, to the entire exclusion of plaintiff, of said street railway cars and horses, and has occupied by the said railway track, cars, and horses the portions of the streets aforesaid, upon which he has the right, as against the defendants, to maintain and operate a street railway, and has thereby prevented the plaintiff from maintaining and operating a street railway thereon as he otherwise could and would have done, and has carried and conveyed divers passengers for hire, over and upon said street railway heretofore mentioned and described, and continues so to do up to the present time; and that by reason thereof the plaintiff has been deprived of divers profits and emoluments, which would otherwise have arisen and accrued to him from the enjoyment of said franchise, and has been greatly disturbed in the possession thereof, and his right and title thereto, to his damage in the sum of \$1,000 per month from said twenty-third day of October, 1882. The prayer is for judgment against the defendant for the sum of \$1,000 per month, from said twenty-third day of October, 1882; "and for the possession of his franchise and privilege aforesaid," and for costs, etc.

This is the second appeal in this cause. When it was formerly here, it was upon a demurrer to the complaint, and this court then reversed the ruling of the court below sustaining the demurrer, and remanded the cause for further proceedings. This court then said: "The main question presented by the demurrer was whether the appellant, when he incorporated with others under the name of the Multnomah Street Railway Company, necessarily made the company the grantee of the franchise, whether he thereby *ipso facto* associated with himself therein the other persons so as to entitle them to the rights and privileges granted by the ordinance. Can the allegation in the complaint that the appellant had never associated with himself any person or persons whatever in the use and enjoyment of the franchise be true, in view of the fact that he and others incorporated themselves under said name, and that the corporation purchased material and constructed and equipped the railway as required by the ordinance by which the right was granted, and that the privilege of building the road, and equipping and operating it, with the right to exact fare for transporting passengers thereon, is a positive right, and has an identity distinct from the structure and equipage of which there can be no doubt? The appellant had the option, under the ordinance, to reserve the privilege to himself exclusively, or have it vest in himself or others whom he might associate with himself therein. He could have contracted with some construction company to build and equip the road for him for a compensation to be paid therefor, and retained exclusive ownership of the franchise; or he could have associated with himself such company, and thereby admitted its members to a joint proprietorship in it. He alleges in his complaint that he adopted the former course, and whether that is true or not depended, in the opinion of this court, upon proof of facts. * * *

I have made this long extract from the opinion for the reason it has not been published, and for the further reasons that it has become the law of the case, and, so far as the facts are the same, must govern on this appeal. When the case was returned to the court below, an answer was filed by the defendant, issues of fact being duly joined. The case was tried by the court without the intervention of a jury, which trial resulted in findings and judgment for the defendant, from which judgment this appeal is taken. No exceptions were taken upon the trial to the admission of evidence, and the case is here upon the questions of law arising on the findings.

So much of the findings of fact as are necessary to a proper understanding of the legal questions discussed are as follows:

"(2) That on the tenth day of July, 1882, said D. E. Budd, W. A. Scoggin, and E. J. Jeffrey entered into a mutual oral agreement, whereby it was mutually agreed and understood by each of said parties that said W. A. Scoggin and E. J. Jeffrey should join with said D. E. Budd in the execution of the bond which said Budd was by ordinance required to file with the auditor of said city, and that said Budd and Scoggin and Jeffrey would thereupon join and associate together on equal terms, and exercise and use the franchise granted to said Budd and his associates by said ordinance, and together build and operate and own in common and in equal shares the street railroad contemplated and provided for by said ordinance; and thereupon, in pursuance of said agreement and understanding, said Scoggin and Jeffrey, on said tenth of July, 1882, did join said Budd in the execution of a bond conditioned as required by said ordinance, and the same was on said tenth of July, 1882, approved by the mayor of said city, and on the next day filed with the auditor of said city, along with the written acceptance of said Budd, of the terms and conditions of said ordinance as required thereby.

"(3) That on the thirteenth day of July, 1882, said D. E. Budd, W. A. Scoggin, and E. J. Jeffrey orally agreed with each other that they would form, or cause to be formed, a corporation, under the laws of Oregon, in which they would be equal owners of stock for the purpose of constructing and operating

the railroad contemplated by said ordinance, and of using the franchise granted thereby, and they did thereupon, on said thirteenth day of July, 1882, cause to be formed a corporation known as the 'Multnomah Street Railway Company,' the defendant herein, and said Budd, Scoggin, and Jeffrey subscribed each \$10,000 to the capital stock of said company, and said Budd, Jeffrey, and Scoggin orally agreed each with the other that said corporation should use, own, and exercise the franchise granted by said ordinance, and construct and operate the roads provided thereby for its own use and benefit; but said Budd did not then nor has he ever executed any written assignment, transfer, or conveyance of the franchise granted by said ordinance, nor did he make any other written articles of agreement or association with said Scoggin and Jeffrey than the articles of incorporation of the defendant company.

"(4) That by articles of incorporation the defendant corporation, among other things, proposed to build, own, and operate street railways in the city of Portland, Oregon, and to acquire, by purchase or otherwise, any street railway constructed by any other person, and also to acquire, by purchase or otherwise, any franchise granted by the city of Portland for the construction and operating of any street railways in said city.

"(5) That said corporation duly perfected its organization, and E. J. Jeffrey and W. A. Scoggin and D. E. Budd constituted the stockholders, and were the directors of said corporation, and E. J. Jeffrey was elected and acted as president, W. A. Scoggin was elected and acted as secretary, and D. E. Budd was elected and acted as superintendent of said corporation, and under that organization the said corporation proceeded to the execution of the purposes of its incorporation.

"(6) That said E. J. Jeffrey and W. A. Scoggin, relying upon and by reason of the mutual agreement and understanding had and entered into between them and said Budd, mentioned in paragraphs 2 and 3 of these findings, each paid up the subscriptions made by them to the capital stock of said corporation, being the sum of \$10,000 each, and said corporation, by said Jeffrey as president and director, and said Scoggin as director and secretary, and said Budd as director and superintendent, proceeded to construct on said Washington and Eleventh streets an iron railway, and to equip the same at a cost of about twenty thousand dollars, and to operate the same, and to use and exercise the franchise granted by said ordinance No. 3,477, and continued to do so from about January, 1883, until the commencement of this action; and during said period the defendant, under and by virtue of the franchise granted by ordinance No. 3,477, has collected and received from passengers carried upon its road on Washington and Eleventh streets large sums of money, but the evidence does not show how much, nor does it furnish any basis for an account of the receipts and expenses of operating said railway, or of the profits of said franchise.

"(7) That said D. E. Budd, defendant, was superintendent of the defendant corporation for about nine months, and took charge of the work of constructing the road in Washington and Eleventh streets, and of the operating of said road after it had been built and furnished, and received for his services in that behalf a salary from the defendant corporation of \$100 a month.

"(8) That said D. E. Budd, up to about the time of the commencement of this action, acquiesced in and fully consented to and in the claims of the defendant corporation in respect to the exercise of said franchise by it, and in respect to the ownership of said road and franchise as set forth in these findings, and did not, prior to the commencement of this action, demand from said defendant corporation the possession of said streets, or any portion thereof. Said D. E. Budd did not furnish any money for the construction of said railway, but the said railway was wholly constructed with funds provided by the defendant corporation, and contributed by the said E. J. Jeffrey and W. A. Scoggin as stockholders.

"(9) That said franchise, independent of the railway and equipment, is of the value of ten thousand dollars, (\$10,000.)"

As conclusions of law, the court found that the plaintiff was not entitled to the possession of the franchise, but that the defendant was entitled to such possession. There were no findings as to the amount of damages, and, so far as appears from this record, there was no evidence offered on that subject.

I do not understand that an action at law will lie for the recovery of the possession of a franchise. It is wholly intangible, and not capable of any kind of physical identification or delivery. Therefore a judgment that a party recover such an "airy nothing" would be incapable of enforcement by the ordinary form of process provided for the enforcement of the final judgments of the courts in this state. But, as I understand it, this action is in substance what would be regarded at common law an action on the case to recover damages for the disturbance of the plaintiff in the enjoyment of a franchise, and there can be no doubt that such an action will lie. 1 Chitty, Pl. 131-142. But in such case it is damages for the wrong done which the party recovers, and not the possession of the particular franchise. And this, in effect, was what was held by this court on the former appeal. In this view of the law, no damages having been found for the plaintiff, it is difficult to see on what ground he would be entitled to any relief here, even though we should be of the opinion that the findings show him to be still the exclusive owner of the franchise granted to him by the city of Portland. But, as has been shown, this court held on the former appeal that the plaintiff might have associated with himself such company the defendant, and thereby admit its members to a joint proprietorship in the enjoyment of the franchise in question, and that whether he had done so or not was a question of fact to be determined by proof. The findings of fact, I think, settle this question against the plaintiff.

He did associate with himself Jeffrey and Scoggin, and the three associates built the street railway for the purpose of using and enjoying the identical franchise which had been granted to the plaintiff. To all of these proceedings, the findings show, the plaintiff fully assented, and in fact assisted in carrying them into full effect. Do these acts constitute a wrong to plaintiff? *Thorne v. Mosher*, 20 N. J. Eq. 257. I cannot perceive, under these findings, what wrong the plaintiff has suffered by the acts of the defendant. It was argued here that the defendant was bound to produce some writing by which the plaintiff had conveyed to it the franchise described in the complaint; that, without writing signed by the plaintiff, defendant was a trespasser.

We do not find it necessary to decide at this time whether the right to lay down a railroad track in the streets of the city of Portland, to run cars thereon, and to take fare therefor, is an estate or interest in land, so as to require a writing to convey it or as to whether, lying in a grant, it can only pass by deed. The findings show such consent, acts, and acquiescence, and the expenditure of money, on the faith of the grant, with the plaintiff's consent, as to preclude him from now claiming that the defendant's acts were wrongful. He was the active and efficient cause of the defendant's making large expenditures of money; he was one of its officers at the very time, and superintendent of the work. We could not allow him to now set up his own acts as such superintendent as the identical wrong committed by the defendant of which he now complains.

In addition to this, the grant was to "D. E. Budd, and such other *person or persons as he may associate with himself therein*." I am inclined to think this grant carried the thing granted directly to Budd's associates equally with himself, and that the act of association was all that was necessary to point out and identify the grantees, and that, for this purpose, no writing was necessary; but, if writing were necessary, the signing of the articles of incorporation of the defendant company would be sufficient.

The principle here stated is somewhat analogous to that involved in *Water-*

Works v. San Francisco, 22 Cal. 434. It was there held, when the grant was to George H. Ensign and his associates, and their assigns, who should within 60 days organize themselves in conformity with the laws regulating corporations, that, as soon as the corporation was organized, the franchise granted passed to it by operation of law, without any formal assignment. And the term "associates" received a similar construction in a case involving principles akin to that. *State v. Sibley*, 25 Minn. 387. And I think the reasoning of the court in *Bank v. Boynton*, 11 Cush. 369, tends to support the view suggested.

LORD, C. J. If the proper construction of the words, "and such other persons as he may associate with himself therein," is that, by the act of associating others with him, the ordinance, *ex proprio vigore*, vests the franchise in them jointly, as intimated in the opinion, that construction is decisive of the case, and upon that ground I can concur in the result. On the other hand, if such words mean that the grant of the franchise is to Budd, and only to such persons as he may associate with himself therein when he so elects, and they agree to become such associates, then, as the subject-matter of the grant is an incorporeal hereditament, and lies in grant, it can only pass from him to them by deed, and the judgment of the court below is error, and ought to be reversed. It was on this last theory that the case was tried, and the argument made here; the chief controversy being as to the validity of a parol agreement to effect such transfer. The court held it sufficient, which I think was manifest error.

THAYER, J., expressed no opinion, but concurred in the result.

(15 Or. 413)

BUDD v. MULTNOMAH ST. RY. CO. and others.

(Supreme Court of Oregon. November 15, 1887.)

1. CORPORATIONS—STOCK—SALE FOR NON-PAYMENT OF ASSESSMENTS.

Hill's Misc. Laws Or. § 3221, subd. 6, enacts that corporations may "make by-laws" for the sale of stock for unpaid assessments. The plaintiff, a shareholder in defendant company, had not paid a call made by the directors, who by resolution ordered his stock to be sold. There was no by-law of the company providing for such a sale. *Held*, that a corporation can only sell stock, for non-payment of assessments, in the manner prescribed by statute, and that the sale in question was illegal.

2. SAME—RESOLUTION ORDERING SALE.

Under Hill's Misc. Laws Or. § 3221, subd. 6, a corporation may make by-laws for the sale of stock for non-payment of assessments. The defendant company had made no such by-law, but its directors passed a resolution ordering plaintiff's stock to be sold. *Held*, that the resolution, not being of general application, but being directed against the stock of a particular person, could not be regarded as a by-law.

3. SAME—MEASURE OF DAMAGES.

Plaintiff's stock in the defendant company had been illegally sold by order of the directors for the non-payment of an assessment. *Held*, that the proper measure of damages was the amount the stock brought, less the amount of unpaid calls due thereon.

4. SAME—ASSESSMENTS—POWER OF DIRECTORS.

The necessity for a call on stock cannot be questioned by the shareholders of a company, but is for the directors to determine.

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

H. T. Bingham and McDougall & Bower, for appellant.

STRAHAN, J. This is the second appeal in this action. The opinion of the court on the former appeal is reported in 12 Or. 271, 7 Pac. Rep. 99. After the cause had been remanded, an answer was filed and issues of fact duly formed. Upon a trial which was had before the court without a jury the following facts were found:

"(1) That the defendant, the Multnomah Street Railway Company, was organized by the filing of articles of incorporation in the office of the county clerk of Multnomah county, and in the office of the secretary of state, on the fourteenth day of July, 1882, and that D. E. Budd thereafter, on the twentieth day of July, 1882, in due form, subscribed for one hundred shares of the capital stock of said corporation, of the nominal par value of \$10,000, and said Budd had no other title to stock in said corporation than such as he acquired by said subscription.

"(2) That at the meeting of the stockholders of said corporation held on the twentieth day of July, 1882, E. J. Jeffrey, W. A. Scoggin, and D. E. Budd were duly elected directors of said corporation, and duly qualified as such directors.

"(3) That at a meeting of the board of directors of said corporation held on the fourth day of April, 1883, at the city of Portland, where the principal office and place of business of said corporation was and is fixed, the said E. J. Jeffrey, W. A. Scoggin, and D. E. Budd were present, and it was then and there voted—E. J. Jeffrey and W. A. Scoggin, yes, and D. E. Budd, no—that an assessment of one hundred per centum be levied on all the stock of the corporation, the Multnomah Street Railway Company, said assessment to be paid by the twenty-fifth of April, 1883.

"(4) That on the fifteenth day of April, 1883, a written notice was served on D. E. Budd, signed by W. A. Scoggin, secretary of said corporation, and issued by order of E. J. Jeffrey, president, calling a meeting of said corporation, to be held on the twenty-sixth day of April, 1883, at the hour of 2 o'clock P. M. at the office of the company, in the city of Portland, for the purpose of disposing of D. E. Budd's stock for delinquent assessment.

"(5) That on the twenty-sixth day of April, 1883, a meeting of said directors of said corporation was held at the hour and at the place designated in the above-described notice, at which E. J. Jeffrey and W. A. Scoggin alone were present. It was voted by resolution, then and there passed, declared, and ordered, that 'whereas, D. E. Budd has failed to pay any part of the one hundred shares of the capital stock of the said corporation held by him, according to the resolutions passed by the board of directors of said corporation on the fourth day of April, 1883, that his assessment upon said one hundred shares of stock be and is declared delinquent, and that the secretary be directed to sell said one hundred shares of stock, or so much as shall be necessary to satisfy such assessment, after giving thirty days' notice of the time and place of such sale, by publication in the Sunday Mercury, a paper published in, and of general circulation in, the city of Portland, Oregon.'

"(6) That notice of the sale of said stock of D. E. Budd for delinquent assessment was published for thirty days in said Sunday Mercury, a weekly newspaper, next preceding the day of sale; which day of sale was by said notice designated as May 30, 1883, at the hour of 2 o'clock P. M.; and thereupon, on the said thirtieth day of May, 1883, at said hour, said stock of D. E. Budd, being one hundred shares, was offered for sale by W. A. Scoggin, secretary of said corporation, with the knowledge of and under the direction of E. J. Jeffrey, president, and was then and there bid off and purchased by Amos N. King and E. A. King, who were the highest bidders for the same, for the sum of \$10,200, of which amount \$10,000 was applied in payment of the subscription and assessment of said Budd.

"(7) That the value of said stock, in case the subscription thereon had been paid, was \$10,200, and subject to the assessment of one hundred per centum on said subscription; the value over and above such assessment was \$200.

"(8) That after said sale said stock was transferred on the books of said corporation from the name of said D. E. Budd to the names of Amos N. King and E. A. King, and said D. E. Budd was no longer recognized by said board of directors of said corporation as a stockholder therein.

"In conclusions of law, the court finds that the plaintiff is entitled to recover from the defendants the sum of \$200 and costs and disbursements, and to have judgment for said sum.

"On motion of the plaintiff, the court makes the following additional findings in this case, to-wit:

"(1) The defendants, in their proceedings to sell the stock of D. E. Budd, for the payment of subscription and assessment levied thereon, caused notice of such sale to be published in the Sunday Mercury newspaper as follows: It was inserted five times. The first insertion was on the twenty-ninth day of April, 1883, and the last was on the twenty-seventh day of May, 1883, and the sale was by said notice appointed and did in fact take place on the thirtieth day of May, 1883.

"(2) At the time said notice was inserted and standing in said newspaper the said newspaper was published and circulated as a weekly newspaper, was printed on Saturday of each week, but bore date of the Sunday following, was circulated to a limited extent on Saturday night of each week, but principally circulated on Sunday, running the same as its date. It did not receive nor publish the telegraph news, but had a large circulation, equal to that of any weekly newspaper published in Oregon, except the Oregonian. Its place of publication and where it was printed was in the city of Portland, Oregon."

On this appeal several questions of law have been discussed, which we will now consider.

1. *Assessment of Stock.* It is claimed that the "call" or assessment of 100 per cent. on the stock of the defendant corporation was unlawful and unauthorized, for the reason that the resolution adopted by the directors does not show that it was made for any corporate purpose; nor does it show that any demand of the business of the company required that the subscriptions should be paid. This call appears to have been made by the board of directors of the defendant corporation, at which all were present, and there can be no question but what they had the power to make it. If the statute were entirely silent as to who should exercise the corporate power of making calls on stock, that power would devolve upon the directors. *Cook, Stock & Stockholders*, § 109. But the statute contains ample provisions covering this subject. Section 3225, *Hill's Misc. Laws*, provides: "* * * From the first meeting of the directors, the powers vested in the corporation are exercised by them, or by their officers or agents, under their direction, except as otherwise provided in this chapter." It is not provided in said chapter that this particular power is vested elsewhere; therefore there can be no question but what it is one of the "powers" which is to be exercised by the directors. And such, it is believed, is the effect of the intimation of this court in *Willamette F. Co v. Stannus*, 4 Or. 261, nor is there anything in the other objections taken, as to the form of the call. All that is really necessary is that there should be some act or resolution which evinces or shows a clear official intent to render due and payable a part of all the unpaid subscription. *Cook, Stock & Stockholders*, § 115. So, also, the necessity of the call is not open to question by the stockholders. The determination of that question is for the board of directors. *Insurance Co. v. Floyd*, 74 Mo. 286; *Judah v. Insurance Co.*, 4 Ind. 333.

2. *Sale for Non-Payment of Assessment.* Counsel for the appellant have argued that the proceedings which were taken by the defendant corporation, upon the failure of Budd to pay the call upon his shares of stock, were entirely irregular and unauthorized by law, and in this we are inclined to think they are correct. A corporation has no inherent power to forfeit or sell the shares of stock owned by delinquent stockholders. That is not a common-law remedy, and can only be exercised when it is expressly conferred by some statute. *Westcott v. Mining Co.*, 23 Mich. 145; *Cook, Stock & Stockholders*, § 123. But it is claimed, on the other hand, that the statute has conferred the power exercised in this case, and counsel cite section 3221, subd. 6, *Hill's*

Misc. Laws. That section contains a particular enumeration of the powers conferred on all corporations organized under said act. By subdivision 6 they are empowered "to make by-laws not inconsistent with any existing law for the sale of any portion of its stock for delinquent or unpaid assessments due thereon, which sale may be made without judgment or execution; provided, that no such sale shall be made without 30 days' notice of time and place of sale, in some newspaper in circulation in the neighborhood of such company, for the transfer of its stock, for the management of its property, and for the general regulation of its affairs." This section confers the power, but it also prescribes the manner in which it shall be exercised. It must be by a "by-law not inconsistent with any existing law." In such a case, if the corporation determines to proceed by a sale of the stock for unpaid assessments, instead of by action to recover the money, it must have such a by-law as the statute prescribes, and compliance with such by-laws must be made to affirmatively appear. But it is claimed that the corporation defendant enacted a by-law for this particular case, and that the same appears in finding number 5. That resolution is in no sense a by-law. It is directed especially against the interests of a single stockholder. How many others may be delinquent does not appear; possibly none in this particular instance.

But that does not affect the principle. If a majority of a board of directors of a private corporation may in any case pass such a resolution, and enforce it, they may do it in every case. The majority need not enforce the payment of calls, only in particular instances, to be designated by resolution.

As was said in *People v. Throop*, 12 Wend. 181: "The resolution entered by the directors is not entitled to the name of a 'by-law'; it is a mere direction to the officers to exclude a director of the bank from the enjoyment of his rights. It is aimed at a single individual, not a general regulation affecting the directors at large or the stockholders." I think that any by-law enacted under this section of the Code, to be reasonable, ought to be general; that is, it ought to affect every delinquent subscriber, and all delinquent stock, alike, and it ought not to be directed against the stock or interests of a particular stockholder. These are essential requisites to a valid by-law.

As was said in *Commissioners v. Gas Co.*, 12 Pa. St. 318: "A by-law must be reasonable, and for the common benefit. It must not be in restraint of trade, nor ought it to impose a burden without an apparent benefit. *Village of Buffalo v. Webster*, 10 Wend. 99; *Mayor of Hudson v. Thorne*, 7 Paige, 261; *Stokes v. City of New York*, 14 Wend. 87."

So in *Goddard v. Merchants' Exchange*, 9 Mo. App. 290, it is said: "But by-laws must be certain, must be directed to all within the sphere of their operation, and must operate equally."

So, also, in the *People v. Benevolent Soc.*, 41 Mich. 67, 1 N. W. Rep. 931, it was said: "It is plain, however, that all corporation by-laws must stand on their own validity, and not on any dispensation granted to members. They cannot be subjected to any conditions which do not apply to all alike, and cannot be compelled to receive, as matter of grace, anything which is a matter of right; neither, on the other hand, should there be personal exemptions of a general nature from any valid regulations that bind the mass of corporations."

The sale of the plaintiff's stock by virtue of the resolution set out in the fifth finding was clearly illegal, and without authority.

3. The measure of damages remains to be considered. The appellant contends that, if the sale was illegal, he is entitled to recover in this form of action the full amount bid for the stock, without any regard whatever to the fact that he had paid nothing for it. In this class of cases, the authorities do not seem quite uniform as to the proper measure of damages in case of wrongful conversion. Perhaps the better rule is, the value of the stock at the time of the conversion, or a reasonable time thereafter. Cook, Stock & Stock-

holders, § 581. But this general rule is subject to exceptions, one of which is, where the plaintiff has suffered only a technical conversion. Without any actual pecuniary loss, only nominal damages can be recovered. Section 586. And the general rule in assessing damages is compensation, that is, that the plaintiff shall recover such sum as will compensate him for the injury he has suffered by the wrong of the defendant. In this case these shares were incumbered by an assessment equal to their par value; that is, the purchase price of those shares for which the plaintiff was indebted to the defendant corporation. That sum must, in any event, be paid to the defendant if the shares would bring it upon the market. The findings show that they did bring that sum, and \$200 more, and that of the proceeds of the sale \$10,000 were applied in satisfaction of plaintiff's debt to the defendant corporation. What effect these proceedings had upon the plaintiff's right to the stock in question we cannot now consider, because the question is not involved here. All that we now decide is that, under these findings, the sale of the plaintiff's stock was irregular and unauthorized, and that the court below did not err as to the measure of damages under the peculiar facts of this case. Whether the prosecution of this action to final judgment by the plaintiff is to be regarded as an election on his part to claim the money rather than the stock, and thereby ratify and affirm the irregular proceedings taken against him, (*Morrison v. Crawford*, 7 Or. 472,) or whether actual payment of the judgment is necessary to divest his title to the shares, we do not now consider or decide.

Let the judgment of the court below be affirmed.

THAYER, J., concurred.

(15 Or. 398)

POWELL and others v. WILLAMETTE VAL. R. CO. and others.

(Supreme Court of Oregon. November 15, 1887.)

1. FRAUD—CONFIDENTIAL RELATIONS—ATTORNEY AND DIRECTOR OF INSOLVENT CORPORATION.

An attorney, who was also a director, of an insolvent railroad company, was employed by third parties, who desired to reorganize the road to buy up the claims of plaintiffs, creditors of the company, which he did, not informing them of the scheme of reorganization. *Held*, that his position as director and attorney for the debtor company required him, in his dealings with plaintiffs, to exercise the utmost good faith; but, where they received all that their claims were worth, the fact that they were not informed as to the new scheme would not constitute constructive fraud on the part of the director.

2. CORPORATIONS—SALES OF STOCK—WHAT CONSTITUTES.

Hill's Misc. Laws Or. c. 32, § 3230, provide that all sales of corporate stock transfer to the purchaser all the original holder's rights, and subject him to any unpaid balance due on the stock. A debtor to the company conveyed all his stock to one as trustee, to sell the same to any one who would pay his indebtedness to the corporation, and get him a discharge therefrom. *Held*, that this was no sale, and the trustee was not such a purchaser as would create a liability, as against him, for any unpaid balance on the stock.

Appeal from circuit court, Multnomah county; LOYAL B. STEARNS, Judge. *James K. Kelley*, for appellants. *Dolph, Bellinger, Mallory & Simon* and *Ellis G. Hughes*, for respondents.

THAYER, J. This appeal comes here from a decree of the circuit court for the county of Multnomah. The case has been here before on appeal from a decision overruling a demurrer. It is reported in 13 Or. 446, 11 Pac. Rep. 222, and the material parts of the complaint are set out. The main facts in the case are that the Dayton, Sheridan & Grand Ronde Railroad Company, a private corporation, incurred separate debts to the appellants respectively, which it was unable to pay, and, in order to secure their payment, conveyed to the Willamette Valley Railroad Company, one of the respondents herein, in consideration of that company agreeing to pay said debts, all its property;

that the latter company, in order to secure these debts, made a mortgage to one William M. Evans, as trustee, covering all the property that had been conveyed to it by the former company, and conditioned for the payment of the several debts due the several appellants; and, in accordance with the terms of said mortgage, issued and delivered to each appellant a separate certificate, stating the amount due him under the mortgage on account of his debt due him from said Dayton, Sheridan & Grand Ronde Railroad Company; that the respondent Hughes, acting for certain parties who contemplated the formation of a company in Scotland to supersede the above-named companies in the business of operating and managing their railroads, purchased of the appellants their said debts at 50 cents upon the dollar; that said parties subsequently organized a company known as the "Oregonian Railway Company, Limited," (also one of the respondents herein,) and the said property was transferred to it, having first, however, been transferred to an intermediate company, known as the "Oregon Railway Company, Limited," (another of the respondents,) and which was organized to receive and hold the same until the Oregonian Railway Company, Limited, could be organized in Scotland; and that Hughes, acting under a writing from one Joseph Gaston, also sold and transferred to said Oregonian Railway Company, Limited, 5,000 shares, at the par value of \$500,000, which had been subscribed by said Gaston, of the capital stock of said Willamette Valley Railroad Company,—all of which was unpaid, and which was at the time in the hands of said Hughes to be sold and transferred. In the former case, as will be seen from the report referred to, only the sufficiency of the complaint was considered; and counsel for the appellant contends that the court failed to understand the real principles of the case, but viewed it merely as a suit to charge Hughes on account of alleged fraudulent misrepresentations it is claimed he made to the appellants when he purchased from them their several claims.

I think counsel are substantially correct in that particular; but it will be observed that the complaint charges Hughes with having represented to appellants that certain other creditors of the Willamette Valley Railroad Company had agreed to accept 50 cents on the dollar in full of their claims, and that the latter company was insolvent; and that, if they did not accept 50 cents on the dollar, they would get nothing, and that, relying on these representations, they agreed to accept that amount in full; that thereupon said Hughes paid them that amount, and they severally made the assignments to him; that Hughes was at that time director of said Willamette Valley Company, and had been employed by Evans, said trustee, as his attorney to represent the interests of appellants under the said mortgage to Evans, and that said Evans having died, he was the sole representative of their interests under it; that he was the owner of shares of unpaid stock of the Willamette Valley Railroad Company greater in amount than all its debts and liabilities, and was then under an agreement to purchase and obtain control of the property of the latter company, and to sell and deliver the same, and to procure the purchase and delivery of the claims of appellants for the least possible sum, for the joint benefit of himself and other parties then unknown to appellants; that the representations made by Hughes as to the insolvency of the Willamette Valley Railroad Company, and of other creditors having agreed to take 50 cents on the dollar for their claims, were false; that the money he did pay appellants was not his own, but belonged to parties to whom he had sold the road; that appellants were ignorant of the facts relative to his sale of the road, and to whom he had sold it, and as to his ownership of capital stock, and were at the time, by reason of the relations of trust and confidence in him, relying upon him to protect their interests, and, by reason of these matters, Hughes did defraud them of 50 cents on the dollar of their claims.

It will also be seen that in the prayer for relief the court was asked to decree that Hughes pay the said claims. The prayer, however, is in the alter-

native in that respect. In view of these allegations and prayers for relief, the court might easily mistake the case as a suit to recover a personal decree against Hughes on account of the alleged fraudulent misrepresentations it is claimed he made to the said appellants. Besides, the counsel's attitude, when here before, with the allegations referred to, confessed by the demurrer, was quite different from what it is after the facts have been tried, and the findings made that the charges of false representations are untrue. They now graciously disclaim any reliance upon any actual fraud committed by Hughes, but insist that he is chargeable with constructive fraud.

Dealings of a Fiduciary Character. In other words, that Hughes having been director, and the attorney of the Willamette Valley Railroad Company, at the time the claims were purchased from appellants, as found by the referee, rendered the purchase fraudulent and void as a matter of law. This is an important question in the case, for, unless the appellants can be relieved from their sale of the claims, unless their sale of them can be nullified, they have no standing in court, conceding that their suit is well brought. Whether Hughes acting the part he did in the purchase of the claims is fraudulent or not, depends, in my opinion, upon the nature of the transaction, and the effect of it upon the appellants. I do not believe that his relations to the appellants, on account of the positions he held in said company necessarily prevented him from negotiating a purchase of said claims for himself, and much less for other parties. In the first place, he may have acted with the strictest integrity to the appellants, and in the second it may have been an advantage to them, instead of an injury.

An attorney at law holds as sacred a relation to his client as can be formed in the business relations of life, yet his dealing with the client is not necessarily fraudulent, though it devolves upon him to establish that he acted honestly and fairly, whenever his good faith in the transaction is called in question. *Bingham v. Salene*, 14 Pac. Rep. 523. If Hughes did maintain a relation of trust and confidence to the appellants in regard to their claims, it does not conclusively follow that he intended to defraud them by purchasing the claims at a discount, nor that they were defrauded thereby. If he realized for them all that could reasonably have been expected under the circumstances,—realized as much as they would if they had retained them,—I do not see any tenable grounds upon which they can recover against him, or can claim that they were injured in consequence of what he did.

The referee, to whom the case was referred to find the facts, has found that the Willamette Valley Railroad Company was, at the time of the purchase of the claims, insolvent and unable to pay its debts; that all its property was subject to mortgage liens prior to the mortgage or trust deed made to Evans; that the prior liens amounted to about \$115,000, and were in process of foreclosure by suit then pending; and that it was generally believed at the time that all of said property was of no greater value than the amount of the prior liens. If that finding be correct, what hope or expectation was there that the appellants would realize anything unless they did sell the claims upon the terms proposed by Hughes, or what has since been developed to convince any one that they would have obtained anything therefor if they had retained them? Strip the case of the alleged misrepresentations of Hughes, and it is fully established that the appellants received even more than their claims were worth, unless his liability upon the Gaston stock is taken into consideration. I think it apparent to any one that the appellants made an advantageous deal with their claims, unless they could have made Hughes liable upon the stock referred to. Upon that feature of the case two questions are suggested: (1) As to the duty of Hughes to inform appellants of his relations to the said stock, and liability thereon; and (2) as to whether he was under any liability to appellants in consequence of the relation he held to the stock.

Appellants' counsel insist that directors of corporations have no right, un-

der any circumstances, to use their official positions for their own benefit, or for the benefit of any one except the corporation itself, and that the powers and management vested in the directors of an insolvent corporation, which has ceased to carry on business, are solely powers to manage assets in trust for its creditors, and for their benefit; that these powers are held in trust by them for all the creditors; that directors or managing agents, who originally stood in a fiduciary relation to the company, become placid, after insolvency, in a fiduciary relation to its creditors; that the law will not permit an officer of a corporation to purchase claims against the corporation, and assign them to a firm of which he is a member; that a purchase by a trustee from his *cestui que trust* under any circumstances is voidable, and will be set aside on behalf of the beneficiary, and that it is not material that there should be an advantage or profit arising out of the purchase from the *cestui que trust*; that it is enough to show the relation, and the purchase.

I think the counsel in the main are correct in these several positions. I have no doubt but that the propositions they assert are true in certain cases, but I doubt very much whether they are applicable throughout to the case under consideration, or that the proposition that a purchase by a trustee from his *cestui que trust*, under any circumstances, is voidable, and will be set aside, can be maintained under the broad statement in which it is made. Mr. Pomeroy, in his work on Equity Jurisprudence, § 957, lays down the rule correctly. He there says that "there are two classes of cases to be considered, which are somewhat different in their external forms, and are governed by different special rules, and which still depend upon the single general principle. The first class includes all those instances in which the two parties consciously and intentionally deal and negotiate with each other, each knowingly taking a part in the transaction, and there results from their dealings some conveyance or contract or gift. To such cases the principle literally and directly applies. The transaction is not necessarily voidable—it *may* be valid; but a presumption of its invalidity arises which can only be overcome, if at all, by clear evidence of good faith, a full knowledge, and of independent consent and action. The second class includes all those instances in which one party, purporting to act in his fiduciary character, deals with himself in his private and personal character, without the knowledge of his beneficiary; as where a trustee or agent to sell, sells the property to himself. Such transactions are voidable at the suit of the beneficiary, and not merely presumptively or *prima facie* invalid. Nevertheless this particular rule is only a necessary application of the single general principle. The circumstances show that there could not possibly be the good faith, knowledge, and free consent required by the principle; and therefore the result, which is a rebuttable presumption in the first class of transactions, becomes a conclusive presumption in the second."

It requires no extraordinary discrimination to determine that the case under consideration, if regarded in the light of a trust, falls within the first class above mentioned. It is a case where the parties have "consciously and intentionally dealt with each other," and not a case "in which one party, purporting to act in a fiduciary character, deals with himself in his private and personal character, without the knowledge of his beneficiary." It is not a case where a trustee—admitting Hughes to have been a trustee—has disposed of property belonging to a beneficiary, nor where a trustee has purchased property of a beneficiary belonging to the latter. Hughes was not in charge of the appellants' claims. The latter had them with full power to sell them or keep them; and if they chose to sell them to Hughes, and the transaction was fair, they have no grounds upon which to demand that the sale be set aside. Hughes' position in the debtor company, as director and attorney, required him especially, in his dealings with appellants, to maintain the utmost good faith, and I think the proof shows that he did so; and, further than that, he

did them a substantial favor when he assisted in the negotiation and purchase of their claims at 50 cents on the dollar; and most all of them who testified in the case, about 18 or 20 of them, seem to be under that impression, and to express satisfaction at the result of the transaction. They had been informed, evidently, that they had a claim for the remainder of their debts, and, of course, were anxious to recover it; but did not pretend that Hughes, or those for whom he acted, had done anything in the affair of which they could complain; and it does not take more than half an eye to see that they got out of the affair more than they could have reasonably expected in the condition it was in. They had honest claims, no doubt, against the Willamette Company, and were entitled to have them paid in full; but the company was insolvent,—was in the hands of a receiver.

There were liens on the property amounting to \$115,000, prior to theirs, which were in process of foreclosure; and how could they have expected to even realize anything, and, in my opinion, never would, had it not been for some overcredulous Scotchmen who evidently had more money than discretion? The latter conceived the idea of forming a new company to carry out the objects of the two defunct affairs, which were then wrecks. They engaged Mr. William Ried to purchase up the claims, and to get possession of the outstanding stock. Mr. Ried employed Mr. Hughes to conduct the matter. Hughes, as a matter of course, did not go and tell the creditors of the particulars of the scheme, if he knew them. He claims he did not know them, and I believe the referee has found that he did not know them. The evidence may warrant the finding; but I am too well acquainted with Mr. Hughes, and naturally too skeptical, to believe that he was ignorant concerning the matter. But it made no difference his not telling them. If he had done so, they would more than likely have become excited, and, if possible, have frustrated the plan, and have done themselves a serious injury financially. I think it was prudent in his not telling them. They knew he was acting in the matter for other parties, and that he was buying the claims with the funds of such parties; and that they had a recourse upon the subscribers for stock in the Willamette Company that had not been paid up. They may not have known that Hughes held any such stock, and I am not prepared to say that he was obligated to tell them if he did.

Transfer of Stock. But conceding that it was his duty to make known to them the facts upon which appellants now claim he was owner of such stock, and liable thereon, is it true that he was such owner, and under any such liability? The referee found "that on the twenty-ninth day of December, 1879, at the special instance and request of the defendant E. G. Hughes, acting for and on behalf of William Ried, the agents of the then promoters of the defendant, the Oregonian Railway Company, Limited, J. Gaston, owning and holding a large majority in interest in the capital stock of the Dayton, Sheridan & Grand Ronde Railroad Company and the Willamette Valley Railroad Company, to-wit, one hundred thousand dollars in the first-named corporation, and five hundred thousand dollars in the last-named corporation, executed and delivered to the said Hughes an instrument in writing, of which the plaintiffs' Exhibit No. 134, in the testimony herein, is a copy; and thereafter, on the tenth day of February, 1880, at the special instance and request of the said Hughes, the said Gaston executed and delivered to Hughes an instrument in writing, of which defendants' Exhibit No. 241, of the testimony herein, is a copy." The substance of the two instruments in writing is that Gaston, in consideration of, and to procure release and discharge of, all debts and liabilities incurred by him in the construction of the said Dayton, Sheridan & Grand Ronde Railroad, assigned to Hughes, as trustee, all his right, title, and interest in and to the stock of that company, and of the Willamette Valley Railroad Company, to have and to hold the same in trust for the use and purpose, to-wit, to convey the same absolutely and unconditionally

to such person, persons, or corporation as should within a certain time thereafter procure Gaston's full release and discharge of and from such debts and liabilities. This appears to have been, in effect, all the sale there was of said stock from Gaston to Hughes. The instruments were signed only by the former, and the latter obtained no other title to the stock than what was thereby conveyed.

The statute provides that "all sales of stock, whether voluntary or otherwise, transfer to the purchaser all rights of the original holder, * * * and subject such purchaser to the payment of any unpaid balance, due, or to become due, on such stock; but, if the sale be voluntary, the seller is still liable to existing creditors for the amount of such balance, unless the same be duly paid by such purchaser." Section 14, c. 32, Hill's Misc. Laws. Was the transaction between Gaston and Hughes such a sale of the stock, by the former to the latter, as would subject the latter to the payment of the amount due thereon, under said provision of the statute? is the question to be solved. The liability of a purchaser of stock in such cases is statutory; and unless the transaction between Gaston and Hughes constituted a sale of the stock within the meaning of the statute, such liability did not attach. It is not a case where a person has had stock transferred to him upon the books of the company, and thereby estopped himself from denying his ownership of it. There no sale in fact is necessary in order to charge the transferee. But here the question must be determined wholly upon the effect of the two instruments referred to. If they evidence such a sale of the stock as suggested, then Hughes became liable; otherwise not. The assignment of the stock was to Hughes, as trustee, to have and to hold the same in trust for the use and purpose, to convey absolutely and unconditionally to any one who would procure, in a certain time, Gaston's release and discharge from certain debts, etc. This certainly was no sale to Hughes; it was no more than a power to enable him to sell upon certain specified terms. It vested no title in Hughes, more than a power of attorney to dispose of the stock would have done. It did not transfer to Hughes all the rights of Gaston in the stock, or any rights, except to look up a purchaser, and sell him the stock upon the terms specified in the instruments; nor did it vest in Hughes the ownership of the stock as a trustee. It merely clothed him with a special and limited authority,—made him an agent for Gaston to do a particular thing for the latter's advantage.

"Sales of stock," within the meaning of the statute, are transfers of the general legal title. They could not have been meant to be anything less, or the legislature would not have provided that they should operate to "transfer to the purchaser all the rights of the original holder." In this case all the rights of Gaston in the stock remained in him, except so far as they were suspended by force of the said instruments. If Hughes had failed, within the time limited in the said instruments, to find a person who would procure Gaston's release from said debts and liabilities, his authority would have ceased, and Gaston's power over the stock been restored to its former extent. How could the parties have intended a sale of the stock to Hughes, when the consideration was to be paid by other parties, and the conveyance thereof, "absolutely and unconditionally," was to be made to such parties? It is true that the granting clause in the instruments is sufficiently broad to constitute a sale of the stock, but when all parts of them are taken together, and the general object and purpose of the instruments considered, they must, I think, be construed as only conferring a power upon Hughes to sell Gaston's stock to some person who would, within the time therein limited, procure him a full release and discharge from the debts and liabilities referred to.

If this view is correct, then Hughes was not such a purchaser of the stock in question as would create a liability on his part in favor of the appellants; and his failure to inform them of his relations to the stock, if in any case he would have been required to do so, was not a violation of any duty he was

under to them. I am unable to discover that Hughes is chargeable with fraud, actual or constructive, in the transaction of buying up the claims, or that the appellants were defrauded thereby. In my opinion, if the appellants had a right to join in the suit as co-plaintiffs, they have not succeeded in establishing a cause of suit herein. It is claimed that this suit is in the nature of a creditors' bill, but I do not see how it can be so regarded. A creditors' bill was to reach assets, and compel an application of them to the payment of a complainant's claim. This suit is to establish a personal liability against the respondents. It is to compel them to account for property that came into their hands charged with the payment of their claims, and to establish a liability against them as purchasers of unpaid stock. In order to pursue that remedy alone, the appellants had a right to unite as plaintiffs; but, when they sought relief on the grounds of the actual fraud of the respondents, they were required to show that it was a joint tort, at least so held in the former case, and I deem it proper to make this explanation, so that the profession may not be misled by that holding. The decree appealed from will be affirmed.

(15 Or. 427)

KIMBALL v. MOIR and others.

(Supreme Court of Oregon. November 21, 1887.)

PROMISSORY NOTE—STIPULATION FOR ATTORNEY'S FEES—VOID FOR UNREASONABLENESS.

Where a promissory note contains a stipulation for the payment of an unreasonable fixed sum as attorney's fees in case of suit thereon, the court will not enforce the payment of it, and, being unauthorized to make a new contract for the parties, will make no allowance therefor. *Balfour v. Davis*, 14 Or. 47, 12 Pac. Rep. 89, followed.

Appeal from circuit court, Multnomah county; E. B. STEARNS, Judge.

Dolph, Bellinger, Mallory & Simon, for respondents. *McDougall & Bower*, for appellants. *Whalley, Brounough & Northrup*, for the Dundee Mortgage Trust Invest. Co.

STRAHAN, J. There is but a single question presented by this appeal, and that is whether or not this court will enforce an agreement in a promissory note to pay 10 per cent. on the amount due as attorney's fees, in case of suit thereon. The amount due on the note, principal and interest, at the date of the decree, was \$5,080, and the amount of attorney's fees allowed in the court below was \$508. In *Balfour v. Davis*, 14 Or. 47, 12 Pac. Rep. 89, we had occasion to consider the effect of inserting in a note a fixed percentage, payable as attorney's fees, in case of suit thereon, and declined to enforce it, or give it any legal effect. In referring to the case of *Peyser v. Cole*, 11 Or. 39, 4 Pac. Rep. 520, it was said: " * * * We do not feel disposed to extend the doctrine there announced beyond the precise question then before the court." To allow the attorney's fees in this case would be a departure from the doctrine thus announced. We further held, in effect, in *Balfour v. Davis*, *supra*, that when the parties had fixed the amount of attorney's fees in a note which was unconscionable and unreasonable, we would not undertake to partially enforce the contract, by fixing such sum as we might deem reasonable. If a party wishes to indemnify himself for attorney's fees in case of suit upon a promissory note, he may do so by providing therein for a reasonable attorney's fee. It is not practicable, nor is it consistent with sound public policy, to allow parties, at the inception of a transaction of this nature, to determine the amount of attorney's fees to be paid in case of default. It is impossible for them to know at that time the extent or value of the services to be rendered. In such a case they will always be placed at the highest possible limit, and the defendant may show their unreasonableness, if he can. Some of the authorities hold that the insertion in a note of a fixed percentage, as attorney's fees in case of suit, is to be regarded as a penalty from which

the court, in giving judgment, may vary according to the circumstances of the particular case. But such is not the nature of the transaction, nor was it the intention of the parties. It is a liquidated sum, to be paid at all events, if suit is brought. I think if such a contract is good for any purpose it must be enforced as the parties made it; and therefore, for the reasons stated in *Balfour v. Davis, supra*, we refused to modify, and then enforce it as modified. But on the other hand, if a contract provides for reasonable attorney's fees, the court, when called upon to enforce it, as soon as the extent of the services rendered by the attorney is ascertained, has knowledge of their value, and can always make the proper allowance without the possibility of unfairness or abuse. If necessary, the parties could also offer evidence on the subject to assist the court in reaching a conclusion as to the value of such service. It appears from this record that the plaintiffs offered evidence tending to prove the reasonableness of the attorney's fees claimed. This evidence could not be considered without wholly ignoring the terms of the contract. That had fixed the amount, and such evidence was clearly irrelevant. We perceive no rule, consistent with sound legal principle, that will partially recognize the validity of such contracts; and hence in *Balfour v. Davis, supra*, we refused altogether to enforce such a contract, and to that we adhere.

Let the decree be modified as to attorney's fees, except as to the amount offered or admitted by the defendants, and affirmed in all other respects.

(74 Cal. 187)

MOORE and others v. BOYD and others. (No. 9,792.)

(Supreme Court of California. November 29, 1887.)

1. CORPORATIONS—ACTIONS TO ENFORCE STOCKHOLDER'S LIABILITY—LIMITATION.

The liability of a stockholder for a debt of a corporation is a liability "created by law," referred to in Code Civil Proc. Cal. § 359, which enacts that an action to enforce a liability created by law must be brought within three years after the "discovery * * * of the facts upon which * * * the liability was created."

2. SAME—WHEN STATUTE BEGINS TO RUN.

Defendants were sued as stockholders for an indebtedness contracted by a company. Code Civil Proc. Cal. § 559, limits the time for bringing such an action to three years "after the discovery by the aggrieved party of the facts upon which * * * the liability was created." *Held*, that if the plaintiffs desired to rely on the stockholders it was incumbent upon them to examine the books of the company to discover how the stock stood, and that, as the books of the company were open to inspection by the plaintiffs, they would be charged with that knowledge which could have been ascertained by such inquiry, and that the time commenced to run when the debt was incurred.

3. SAME—ESTOPPEL TO DENY OWNERSHIP OF STOCK.

The defendants were sued for an indebtedness contracted by a corporation in which they were shareholders. One of the defendants had stated in a letter to a third party that he owned 11,000 shares of stock in the company. *Held*, that the admission not being made to the plaintiffs, but to a third person, did not operate as an estoppel to prevent said defendant from denying the ownership.

Commissioners' decision. Department 1.

Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

James A. Wagner, for appellants. *McAllister & Bergin*, for respondents.

HAYNE, C. This is an action against certain stockholders of the South Mountain Consolidated Mining Company, a corporation having a capital stock of 100,000 shares, upon an indebtedness of the company to plaintiffs of \$46,953.50, incurred by the company during the months of July and August, 1875. The defendant Lent is alleged to have owned at that time 33,145 shares; the defendant Boyd, 11,000 shares; and the defendant Willis, "a large number of shares." The court below gave judgment for the defendants, and the plaintiffs appeal.

As the positions of the defendants are somewhat different, we will consider them separately.

1. The defendant Willis disposed of all the stock in which he had any actual interest before the months of July and August, 1875. Other stock, however, stood in his name, "as trustee," upon the books of the company. In 1874, 30,000 shares belonging to the company were placed in the name of "William Willis, Trustee." These shares were disposed of under the direction of the president in the acquisition of outstanding titles to the mine. As we gather from the evidence, no change was made in the way this stock stood upon the books of the company. Before July, 1875, about 60,000 other shares belonging to one Minear were placed in the name of "William Willis, Trustee," as collateral security for a debt of the company, for which Willis had made himself responsible. These shares stood upon the books of the company in this way during the months of July and August, 1875. But before that time the greater part had been sold to outside parties, and the proceeds applied to the reduction of the debt for which it was security. Most of the remainder was sold during said months of July and August. Whenever the stock was sold, Willis simply indorsed the certificates in blank, and delivered them to the purchasers, leaving the stock to stand upon the books of the company in the name of "William Willis, Trustee." As a matter of course, after this, he did not know what became of the stock, or who owned it,—the certificate being transferable by delivery "in the ordinary course of business, just like a 20-dollar piece."

The position of appellants' counsel is that this made Willis liable as a stockholder. The argument is that after the stock pledged was sold he no longer held it as collateral security; that its being on the books in his name enabled him to vote it, and control the company; and that the mere addition of the word "trustee" to his name, without stating for whom he was trustee, amounts to nothing, under the decisions in *Brewster v. Sime*, 42 Cal. 142, and *Thompson v. Toland*, 48 Cal. 113. In other words, that he appeared upon the books of the company to be a stockholder, and that this made him liable. We do not find it necessary to examine the validity of this argument. The condition of affairs above described existed at the time the indebtedness was contracted. And, if we assume in favor of the appellants that it made Willis liable as a stockholder, it made him liable in July and August, 1875; and the claim against him is barred by the statute of limitations.

Section 359 of the Code of Civil Procedure is as follows:

"Sec. 359. This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce *a liability created by law*; but such actions must be brought within three years after the discovery by the aggrieved party of *the facts upon which the penalty or forfeiture attached, or the liability was created.*"

The liability of a stockholder for the debt of the corporation is a liability "created by law," (*Green v. Beckman*, 59 Cal. 545;) and therefore the above section applies to it. More than three years having elapsed before the action was brought, the claim was barred by limitation unless there was no "discovery * * * of the facts upon which * * * the liability was created." What were such facts? Manifestly the existence of the indebtedness of the corporation, and the fact that the defendants owned a certain proportion of the stock. Now, the plaintiffs, having advanced money directly to the corporation, could not have been ignorant of the indebtedness arising therefrom. The inquiry, therefore, is reduced to this: Were they ignorant of the fact that during the months of July and August, 1875, the stock stood upon the books of the company in the name of "William Willis, Trustee?"

For the purposes of the statute of limitations, if the means of knowledge exist, and the circumstances are such as to put a man of ordinary prudence on inquiry, it will be held that there was knowledge of what could have been

readily ascertained by such inquiry. This rule is applied both in equity (*New Albany v. Burke*, 11 Wall. 107; *Bank v. Carpenter*, 101 U. S. 567) and at law, (*Bailey v. Glover*, 21 Wall 349; *Wood v. Carpenter*, 101 U. S. 141.) In the present case the plaintiffs could have discovered how the stock stood upon the books of the company by looking at the books; and we think that it was incumbent upon persons advancing money to the corporation, and relying upon the stockholders for payment, to have done so. It is not shown that they made any effort to do so; and therefore they cannot claim the benefit of the exemption made by the section above quoted as to the running of the statute. If, therefore, there was any liability upon Willis from the way the stock stood upon the books of the company, it is barred by limitation.

2. The defendant Boyd never had any stock in his name upon the books of the company, either as trustee or otherwise, except the five shares put in his name to qualify him to act as director. He admits being interested in some of the stock at one time; but he disposed of it before July, 1875. The court finds that, "in the months of July and August, 1875, said defendants did not, nor did any of them, own any other or more of the capital stock of said South Mountain Consolidated Mining Company than the five shares thereof standing in their names as aforesaid." This finding is as broad as the issue; and no objection is taken to its sufficiency in point of form. And it responds to the questions presented by the evidence. Was the evidence sufficient to support it?

As an original proposition we should have had much difficulty in coming to the conclusion that this defendant did not own 11,000 shares of the stock at the time the indebtedness was incurred; for in a letter to a third party, dated September 28, 1875, he said: "I am compelled to pay assessments on over eleven thousand shares of my own stock;" and the letter displays much indignation over the conduct of one Townsend, who was supposed to have depressed the value of the stock in the market. But Boyd denied that he owned any stock, and explained his letter by saying that the company owed him money, which he expected to get out of the sum raised from the assessment; and that he wrote the letter in the expectation that it would be shown to other stockholders, and would encourage them to pay the assessment on their stock. This explanation seems open to doubt. But the court below heard and saw the witness, and therefore had a better opportunity for arriving at a conclusion than is afforded by a record; and under the well-settled rule its conclusion as to the fact will not be disturbed.

It is contended, however, that the letter referred to operated as an estoppel upon the writer, and prevented him from denying that he was a stockholder. But the admission was not made to the plaintiffs, or any of them, and therefore did not operate as an estoppel. *Reynolds v. Lounsbury*, 6 Hill, 536. To hold that an estoppel exists under these circumstances would be to make every admission an estoppel.

The foregoing disposes of the claim as to the defendant Boyd, and it is unnecessary to consider the question of the statute of limitations as to him.

3. The defendant Lent never had any stock in his name upon the books of the company except the five shares necessary to qualify him as a director. He admits having been interested in a large number of shares, but testifies that he disposed of them before the months of July and August, 1875. We see nothing in the evidence to cast doubt upon the finding above quoted, that he owned no stock at the time the indebtedness was incurred. He says, however, that a large part of this stock was given away or disposed of in a way he does not distinctly remember. His testimony is as follows: "I cannot remember at this time what disposition I made of it, but I am positive it was all sold at about the sum I gave for it. In the first place, in organizing a company, the first men that come in are newspaper men who want to know what is this company,—want me to carry some stock. Another will want me to carry some stock, and I think every share of that stock went in that

way; but I cannot remember. * * * I cannot remember now the disposition of my 500 shares. I think I gave it out at different periods as presents to persons around the office or some one else. I think I gave it to somebody or other. I don't know who it was, but after we got through with the 3,500 shares, I know that Boyd, Willis, and myself said: 'We will give this away.' Willis said: 'I am going to give my mother mine.' Boyd said: 'I will give mine to Mrs. Blank;' I forget the name. And I said: 'I will do the same thing,' and what I did with it I don't know. I am so sure I had no stock after that," etc.

The learned counsel for the appellants argues that stock cannot be transferred in this way, as against creditors of the corporation, and among other authorities cites *Bowden v. Johnson*, 107 U.S. 251, 2 Sup. Ct. Rep. 246, and *Thomp. Stockholders*, § 215. But the rule he invokes requires that the transfer should be for the purpose of escaping liability, and to a person whom the stockholder knows to be irresponsible. The evidence shows no such case. And if the rule is to be applied in this state, (as to which we express no opinion,) this is not a case for its application.

4. All three of the defendants were directors, and each had five shares of the company's stock transferred to their names upon the books of the company. This, we think, made them liable as stockholders. *Wolf v. St. Louis I. W. Co.*, 15 Cal. 319. But under the views above expressed this liability was barred by limitation. And, if this were not so, the matter is too trifling to require the reversal of the judgment. This seems to be the view of the counsel for the appellants; for on page 6 of his brief he says: "Even if the defendants had owned the five shares each, standing in their names, the amount for which they would be liable would be such a trifling sum that it would not justify them in taking up the time of a court with a suit, to say nothing of the costs to themselves. Five shares to each of the defendants would be 15-100,000 of 46,963, or just a little over 70 cents; or, with interest, about \$1.40." We quite agree with counsel that this is too trifling a matter to take up the time of a court. It is a case for the application of the maxim, *de minimis non curat lex*. *Wolff v. Prosser*, 14 Pac. Rep. 852.

We therefore advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(2 Ariz. 319)

TERRITORY v. BARTH.

(*Supreme Court of Arizona*. December 9, 1887.)

1. FORGERY—PRINCIPAL AND ACCESSORY—ACCOMPLICE.

He is the principal who directs the forging of an instrument, and utters the same, and receives the proceeds thereof, though the writing be by another, under his direction.

2. GRAND JURY—IMPANELING—EXCUSE OF JUROR—PRESUMPTION ON APPEAL.

The court may, of its own motion, excuse a juror for any apparent disqualification, and, in the absence of the facts, it will be presumed that the court acted upon good reason.

3. CONTINUANCE—ABSENCE OF WITNESSES—MATERIALITY OF TESTIMONY—AFFIDAVIT.

The affidavit must show that the testimony of an absent witness is material. If it be to contradict the testimony of an anticipated witness, it must state that that testimony is false.

4. CRIMINAL PRACTICE—INSTRUCTIONS—REASONABLE DOUBT.

In a criminal case, proof to a moral certainty is not required.

(*Syllabus by the Court*.)

v.15p.no.11—43

Appeal from district court, Gavapai county; WRIGHT, Judge.
Sumner Howard, Herndon & Hawkins, and E. M. Sanford, for appellants.
Briggs Goodrich, Atty. Gen., for appellee.

BARNES, J. This was an indictment against defendant, Solomon Barth, accusing him of the crime of forgery of a county warrant, with a count for uttering said forged warrant. Defendant urges as error the refusal of the court to quash the indictment for irregularity in the formation of the grand jury. Defendant was present at the time the grand jury was impaneled, and given an opportunity for challenge, which he declined to accept, on the ground that he had not been held to bail for this offense, and was under no accusation. Leaving the question whether he has waived his right of challenge, we will consider the alleged irregularity. Section 176, Comp. Laws, c. 11, provides for an order summoning 24 persons to serve as a grand jury, which order was made in this case, and the sheriff returned 24 persons served, and they all appeared. Section 178 provides that the names of persons in attendance be written on separate ballots, and put in a box, from which the grand jury shall be drawn, which was done; but the court of its own motion excused the sixth person whose name was drawn, and this is the error assigned. It does not appear for what reason this juror was excused. To know whether the excuse was justified or not the facts should be made to appear. We must assume, in the absence of the facts upon which the court acted, that the court acted for good reason, and not arbitrarily. Suppose the juror had been deaf and dumb, blind, intoxicated, or for any other reason disabled from jury service, no one can doubt for a moment the power and duty of the court to excuse the juror. The court should excuse a juror for any apparent disqualification, and we must assume that the court acted properly. Having excused this juror 23 persons remained, the number the law provides to constitute a grand jury, and it was organized with those persons. In this it does not appear that the court erred.

It is urged that the court erred in refusing to grant a change of venue. Application was made on the ground that "a fair and impartial trial" could not be had in the county. Comp. Laws, 699. The statute provides that, if the court "is satisfied that the representation is true," the venue may be changed. Id. 687. The plaintiff filed his own affidavit, and affidavits of three others, of facts tending to show that such a prejudice existed against defendant in the county to such an extent as would prevent a fair trial. This was met by the affidavits of 14 persons living in different parts of the county denying the existence of such prejudice. The defendant was simply overwhelmed by the evidence, and the court very properly refused the change.

Error is assigned in the refusal of the court to grant a continuance. This is a motion addressed to the sound discretion of the court, and for the abuse of such discretion error may be assigned, and the cause reversed. *Territory v. Davis*, 10 Pac. Rep. 359; *People v. Francis*, 38 Cal. 183. We do not think there was such an abuse of discretion in this case as requires a reversal. It does not appear clearly that the testimony of the witnesses Lee, Eoff, and Bibb could be procured at a time to which the case could be postponed. But the fatal error to this showing is that the facts which defendant expected to prove by the witnesses are not clearly stated, nor are they made to appear to be material. In the main they suggest that they will contradict or discredit a witness named Silvers. It is true that an emergency might arise in the trial in which such testimony would be competent. For all that appears in the affidavit, Silvers would admit every fact expected to be proved, and in that case the evidence would be incompetent. Besides, the affidavit nowhere states that the testimony of the witness Silvers, which the affidavit anticipates, is untrue. If true, the proposed evidence would avail nothing. The witness Silvers might be filled with prejudice; might have

been hired to remain in the jurisdiction of the court for the purpose of being a witness; might have even threatened to put defendant in Yuma, and yet his testimony be true. This the defendant should have negatived, and shown to the court that the proposed testimony was material to meet the *false testimony* of the witness. By the witness Eoff he expected to prove that the said writing was "not uttered and forged as true," as alleged. This is a conclusion of both law and fact. The facts should have been stated. We think the court did not err in refusing to continue the case. We will not review all the errors assigned. The demurrer was properly overruled. The indictment sufficiently alleges a forgery of this instrument, and in the second count the uttering of an alleged instrument knowing it to be false and forged.

The evidence shows that a general county warrant was issued to Patterson & Co. for lumber, for \$91.24, signed by Luther Martin, chairman of the board, and by Charles Kinnear, clerk of the board; that J. B. Patterson, one of the company, took the warrant to defendant's store, and handed it to Harry Silvers, defendant's clerk. He had spoken to defendant about it, who told him he was giving 80 cents on the dollar for county warrants. Silvers gave a check for 80 per cent. of the amount of the warrant. The check was signed by defendant.

The alleged warrant was offered in evidence, and was for \$190, and was the same warrant delivered to Silvers by Patterson. Silvers testified that defendant told him that he expected a warrant from Patterson, and told him to pay 80 cents on the dollar for it, and signed a check in blank to pay for it with. Silvers put the warrant in the safe with other warrants. A few days after, defendant asked Silvers for all the warrants, which were given to defendant, and he shortly returned with them, and Silvers noticed this to be for \$191, instead of \$91, and called defendant's attention to it, who told him to keep his mouth shut. At defendant's direction, this warrant with others were sent to a bank at Prescott for discount. Defendant indorsed the warrant. The alterations were made in the handwriting of Kinnear. There was evidence of several other warrants altered in the same way, discounted at the same time. It is urged that the witness Silvers is an accomplice, and that his testimony is not corroborated. Comp Laws, 344. We think the corroboration is complete. The defendant indorsed the warrant; received the money for the same; false entries appeared in his books as to it; in fact, the whole case together demonstrates that defendant was engaged in a conspiracy to buy and raise warrants. He had corrupted the clerk of the board to aid him, and give the appearance of genuineness to the county warrants. He had induced his book-keeper, Silvers, to aid him under his direction. He was the prime mover, the chief actor, the archconspirator, the principal, in this criminal transaction. The writing was not in his hand, but it was by his direction, and is as much his act as if he had written the words himself. He is not an accessory in any sense. An indictment which alleges that defendant forged, is proved by evidence that the false writing is made by his direction, and for his use, and followed by proof that he uttered the forged instrument. He was the principal offender. The whole case evinces an amount of turpitude and criminal intention that is appalling. How the jury could have been led to have recommended him to the mercy of the court we cannot understand. His guilt was made clear by the evidence. Of that there can be no doubt, and the evidence upon which this conclusion rests is both competent and convincing. Such an infamous conspiracy as is here shown, having as one of its actors a trusted officer of the county, and its purpose the wholesale robbery of the funds of the county, should be met with sure and swift punishment. And it is well that the principal actor, a man of wealth, power, and influence, a merchant of many years, as this record discloses, should be the first convicted, rather than visit the blame upon his mere instruments, the clerk of the board and his own book-keeper.

After a careful examination of the whole case, we see no such error as warrants a reversal of the case. The instructions, as a whole, submit the case fairly to the jury. We will notice but one objection to the charge. The court instructed the jury that the law presumes defendant to be innocent "until such strong proof of his guilt of the offense charged shall be adduced as to remove every reasonable doubt of his guilt. A reasonable doubt, however, means a substantial doubt, arising from the evidence, and not a mere possibility of the defendant's innocence. If, upon the whole case, the jury entertain a reasonable doubt of the defendant's guilt, they should acquit;" and refused to instruct that "by reasonable doubt is meant that state of the case which leaves the mind of the jury in that condition that they cannot say they feel an abiding conviction, to a *moral certainty*, of the truth of the charge;" and that "the evidence must establish the truth of the charge to a reasonable and moral certainty." We think the court was correct in the charge. There is nothing more difficult than to attempt to make clear what is meant by the reasonable doubt that will warrant an acquittal. The words themselves perhaps convey the idea as accurately as any paraphrase can do. To say that proof to a moral certainty is required, is misleading. Whatever may be the meaning of those words to scholastics, to a common mind it requires a much higher degree of proof than is necessary in a criminal case. To require proof to a moral certainty would make it impossible to enforce the criminal law. In a civil cause, a mere preponderance of evidence governs the verdict; in a criminal case, the mind of the jury must be convinced of the truth of the charge. That is all. To be convinced means that the evidence must be such that the reason sees no doubt left of the defendant's guilt. The law does not deal with doubts that the imagination may conjure up. The mind may not run outside the evidence in search for doubts; the reason must detect and point them out in the evidence alone, and direct the mind to stop short of being convinced. When the mind so hesitates from conviction, there exists a reasonable doubt. If the mind, on the other hand, rests satisfied and convinced, all reasonable doubt is removed. It is that condition of mind as leads reasonable men in the important affairs of life to act with confidence and not to pause and hesitate and say "I am not satisfied," after a consideration of all the facts bearing upon the proposition. Ordinary men can and do understand this; but to ask for a moral certainty startles the mind with doubt and uncertainty which may not be removed by any evidence, however convincing to the reason. Such is not the demand of the law. *Com. v. Costley*, 118 Mass. 1; *State v. Reed*, 62 Me. 142; *People v. Guidici*, 100 N. Y. 503; *Arnold v. State*, 23 Ind. 170; *Miles v. U. S.*, 103 U. S. 304; *People v. Finley*, 38 Mich. 482; *McGuire v. People*, 44 Mich. 286, 6 N. W. Rep. 669; *State v. Bridges*, 29 Kan. 138; *Massey v. State*, 1 Tex. App. 564; *Densmore v. State*, 67 Ind. 306; *Batten v. State*, 80 Ind. 394; *Holmes v. State*, 9 Tex. App. 313; *State v. Rover*, 11 Nev. 348; *Mixon v. State*, 55 Miss. 527, *Meyers v. Com.*, 83 Pa. St. 142; *Anderson v. State*, 41 Wis. 433. And see *People v. Ah Sing*, 51 Cal. 372; Judge SHAW, in *Com. v. Webster*, 5 Cush. 320; *Allen v. Fox*, 10 Amer. Law Rep. 642; 3 Greenl. Ev. § 29, and note; Starkie, Ev. 507.

The judgment of the district court is affirmed.

WRIGHT, C. J., concurs.

PORTER, J. I concur; and on the question of reasonable doubt will add that explanations of reasonable doubt confuse more than they make clear. In *Miles v. U. S.*, *supra*, the court says: "Attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury."

(10 Colo. 395)

JENNINGS and another v. RICKARD.

(Supreme Court of Colorado. November 11, 1887.)

1. PARTNERSHIP—RIGHTS OF PARTNERS—FRAUD—ACCOUNTING.

Plaintiff sold to defendants, his partners, his one-third interest in certain partnership property for \$400, and conveyed it to them by deed. The defendants the same day conveyed by a deed, placed in escrow, the same property to a third party, concealing from the plaintiff at the time of his sale to them that such negotiations were pending. *Held*, that the concealment of the negotiation was a fraud upon the plaintiff, and that defendants should account to him for one-third of the proceeds of the sale.

2. SAME—MINES AND MINING—LOCATION OF CLAIM.

Plaintiff, being a partner with defendants, by the terms of the partnership was to have one-third interest in claims located by defendants. The partnership was dissolved in the spring of 1878. One of the defendants, while prospecting some years prior to 1879, discovered some "float" on the mountain-side, where a valuable mine was afterwards discovered, and stuck a stake there, with a view of returning at some future time and discovering the vein from which it came, but did not return until after 1879. *Held*, that while the failure to pursue the search might have been neglect on his part, it was not fraudulent, and plaintiff had no interest in a mine located in 1879 by defendants on that vein.

3. SAME—PLEADING AND PROOF—VARIANCE.

Plaintiff entered into partnership with the defendants for the purpose of locating and working mining claims; he to furnish money, etc., and they to do the active work of prospecting and locating, each to have one-third interest in claims discovered and located. Plaintiff alleged that defendants had located valuable mines during the partnership agreement, and had concealed the facts from him, and that he knew nothing of them until after the dissolution of the partnership and settlement. The defendants in their answer alleged that the partnership extended until the spring of 1878. In their testimony, they claimed it was dissolved in 1876, and that certain of the mines mentioned by plaintiff were located in 1876 and 1877. *Held*, that the testimony that the partnership was dissolved in 1878 did not sustain the allegations of the answer, and that the admissions in that must govern, and defendants must account for mines located up to the spring of 1878.

4. LIMITATION OF ACTIONS—PLEADING THE STATUTE—WAIVER OF OBJECTION.

Defendant did not interpose the plea of the statute of limitations, either by demurrer or answer in the trial court. *Held*, that this defense, if not specially pleaded, must be treated as waived, and cannot be raised for the first time on appeal.¹

Error to district court, Fremont county.

The defendant in error obtained a decree from the court below for \$20,200. The plaintiffs in error, the defendants below, bring the cause to the supreme court by writ of error. The facts of the case are sufficiently stated in the opinion of the court.

Teller & Orahod and *J. M. Waldron*, for plaintiffs in error. *Wells, Smith & Macón*, for defendant in error.

ELBERT, J. Charles Rickard, the plaintiff below, on the eighteenth of December, 1882, filed his bill of complaint against the defendants, John and Daniel Jennings, claiming a decree against them for \$20,200, on account of certain partnership transactions. He alleges that in the fall of 1874 he and the defendants entered into a mining copartnership for the purpose of collecting mineral specimens, and also for the purpose of discovering, locating, and developing lodes and mining properties; that by the terms of such copartnership agreement Rickard was to furnish certain moneys, horses, wagons, etc.; that the defendants were to do the active work in the field in prospecting and locating mining claims, and that each were to have a one-third interest in all mining claims discovered and located by the defendants; that this copartnership continued until April, 1878; that during this time the defendants discov-

¹As to the necessity of pleading the statute of limitations to make it available as a defense, see *Merriam v. Miller*, (Neb.) 34 N. W. Rep. 625, and note.

ered and located the Mammoth, the Empire, and the Trail lodes, and a certain claim to coal lands, and reported the same to plaintiff as properties belonging to the copartnership; that they reported the aforesaid lodes as being all that had been discovered, located, and claimed by them during the continuance of the copartnership agreement. He alleges that on the nineteenth of March, 1878, he conveyed to said defendants, for the sum of \$400, all his interest in and to the foregoing copartnership properties. Concerning this conveyance of the nineteenth of March, 1878, he alleges a distinct and separate fraud upon the part of defendants Jennings, by reason of which he is entitled to a decree against them for \$200. This fraud concerns properties admittedly belonging to the copartnership, and will be considered first.

Under the terms of the copartnership, the lodes were located for convenience in the names of the defendants, and they were authorized to negotiate and sell them, accounting to plaintiff for one-third of the proceeds. The evidence clearly shows that on or about the nineteenth of March, 1878, the defendants approached the plaintiff concerning a purchase of his third interest in the foregoing copartnership properties, and that the negotiation resulted in the sale by plaintiff to defendants of his third interest in the same for the sum of \$400, which he then and there conveyed by deed of that date to defendants. It also quite clearly appears that at the time of this sale the defendants were negotiating a sale of the copartnership coal claim to one Smith, for the sum of \$1,800. Although this sale to Smith was not consummated until some time thereafter, the deed to Smith, which was placed in escrow, bears date March 19, 1878, the date of the conveyance by the plaintiff to defendants of his one-third interest in the copartnership properties. The one-third interest of the plaintiff in the proceeds of the sale of this coal mine would have amounted to \$600, \$200 more than the defendants paid him for his entire interest in the four claims.

The partnership relation is a trust relation, and the members of a copartnership are held to a strict rule of good faith and fair and open dealing. He who assumes the relation invites the confidence of his copartners, and pledges fidelity to the interests of the copartnership. The requirements of the copartnership relation which the defendants sustained to the plaintiff demanded that, at the time of the negotiation for a sale of his third interest in the copartnership properties, they should have made known to him the negotiation which was then pending with Smith for the sale of the coal claim for the sum of \$1,800. Their concealment of this negotiation from the plaintiff was the concealment of an important fact, affecting the value of plaintiff's copartnership interest for which they were negotiating. It enabled them to deal with him on unfair and unequal terms. It was a fraud, and equity and good conscience required that defendants should account to plaintiff for one-third of the proceeds of that sale.

The sale by plaintiff to defendants of his one-third interest in the copartnership properties, to-wit, the Mammoth, the Empire, and the Trail lodes, and the coal claim, was a sale in gross for \$400. The consideration paid for each property respectively, does not appear. As the plaintiff introduced no evidence upon this point, and only prayed in his bill of complaint that the defendants be decreed to account for the sum of \$200, the difference between the entire consideration paid him for the whole property and his third interest in the proceeds of the sale of the coal claim, the court was justified in limiting its decree in this behalf to that sum.

Secondly. The plaintiff alleges another and distinct fraud respecting certain mining properties, which he claimed belonged to the copartnership, a claim which the defendants contest. Plaintiff alleges that, during the continuance of said copartnership agreement, the defendants discovered and located certain other mining claims, viz., the Cliff, the North Star, the Hiawassee, the Galena, the East Wing, the Buckeye, and the Sylvanite; that under the terms of their co-

partnership agreement he was entitled to a one-third interest in the same, but that the defendants fraudulently concealed from him the discovery and location of said claims, and that he never knew of the existence of said claims, or of his rights therein, until on or about the twenty-seventh day of September, 1879, when the defendants sold and conveyed said claims to one Ballentine for the sum of \$60,000. By reason of this fraud upon the part of defendants, the plaintiff claims a decree for \$20,000, one-third of the proceeds of said sale to Ballentine.

The defendants, in their answer, deny the copartnership, except as therein-after stated, and "thereinafter" they say "that they, the defendants, further answering, admit that they entered into an agreement with plaintiff to gather specimens and prospect for lodes, substantially as set out in the complaint, and that such agreement continued until the early part of the year 1878." They set forth the sale and deed of the nineteenth of March, 1878, by plaintiff to defendants, and say "that, upon the completion of such sale by plaintiff to defendants, it was then and there agreed by and between them that all former associations, agreement, copartnership, and business relations theretofore existing between plaintiff and these defendants should cease, and the same were then and there fully dissolved and terminated." In view of the testimony, as will be seen, this is an important admission. They deny any fraudulent concealment of lodes discovered and located as alleged in the complaint, but claim that the Mammoth, the Empire, the Trail lodes, and the claim to coal lands, reported by them to plaintiff as copartnership properties, were all the lodes discovered and located by them during the continuance of the copartnership, from the fall of 1874 to the spring of 1878.

Upon the admissions of the defendants in their answer and testimony, the Cliff, the Hiawasse, the Galena, and the North Star must be treated, without hesitancy, as properties belonging to the copartnership. The defendants, in their answer, admit that the copartnership formed in 1874 continued until the spring of 1878. The copartnership must be treated as extending to all mining properties discovered and located by the defendants during that period, in the absence of any limitation. John Jennings admits in his testimony that the four lodes named were discovered and located in 1876 and 1877. The defendant, Daniel Jennings, while he does not testify upon this point, does not in any way controvert or disclaim it. It is true that they both claim in their testimony that they understood that the copartnership was dissolved in the spring of 1876, when the copartnership "specimen store" was sold; but this testimony does not support the allegations of the answer, the admissions of which, upon this point, must be held to control.

It appears from the testimony that these four mines belonged to the group of ten which were sold to Ballentine for the sum of \$12,000. There is no evidence fixing the separate value of the mines which constitute this group. In the absence of any evidence upon this point, the respective mines constituting the group must be treated of equal value. In so far, therefore, as the decree of the court below was based upon the right of the plaintiff to recover one-third of the proceeds arising from the sale of the Cliff, the Hiawasse, the North Star, and the Galena is concerned, we think it is justified by the pleadings and the evidence.

It appears that three other mines which plaintiff claims belong to the copartnership, viz., the Sylvanite, the Buckeye, and the East Wing, were at the same time, namely, on the twenty-seventh of September, 1879, conveyed to Ballentine by a separate deed, and that the true consideration therefor was \$48,000. This sum, together with the \$12,000 for which the other group sold, constitutes the \$60,000 for the one-third of which plaintiff claims a decree.

It remains, therefore, to determine whether, upon the evidence, these three mines belonged to the copartnership. The two Jennings and other witnesses testify positively to their discovery and location in 1879, after the copartner-

ship had been admittedly dissolved. It appears that the Sylvanite was by far the most valuable of the three; that the other two were not regarded as of much value. There was an effort upon the part of the plaintiff to show that, while the Sylvanite was not located until 1879, it was really discovered by the Jennings during the existence of the copartnership, and its discovery fraudulently concealed from the plaintiff. Daniel Jennings admits in his testimony that some years prior to 1879, while prospecting, he discovered some "float" upon the mountain side some four or five hundred feet from where the Sylvanite was afterwards discovered, and that he stuck a stake there to indicate the locality, with a view of returning at some future day to prospect for the vein from which it came, but that he never did return to renew his search until 1879. Other witnesses testify to substantially the same admission on his part. At the worst, this was but a neglect upon his part to pursue a search that might have terminated beneficially to the copartnership. His failure to do so, however, does not appear to have been fraudulent. It is not shown that at the time he stuck the stake where he found the "float," that he discovered the vein from which it came, or that he had any knowledge respecting it that would render his failure to make further search for the mine fraudulent. Such and other indications of the existence of mineral veins are frequent in the path of the prospector. All that can be required of him is that he pursue his search with diligence and good faith. His failure to follow up a particular "float," or other indication of a lode, is not a fraud as of course. It will not do to say, under the circumstances of this case, that Jennings, after the dissolution of the copartnership, could not return to and prospect in Elk Mountain district for other lodes, except at the peril of having to yield to plaintiff a one-third interest in their discoveries, upon the proposition that by proper diligence they might have discovered such lodes during the existence of the copartnership. The evidence does not show the fraudulent concealment of a discovery, as in the case of the other group of mines.

In so far, therefore, as the decree of the court below was based upon the rights of the plaintiff to recover one-third of the proceeds arising from the sale of these three mines, we do not think it justified by the evidence.

The argument that the action is barred by the statute of limitations cannot be considered. The objection is taken for the first time in this court. The defense was not interposed in the court below, by either demurrer or answer. This defense is in the nature of a special privilege, and if not specially pleaded must be treated as waived. It cannot be considered under the general objection that the complaint does not state facts sufficient to constitute a cause of action. *Hexter v. Clifford*, 5 Colo. 173; *Chicington v. Colorado Springs Co.*, 9 Colo. 609, 14 Pac. Rep. 212.

The decree of the court below is reversed, and the cause remanded.

(10 Colo. 337)

TRITCH v. NORTON and another, Copartners, etc.

(*Supreme Court of Colorado.* October 31, 1887.)

1. MECHANICS' LIENS—PRIORITY—TRUST DEED—WORK DONE UNDER SUBSEQUENT CONTRACT.

Act Colo. February 12, 1881, provides that a mechanic or material-man shall have a lien from the commencement of the work or furnishing of the material, under an express or implied contract, which shall attach on any estate the latter may have at the time, and shall be superior to any after-created lien, or any prior lien of which the mechanic or material-man had no real or constructive notice. Plaintiff contracted to build for one M. a house on two lots belonging to M. By mistake of M. the house was built on lots not belonging to him. When the mistake was discovered, work was stopped, and M. purchased these lots, and made a loan of defendant to pay for them, giving him a trust deed to secure the loan, executed and recorded the same day M. obtained a deed to the lots. At that time plaintiffs had been paid in full for their work and material on the house. *Held*, that the lien under the trust deed was a prior lien to that of the plaintiffs for work done on the

house after the loan was made, as the old contract was ended when the work was stopped, and the house was finished under a new one, express or implied, made after the purchase of the lots.

2. SAME—KNOWLEDGE OF MORTGAGEE.

Plaintiffs contracted to erect a building on lots of M. By mistake it was put up on lots not owned by M., who then purchased the other lots, and borrowed money from defendant to pay for them. The plaintiffs, at that time, had been paid by M. all the money due on the building. *Held*, that the contract of plaintiffs to build on the lots of M. was at an end when the mistake was discovered, and if they went on and finished the house, it would be a new contract, subsequent in time to defendant's trust deed, and the knowledge by defendant that plaintiffs intended to do so would not give them any priority over the lien of defendant.

3. SAME—DUTY OF MORTGAGEE.

Defendant loaned money on a lot on which was an unfinished building, and recorded the trust deed. After that the house was completed under a new contract. *Held* that, having recorded his mortgage, he was not affected by any further liens the mortgagor might create on his property, whether he knew of them or not.

4. SAME—CONSTRUCTIVE NOTICE—PRIVITY.

One M. borrowed money of defendant, and gave him a trust deed secured in real estate therefor. He contracted with plaintiffs at the time to complete an unfinished building on the land. *Held*, that where there is no proof of the knowledge of such fact on the part of defendant, there is nothing in the relation of mortgagor and mortgagee which gives rise to the doctrine of privity and its consequences.

5. SAME—LIEN ON STRUCTURE—WORK SUBSEQUENT TO TITLE ACQUIRED.

Act Colo. February 12, 1881, p. 168, § 8, provides that the builder shall have a lien "on such structures where the other has no ownership, interest, tenancy, or claim of, in, or to such land." Plaintiff contracted to build a house for M. on certain lots owned by him, but it was built on lots not belonging to him, but which he, on finding out the mistake, purchased, borrowing money to pay for them, and giving a trust deed therefor. *Held*, that when M. purchased the lots, the old contract to build on his lots was at an end, and when plaintiffs began then to finish the house it was under a new contract, and M. was not a person without ownership, interest, or claim on the land.

Commissioners' decision. Appeal from county court, Arapahoe county.
Markham & Dillon, for appellant. *I. E. Barnum*, for appellees.

MACON, C. This action was commenced in September of 1882 by appellees, Norton & La Due, on their demand for balance due them on their contract with Machen for the construction of a dwelling-house, and for the enforcement of their mechanic's lien asserted for the same against lots 7, 8, 9, and 10, in block 9, in Waddell & Machen's subdivision of Denver. Machen and others were made parties defendants, appellant being the only contending defendant at the hearing of the cause.

In their complaint, plaintiffs alleged that on March 15, 1882, Machen was owner of said lots 7, 8, 9, and 10; that on that date they entered into a contract in writing with him, whereby it was agreed that plaintiffs should construct for him a brick dwelling-house, with basement, etc., on said lots 9 and 10, for the sum of \$3,500, payable \$400 when first-story joists were on, \$400 when second-story joists were on, \$400 when brick work completed, \$500 when house inclosed, \$400 when ready for plastering, \$400 when plastering completed, \$500 when ready for painting, \$500 when house completed; that the situation of the house was as directed by Machen; that on the eleventh day of August, 1882, plaintiffs duly completed the same in accord with the terms of said contract, and besides did extra work thereon, to the amount of \$100, at request of Machen; that \$1,600 had been paid upon the contract, and the remainder, \$1,900, thereon, and the \$100 for the extra work, remained due and unpaid; also alleged all the necessary steps fixing the mechanic's lien to the said premises for this amount. Afterwards, on December 2, 1882, by leave of court, plaintiffs filed an amendment to their complaint, in which it was alleged that appellant, Tritch, had become interested in the premises by purchase since the commencement of the action, and while *lis pendens* was duly of record in the records of said county, containing full notice of the action, and its pur-

poses, and asked an order that said Tritch be made party to the action, and that it might be decreed that whatever interest he might have in the premises be subject to the lien of plaintiffs. Whereupon Tritch came and answered, denied the allegations of the complaint, except those concerning *lis pendens* notice, and alleged as follows:

"But defendant says that the plaintiffs, in disregard and violation of a contract, which they had made with said Machen to build him a house on lots 9 and 10, where said Machen desired it, did, without the knowledge, consent, or authority of said Machen, enter upon lots 7 and 8, and commence to do certain work upon and about the erection of a building thereon, where said Machen did not desire such building, and that after said work had so progressed on said lots 7 and 8 to a considerable extent, just how far this defendant does not know and has not information sufficient to enable him to state, the said Machen discovered that the plaintiffs, in disregard and violation of their agreement and contract set out in the complaint herein, were erecting a building on lots 7 and 8 instead of lots 9 and 10, and thereupon the said Machen notified the plaintiffs thereof, and that the said building was not being located as in the contract provided and he desired. Then the said Machen and the plaintiffs, as this defendant is informed and believes, made and entered into some sort of a new contract and agreement, not in writing, by which the plaintiffs were to be allowed to proceed to the completion of said building, which they had in violation of their said contract begun, on said lots 7 and 8, instead of lots 9 and 10 as aforesaid, it being understood and agreed that the said Machen should pay them therefor a certain sum in money, the exact amount this defendant does not know, and cannot state, and the remainder, amounting to one-half or more of the total cost thereof, the said Machen was to satisfy and pay, by conveying to plaintiffs certain lots in the said Waddell & Machen's addition, or elsewhere, the number, designation, and location of which this defendant does not know and cannot state; that the written contract should and did then and thereby terminate, and was by mutual consent and by the action of the parties thereto canceled and set aside, except that probably the plans and specifications therein mentioned were to govern in the completion of the building under said new contract.

"And this defendant says that in order to enable himself to comply with this proposition of settlement, and enter into said new contract as aforesaid, and before the same was entered into, the said Machen was compelled to borrow the money to pay to plaintiffs, and that this defendant did loan the said Machen the sum of fifteen hundred dollars with which to make payment. For said sum of fifteen hundred dollars the said Machen executed his certain promissory note, and also conveyed the said lots 7, 8, 9, and 10 to Job A. Cooper, trustee, with the sheriff of Arapahoe county, successor in trust for the use and security of this defendant as aforesaid. That by said conveyance, this defendant had and acquired a prior and superior lien upon the said lots 7, 8, 9, and 10; that the money loaned by this defendant to said Machen, and secured by said note and deed of trust, as aforesaid, was paid to plaintiff, and fully met and paid off and satisfied any and all claims they had upon or against the said Machen on any account, up to the date thereof, and that the plaintiffs had full knowledge of the loan by this defendant to Machen of the money aforesaid, and of the execution by said Machen of the said trust deed; and the said trust deed was, upon the sixth day of May, 1882, the day of its date, duly placed of record in the office of the recorder of Arapahoe county. Whatever work or labor was done, or material furnished, by the plaintiffs thereafter, was done and furnished with full knowledge and notice of the said trust deed, and that the same was a first, superior, and prior lien upon the whole of said lots 7, 8, 9, and 10.

"This defendant, further answering, says that the said Machen did not make payment of said note, and the interest thereof, according to the terms

and tenor thereof, and according to the stipulations and provisions of said trust deed, but did make default, and that thereupon this defendant, as he had a right to do, did cause and require the said sheriff of Arapahoe county, successor in trust as aforesaid, to advertise the said lots for sale to satisfy, pay off, and discharge the said note, and the accrued interest thereon; and the said sheriff of Arapahoe county, successor in trust as aforesaid, did duly advertise the said lots 7, 8, 9, and 10 for sale, for the purposes aforesaid, as by law and by the terms of said trust deed he was required to do; and pursuant to said advertisement, and in accordance with the law in such cases made and provided, did, on the twenty-seventh day of September, A. D. 1882, at the front door of the court-house, on Lawrence street in the city of Denver, county of Arapahoe, state of Colorado, sell the said lots, with all the improvements thereon, to the highest bidder at public auction, and at said sale this defendant, being the highest and best bidder, became the purchaser of the same, for and at the price of nineteen hundred dollars, which satisfied his said debt as aforesaid, and left two hundred and forty-two and 50-100 dollars over and above the amount of principal and interest and costs thereof, which said balance this defendant paid to the sheriff of Arapahoe county as successor in trust as aforesaid, and the said sheriff, as such successor in trust, executed and delivered to this defendant his deed, whereby the said lots 7, 8, 9, and 10, as set out in the complaint herein, were conveyed to and became the property of the defendant.

"By reason of all which this defendant became and is the sole owner of the said lots, and each and all of them, and the improvements thereon; and defendant denies that the plaintiffs have any claim against or any lien upon the same, or any part thereof, on account of the matters and things set out in their complaint, and amended complaint; and says, that any lien, or pretended lien, of plaintiffs, acquired or sought to be acquired upon the same, by and in virtue of the notices, or pretended notices, to said Machen, as set out in the complaint, was, if valid for any purpose, subsequent and inferior to the lien of this defendant as hereinbefore set forth; and that the lien of this defendant aforesaid having been foreclosed, and the said lots conveyed to him pursuant to law, this defendant prays that so much of the complaint of plaintiffs as seeks to subject said lots, or any part thereof, to any claim, or pretended claims, of plaintiffs against the said Machen, be disallowed and dismissed; and prays that he be quieted in his title and possession of the said premises, and for his costs and all proper relief."

To which plaintiffs replied as follows.

"REPLICATION TO THE ANSWER OF GEORGE TRITCH.

"The plaintiffs reply: (1) That they deny that they did work or furnished any material and did construct said house in part on said lots seven (7) and eight (8) without any direction from said Machen so to do, and they deny the allegation that said work and labor was performed, and said material furnished, as aforesaid, without any contract with said Machen so to do. (2) They deny that, in violation and disregard of the contract which they had made with said Machen to build him a house on lots 9 and 10, where said Machen desired it, they did, without the knowledge or consent or authority of said Machen, enter upon lots seven (7) and eight, (8,) and commenced to do certain work upon and about the erection of a building thereon, where said Machen did not desire said building; and they deny that after said work had so progressed to a considerable extent on said lots seven (7) and eight, (8,) that said Machen discovered that the plaintiffs, in disregard and violation of their agreement and contract, which agreement is set out in said complaint, were erecting a building on lots seven and eight, instead of lots nine and ten; and they deny that, thereupon, he notified them thereof, and that said build-

ing was not being located as the contract required and as he desired; but they admit that when he discovered his own mistake in the lots as set out in the complaint, that he did notify them that he had made a mistake in the location of the building; and they deny that when said Machen discovered that a mistake had been made in the location of the house, that a new contract, not in writing or in any form, was made, by which the plaintiffs were to be allowed to proceed to the completion of said house, which, as alleged in said answer, they, in violation of that contract, had begun on lots 7 and 8, instead of lots 9 and 10; and they deny that it was understood or agreed that the said Machen should pay them therefor a certain sum of money, and that the remainder, amounting to one-half or more of the total cost thereof, the said Machen was to satisfy and pay, by conveying to plaintiffs certain lots in the said Waddell & Machen's addition, or anywhere else; and they deny that it was agreed that the written contract should or did thereby terminate, and deny that it was by the mutual consent and by the action of the parties thereto canceled and set aside in any regard whatever; and they deny that, in order to comply with any such proposition of settlement, and to enter into said new contract, and before the same was entered into, said Machen was compelled to borrow money to pay said plaintiffs; but they admit that he did pay them some money, about the time he discovered his said mistake; but these plaintiffs do not know where he got the same, and leave said defendant to his proof thereof; and they admit that said Machen did give his promissory note to said Tritch, secured by a trust deed on lots 7, 8, 9, and 10, substantially as set forth in said answer; but they deny that said trust deed created or became a lien on said lots, or any of them, prior to the mechanic's lien of these plaintiffs thereon; and they say said trust deed, and its lien and its rights, in connection therewith, are subsequent to and subject to the lien of these plaintiffs on said lots; and they say that, before the completion of said building, and before the filing of said notices, and before the institution of this suit, said Tritch had sold and disposed of said note, given by said Machen to one or both of said McIntyres, who are defendants herein, and he had no interest whatever in said note or said lots at the time of instituting this suit; and they say that said trust deed was not foreclosed under the directions of said Tritch, as the holder of said note, but was foreclosed under the direction of one or both of said McIntyres, and that said Tritch became the purchaser at said sale, with the full knowledge of all the rights and claims of said plaintiffs in the premises, and was not an innocent purchaser thereof,—that he so purchased with full knowledge of this suit."

After which the following amendment to the complaint was made, by consent: "And now come the said plaintiffs, by permission of the court, and in pursuance of the consent hereto annexed on the part of defendant, George Tritch, and file this amendment to the first paragraph of the second allegation, in the first cause of action, by striking out the words, 'that on or about the fifteenth day of March, A. D. 1882, said defendant Edward C. Machen was the owner of said lots seven, (7,) eight, (8,) nine, (9,) and ten, (10,) in block 9,' inserting in the place thereof the following: 'That on or about the fifteenth day of March, A. D. 1882, said defendant, Edward C. Machen, was the owner of lots nine (9) and ten, (10,) and about the sixth day of May following he became the owner of lots seven (7) and eight, (8,) all of block 9.'"

At the hearing of the cause May 28, 1883, Tritch was the only contending defendant. Judgment for \$2,000 was given against Machen, in favor of plaintiffs, and decreed a lien on said lots 7 and 8, and superior to the title of Tritch, with order of sale of the premises to satisfy the lien. Tritch moved for a new trial, which was denied, and he brings the cause here on appeal.

The evidence, as shown by the bill of exceptions, is as follows:

"Bill of exceptions as follows, to-wit: Be it remembered that on, to-wit, the twenty-eighth day of May, A. D. 1883, the said cause came on to be heard,

as well on the issues joined between the plaintiffs herein and the defendant George Tritch, as upon the other issues in said cause, and the trial of said cause by a jury was waived, and the same was submitted to the court, and upon the trial of said issues the following facts were proven:

"(1) That upon the fifteenth day of March, A. D. 1882, a contract was entered into between the plaintiffs and the defendant Machen, for the erection of a brick dwelling-house upon lots 9 and 10 in block 9 in Waddell & Machen's addition to the city of Denver.

"(2) That the plaintiffs and defendant Machen, upon the twentieth day of March, A. D. 1882, went to locate the ground upon which the building was to be erected, (Machen not knowing the exact location of said lots nine and ten) and with a tape line, held at one end by plaintiff Norton, and at the other end by defendant Machen, they measured off the ground, until defendant Machen believed he had located said lots nine and ten, and the plaintiffs commenced the erection of the said dwelling-house on what plaintiffs and Machen believed was said lots 9 and 10, and by direction of said Machen.

"(3) That on or about the twenty-fifth day of March, plaintiffs commenced the erection of said brick dwelling by the excavation on said lots for a cellar or basement story for said dwelling, and by the erection of said dwelling, which was of brick and two stories in height, and with brick basement and foundation walls sunk into the earth, said dwelling being constructed as are ordinary brick dwellings in the city of Denver.

"(4) That the plaintiffs continued the erection of said dwelling until about the fourth day of May, A. D. 1882. At this last-mentioned date the said dwelling was constructed up to the second-story joists, and was ready for the roof. At this last-named date defendant Machen discovered that a mistake had been made in locating the lots upon which said dwelling was to be erected, and by said mistake the dwelling was being erected on lots 7 and 8 in said block, instead of upon said lots 9 and 10.

"(5) That the said Machen had no interest or title in or to said lots 7 and 8, either at the time the erection of the building was commenced or when said mistake was discovered, but, on the contrary, they belonged to and the title was in one R. A. Long.

"(6) That upon discovering the mistake, the said Machen negotiated with the said Long for the sale and conveyance to him, Machen, of the said lots seven and eight, and the price was agreed upon between Long and Machen for said lots.

"(7) And said Machen did not then have the money to purchase said lots 7 and 8, and he negotiated with the defendant George Tritch for the loan to him, Machen, by the said Tritch of the money with which to purchase the said lots 7 and 8, and the said Machen agreed with Tritch that if he would loan the money to purchase said lots, he would execute his note to said Tritch for the money loaned, and would execute his deed of trust upon said lots 7 and 8 to secure the payment of said note. The said Tritch agreed to this arrangement.

"(8) That to effect the purchase of lots 7 and 8, and to secure the money therefor by the loan as aforesaid, and to secure the payment of said loan by the execution of the deed of trust aforesaid, the defendant Machen and the said Long, owner of lots 7 and 8, and defendant Tritch met together upon the sixth day of May, A. D. 1882, and thereupon said Long executed a deed of warranty, conveying to Machen said lots 7 and 8, and the said Tritch paid to said Machen the sum of fifteen hundred dollars, it being the said loan theretofore agreed upon. Said Machen thereupon executed his note to the said Tritch for the said fifteen hundred dollars, and executed and acknowledged a deed of trust, in the usual and ordinary form, conveying to Job A. Cooper said lots 7 and 8 as trustee, to secure the payment of said note for fifteen hundred dollars, and providing in said deed for the sale at public auction of said lots 7 and 8 at the request of the holder of said note, in the event of the non-pay-

ment of said note at maturity. The said deed of trust contained all the usual provisions as to notice, etc., and no objection is taken as to its sufficiency to effect the objects of the trust. Thereupon the said Machen paid said Long the purchase price of said lots, and Long delivered to Machen the deed for said lots, and Machen delivered to said Tritch said promissory note and deed of trust, and thereupon, and upon the same day, said warranty deed and deed of trust were filed for record in the recorder's office of Arapahoe county at the same identical period of time.

"(9) That the plaintiffs thereafter completed the erection of said dwelling-house, in the manner as provided in the said contract they should, and the same was completed upon the _____ day of _____, 1882; that when said building was completed there was due the plaintiffs from said Machen upon the said building under the contract the sum of nineteen hundred dollars.

"(10) That within forty days from the completion of said building, the plaintiffs filed their notice of lien in the recorder's office of said county, in all things as set forth in the complaint, and they did commence this suit to foreclose this lien within six months from the filing of said notice of lien for record, and no objection is taken to the time of filing said lien or the sufficiency of notice, or to the time when said suit was commenced.

"(11) That subsequent to the execution of said several deeds, defendant Tritch assigned the said note for value to _____, and the said Machen wholly failed to pay said note at maturity. Upon such failure, the holders of the note ordered the trustee in said deed of trust to advertise and sell said lots 7 and 8, as provided in said deed of trust, to satisfy said note and interest, and the trustee did advertise said property as directed. That at the sale of said lots at the time fixed in the notice of sale, the defendant George Tritch became the purchaser, and he bid for said lots at said sale the sum of eighteen hundred dollars, which sum was duly paid to the trustee, to be disposed of by him under the trust.

"(12) The trustee in said deed of trust, upon the twenty-seventh day of September, A. D. 1882, in pursuance of said sale and the powers conferred upon him by the deed of trust, executed and delivered to the defendant Tritch his deed of conveyance as such trustee of said lots 7 and 8, and by such deed he did convey, demise, and quitclaim the said lots 7 and 8 unto the said George Tritch. No question is made as to the legality and sufficiency of the said sale and conveyance.

"(13) The said George Tritch did file said trustee's deed for record in the recorder's office in Arapahoe county, September 27, 1882.

"(14) At the time the said Machen discovered said mistake and received the conveyance of said lots 7 and 8, the plaintiffs had been paid in full the installments due them under the contract. And the foregoing was all the evidence introduced in said trial, and were all the facts proven thereat. And thereupon, after argument by counsel, the court did find the issues joined as between the plaintiffs herein, and the said Geo. Tritch, in favor of the plaintiffs. Whereupon said defendant Tritch filed his motion for a new trial of said cause; which motion was overruled by the court, and the above decree rendered upon the findings; to which defendant below excepted and appealed to this court."

Seven errors are assigned by appellant as ground for reversal of the decree; all of which will be determined and disposed of by the decision of the second, which is, that "the court erred in the adjudging and decreeing that appellees do have a lien on the real estate in controversy, and the structure thereon, and decreeing that appellant do hold his interests in said premises and said structure subject to said lien."

The admitted facts in the record present three questions for solution: *First*, was the lien claimed by and decreed to appellees prior in time to the trust deed of appellant? *second*, if it was not, had appellees any equities in the

case by which such trust deed should be postponed to their lien? and, *third*, if appellees cannot maintain a lien upon lots 7 and 8, as against appellant, can they upon the house situated upon said lots 7 and 8?

The lien claimed by appellees depends for its validity upon the act of February 12, 1881, by which it is provided: "All persons performing work or labor, or furnishing materials, by contract, express or implied, with another, or his agent, to the amount of not less than \$25, on or for any structure upon the land of that other, or in or to which that other has an interest, tenancy, or claim of any sort whatever, shall have a lien upon such land and structure to the extent of such ownership, interest, claim, or tenancy had at the time of the commencement of such work or labor or furnishing such materials, and a lien on such structure where the other has no ownership, interest, tenancy, or claim of, in, or to such land, on complying with the terms of this act."

"Sec. 3. It shall be the duty of the county clerk and recorder to record such statement in a separate book, provided for that purpose, and, from the time of such filing, the amount so stated shall become a lien on said land or structure, or both, to the extent of the ownership, interest, claim, or tenancy as aforesaid of the title, subject, nevertheless, to adjudication as hereinafter set forth."

"Sec. 11. So much land as may be occupied by any such structure as may be necessary for the convenient use and occupation of the same shall be subject to the liens hereinbefore provided for, and all such liens shall relate back to the commencement of work or labor, or of the furnishing of materials by the claimant, and shall have priority over any and every lien or incumbrance subsequently intervening, or which have been created prior thereto, but which was not then recorded, and of which the lienor under this act had no notice."

It is thus seen that the lien of the mechanic or material-man begins with the commencement of the work or furnishing material under his express or implied contract with his employer, and attaches upon whatever estate the latter may have at the commencement of such work, or the furnishing materials, and is superior to all after-created liens, and any prior liens or incumbrances of which the mechanic or material-man had no actual or constructive notice when his work began, or he began to furnish material.

In this case, Machen, the employer of appellees, had no title or estate of any sort in or to the two lots 7 and 8 when appellees commenced the erection of the house, nor any right or license from the owner thereof to go upon them for any purpose. The agreement between Machen and appellees was for building a house upon lots 9 and 10. That in all that was done by these parties in the construction of this house upon lots 7 and 8, prior to May 6, 1882, they were trespassers, cannot be denied, and upon a proposition so elementary the citation of authorities is unnecessary. It follows that no lien in favor of appellees could attach upon such *lots* while they remained the property of Long. But on May 4, 1882, Machen discovered the mistake in the location of the house, and informed appellees thereof, whereupon (it is proper to infer from the evidence) the work thereon was suspended, and was not again resumed until after Machen acquired the title to these lots on May 6, 1882. At the same instant of time that Machen's title vested, appellant took his trust deed to secure the money advanced by him to Machen. Between the acquisition of title by Machen and the creation of appellant's incumbrance there was no interval of time which the law will recognize. Upon the conclusion of the negotiations by Machen for the purchase and conveyance to him of the premises in question, appellees proceeded to complete the unfinished building.

Upon ascertaining the mistake in the location of the building, it was the duty of appellees to desist from further work under the original agreement. Failing to do so, they would have become willful trespassers, and as such would not have been entitled to any benefit of the lien statute for improve-

ments thereafter made. This conclusion is not affected by the fact that, under the last clause of section 1 above quoted, they might possibly, by proper proceedings, have secured a lien upon the building, had anything been due for work and material furnished previous to the fourth of May.

It follows, therefore, that appellees must be held to have proceeded, after the sixth of May, under a new contract, express or implied. To the suggestion that, subsequent to this date, they acted, as far as possible, under the terms and conditions of the previous agreement, it is answered that, if such be the fact, that agreement must be regarded as then readopted, and that, for the purposes of this case, its existence dates from the time of such readoption. But it is doubtful if it can be truthfully said that after the sixth of May appellees proceeded, or could have proceeded, under the old contract. They were fully paid for all improvements made prior to the fourth of May. On that date they were apprised of the fact that they had been open trespassers upon lots 7 and 8. A fair inference from the evidence is that they then ceased work, as it was their duty to do, and did not resume until after the purchase by Machen. The agreement to complete an unfinished building on lots 7 and 8 varied in an important and material particular from the agreement to build a house on lots 9 and 10. Leaving out of view appellees' situation as willful trespassers, had they continued work after May 4th, and before Machen's purchase, an action for the value of improvements thus made could hardly have rested upon the original contract. Courts do not enforce contracts between parties, the execution of which is legally impossible. They might, had they not been willful trespassers, perhaps, have recovered compensation for such improvements; but we are not prepared to say that they could have done so by a suit upon the old contract. It therefore results necessarily that the incumbrance of appellant is prior in time to the lien of appellees, because the lien of the latter, if it exists, arises out of a contract subsequent in time to the execution of appellant's trust deed.

Then, are there any equities in favor of appellees which can or should postpone appellant's lien to theirs? Appellees' counsel in argument contend that such equities arise out of the fact, first, that appellant knew of the mistake as to the location of the house when he advanced his money with which Machen paid for the lots. Of this fact there is no proof, though the parties exhibit great care and caution in agreeing upon the conclusions of fact shown by evidence on the hearing of the case in the court below. But if counsel mean such notice existed on the part of Tritch, by reason of the rule, that a vendee or an incumbrancer of land is held in equity to know the rights of all persons in possession or occupancy thereof, as fully as he could learn them by inquiry of such persons, and that this applies in favor of the mechanic building any structure thereon at the time of such purchase or incumbrance, we are unable to see how this will aid them. Assuming appellant did not see appellees at work on the premises in erecting this house, and made inquiry of them as to all that it is claimed he should have done, what would have been the result? He would simply have learned that they had been for the past 30 or 40 days trespassing upon the property of Long, from which act they did not acquire any right of lien upon the lots. He would further have learned that at that time Machen owed them nothing on the house, and that, by the mistake in locating the house, the agreement between them and Machen was at an end, and that, if they should ever go on and finish the house, it would be under a new and different agreement from that made March 15th. Certainly, this was the situation at that time, and a knowledge of it would not have prejudiced appellant, nor made it inequitable in him to take a lien on these lots.

The person in possession must have some rights in or to the premises which the law will recognize and enforce, the knowledge of which the intending purchaser or incumbrancer can obtain by inquiry. But it never was

held that a knowledge of or notice to such person that the occupant might by agreement with the owner of the land acquire some lien thereon or some rights therein, in the future, would bind him to respect such after-acquired rights in case he should purchase the land. And this is precisely the rule now contended for by appellees upon this point.

When appellant advanced his money, and took his security on the lots, he knew, say appellees, all he could have learned by inquiry of them, as to their relations with Machen, and their rights in and to these lots 7 and 8, which, as has been shown, were nothing; but by inference, they say, he also must have known that, after Machen should acquire the title to the lots from Long, he would then enter into an agreement with appellees for the completion of the house, or permit appellees to proceed to build the house, without any express agreement. This is the plain meaning of appellees. But if this all be admitted, it comes to nothing more than notice to appellant that, after his lien should be created, his grantor would or might create other liens upon the estate. Would the case be different if, instead of this asserted lien being a mechanic's lien, it was that of a second or third mortgagee? Clearly not under the statute. And will it be seriously contended that, in the case supposed, the knowledge of appellant that Machen intended to put a second or third mortgage upon the premises would have prejudiced his priority as against all subsequent incumbrances? It follows necessarily from these considerations that appellees can have no priority over appellant, by reason of any supposed knowledge he may have had of the future intentions of Machen and appellees, for the completion of the unfinished house.

Next, it is insisted that, as appellant knew of the prosecution of work on the house, and the completion of the same, after the execution of his trust deed, and did not object to it, he is now bound to postpone his security to the lien of appellees. To this there are two answers: *First*, there is in the record no evidence that appellant had any knowledge or notice of the work going on upon the house at any time before he was made party to this suit; and, *second*, if he did, he would not have been affected by such knowledge. It certainly is not the law that a mortgagee shall give actual notice to the world of his incumbrance. He is required to record it, and when he has so done he may rest in perfect security as to any further liens which the mortgagor may see fit to create on the property.

Mr. Phillips, in his book on *Mechanics' Liens*, says, at section 232: "The lien of the mechanic in such case, for work or labor done upon mortgaged property at the instance of the mortgagor, is subordinate to that of the mortgagee, although the latter knew of such work and labor at the time the mechanic rendered the same, and did not object." *Card v. Bank*, 23 Conn. 355; *Hoover v. Wheeler*, 23 Miss. 314; *Pride v. Viles*, 3 Sneed, 125.

So far from its being appellant's duty in this case to have notified appellees of his rights in the premises, it was their duty, before doing work under the new contract, to have consulted the record, and to have made inquiry of him as to any facts which the record failed to disclose. Again, referring to Phillips in the same section, we find the rule upon this point stated thus: "The rule of *caveat emptor*, therefore, applies against a mechanic as well as in the case of a vendee. If a contractor proposes erecting a building, and furnishing materials or putting labor on a lot of ground, it behooves him to examine and assure himself of the fact that the person with whom he contemplates making his contract, or for whose benefit he is about to employ means or labor, has such an interest or title unincumbered as will enable him to avail himself of a valid or efficient lien. Under the system of registration in this country, a little diligence will always impart to a person the requisite information; and if he fails to inform himself, the law will not relieve him against the consequences of his own negligence." *Brigwell v. Clark*, 39 Mo. 170.

As a further reason why appellant should be postponed to appellees, it is contended that, since appellees can maintain a lien on lots 7 and 8 as against Machen, they can also maintain it as against appellant, because he stood in privity with Machen when he advanced his money for the security of which he took the trust deed, and is thereby affected by the same fact and knowledge as would affect Machen, and to the same extent. As has already been said, there is no proof of such knowledge on the part of appellant, and the conclusion of appellees that he had such knowledge is to be deduced alone from the doctrine of privity. But vendor and vendee, mortgagor and mortgagee, deal at arm's length. Between them there is no such relation as gives rise to this doctrine and its consequences. Under the rule here contended for by counsel for appellees, there could be no such person as an innocent purchaser of land, where there was any wrong in the sale upon the part of the vendor; and the impregnable defense in courts of equity of a *bona fide* purchase for value, without notice of defects of title, could have no existence. The case fails to disclose any fact which can justify the postponement of appellant's rights to those of appellees as to lots 7 and 8.

The last point relied on by appellees to support the decree herein is that, though they may be unable to maintain a lien on the lots as against appellant, they can against the house under the provisions of the act referred to, by force of the clause, "and a lien on such structure where the other has no ownership, interest, tenancy, or claim of, in, or to such land." It is impossible to accept this application of the clause in question, assuming it to be constitutional, for the obvious reason that Machen was not in the predicament pointed out therein. He was not within its terms or meaning. He was not, when the new contract was made, and the work thereunder commenced, to-wit, after May 6, 1882, a person without ownership, interest, or claim of, in, or to the land, but was the equitable owner of the same, and as such was entitled to the possession thereof, with the right to improve it, and did not hold the house as something distinct from the land, but owned it by virtue of his ownership of and title to the land; so that both it and the lots constituted but one article of property, which was real estate. Upon Machen's title there is no doubt that appellees were entitled to a lien; but in the enforcement thereof they could occupy no better situation than that of their debtor, as against the appellant. They could sell no greater estate than Machen had when their lien attached. That estate, as we have seen, was subject to an incumbrance in the hands of appellant, and it cannot be denied that, if appellees had foreclosed their lien before the foreclosure of the trust deed of appellant, the purchaser at such foreclosure sale would have bought the property subject to the trust deed, and under the liability to have been sold out under the same.

The title of Machen to the land, carrying with it all that is considered and held to be land, necessarily gave him title to the house, as part thereof, so that in law there was no structure within the meaning of the statute referred to, distinct from the land, upon which a lien could take effect. Assuming, for the purposes of this case, that the last clause of the section was intended to apply where the land referred to therein is owned by a third person in fee, we do not feel like extending the provision by saying that the peculiar lien mentioned therein was intended to be given in a case where the owner of the building has an interest of any kind in the realty. The statute nowhere, even by implication, repeals the common-law right of the mortgagee of real estate to subject all improvements made thereon by the owner or mortgagor subsequently to his incumbrance, to the payment of his demand, but, on the contrary, recognizes and expressly postpones this statutory lien to all prior liens and incumbrances of which the mechanic or material-man had actual or constructive notice at the commencement of his work or the furnishing of the materials. It follows necessarily from these conclusions that the county court

erred in decreeing that appellant should hold his title to the premises in question subject to the lien of appellees, and in the directions given for the enforcement of such lien, and that so far the decree must be reversed.

The decree should be reversed and the bill dismissed as to the appellant.

I concur: MACON, C.

I dissent: STALLCUP, C.

BY THE COURT. For the reasons assigned in the foregoing opinion of the majority of the supreme court commissioners, the judgment of the county court is reversed, and the cause remanded, with directions to dismiss the complaint as to the appellant.

(10 Colo. 327)

SUPPLY DITCH CO. v. ELLIOTT and another.

(Supreme Court of Colorado. October 31, 1887.)

CORPORATIONS—MEMBERS AND STOCKHOLDERS—TRANSFER OF STOCK—WATER RIGHTS.

Plaintiff was a supply ditch company, and each share of its stock entitled the holder to take 10 inches of water, upon condition that he applied for water before May 20th, and paid the company the sum of one dollar per inch, or secured the company for all the water which he might use. One M. owned two shares, which he pledged to P. before he received his certificate, but the company had notice of the transaction, and recognized P.'s rights. Afterwards M. assigned absolutely the two shares to defendant E. Subsequently the company issued to P. two certificates for the two shares pledged to him, which one Y. attached and sold to B. under an execution in favor of Y., against P., and B. filed the sheriff's certificate of sale with the company. On May 19, 1883, defendant E. applied to plaintiff for 20 inches of water, but did not inform the company of his claim to the M. shares, and tendered \$20, but his demand and tender were refused. About the first of June following, he produced to the plaintiff an order from M. directing the company to transfer to him (E.) the two shares. About the same time P. released to him all his interest in the shares, and directed the company to transfer them to E. Upon the presentation of these orders, E. demanded the transfer of the stock to him on the company's books, but made no demand for water; nor did he tender payment or security for the 20 inches of water which he had demanded on the nineteenth of May; nor did he offer to surrender to the company the certificates of stock, which at this time were still in possession of P. The company refused to make the transfer, and thereupon E. took forcibly 20 inches of water, and the company brought this action for the trespass. The defendant's fourth defense set up the facts on which E.'s right to the stock was based, and E. brought into court \$20 as the value of the water taken. The plaintiff demurred, and the court overruled the demurrer and rendered judgment for the defendants, and allowed them to take out of court the \$20 which they had tendered. *Held*, that as defendant E., on June 1st, when a demand was made on the company for a transfer of the stock, did not produce the certificates, nor give any excuse for their non-production, nor demand the water under these shares, nor offer to pay for it, the defendants had no right to take the water, and the demurrer should have been sustained.

Commissioners' decision. Error to district court, Boulder county.

Dolloff & Rittenhouse, for plaintiff in error. *B. L. Carr*, for defendant in error.

MACON, C. From the admissions of the pleadings in this case, the following facts appear: During and prior to the year 1883, plaintiff in error was an incorporated ditch company, owning an irrigating ditch, and having its capital stock divided into shares, each of which entitled the holder thereof to take from said company ditch 10 inches of water for irrigating purposes, upon the condition that he applied for such water before or by the twentieth day of May of the year in which he desired to use the water, and pay or secure to the company the sum of one dollar per inch for all water which he might use. In 1879 one Moyer owned two shares of the stock of plaintiff in error, and

pledged the same to one I. M. Phillips in trust to secure the payment of a debt due from him to one John Phillips. When this pledge of stock was made, the certificates thereof had not been issued by the company, but the company was advised of the nature of the transaction between Moyer and Phillips, and recognized the right of Moyer to the stock by allowing him to use water and vote at meetings of the company. It seems that no certificates for these shares were issued by the company until the twenty-eighth day of September, 1882, when the company, without the consent of Moyer, issued two certificates for his stock to I. M. Phillips, numbered respectively 385 and 386. Before the issuance of the certificates to I. M. Phillips, and on the eighteenth day of September, 1882, Moyer assigned absolutely these two shares of stock to defendant in error Elliott; but no notice of such assignment was given to the company by Elliott, or any other person, until some time in June, 1883.

In January, 1883, one Yates sued I. M. Phillips, and in the statutory way attached these two shares of stock; and on the eighth day of February, 1883, the same were sold by the sheriff of Boulder county, under the judgment obtained by said Yates against said I. M. Phillips; and one C. J. Buck became the purchaser thereof, who, on the next day, left with the secretary of the company a copy of the certificate of sale issued to him by the sheriff, which was by said secretary placed on file in the proper book of the company. When Yates brought his suit, and when the sale was made to Buck of these shares, both Yates and Buck had notice of the extent and character of I. M. Phillips' interest in said shares of stock.

On the nineteenth day of May, 1883, defendant in error Elliott applied to plaintiff in error for 20 inches of water, in addition to 30 inches to which he was entitled under three shares of stock in the plaintiff company, but did not inform it of his ownership or claim of right to the Moyer shares, and left the company in ignorance of his claim thereto, and tendered \$20 for the additional water demanded, which demand and tender were refused by plaintiff in error. Again, about the first of June following, Elliott produced to the plaintiff in error an order in writing from said Moyer, directing the company to transfer on its books to him (Elliott) the said two shares of stock, and about the same time both I. M. and John Phillips, in writing, directed the company to make such transfer to said Elliott, and release to him all their interest and right in and to said stock. Upon the presentation of these orders to the company, Elliott demanded the transfer of the stock to him on the company books, but made no demand for water; nor did he tender payment or security to the company for the 20 inches of additional water demanded on May 19th.

When this demand was made by Elliott for the transfer of the said stock, the two certificates numbered 385 and 386, before that time issued to I. M. Phillips, were still in the possession of said Phillips, and were not produced to the company by either Elliott or Phillips, and no offer was made to surrender such certificates at that time, nor until about the thirteenth day of July following. The company refused to make such transfer to Elliott; and, after the refusal of the company to transfer this stock to Elliott, (but at what date does not appear,) defendants in error took forcibly, and against the will of the company, 20 inches of water under Elliott's claim of right to the said Moyer stock; for the taking of which this action was brought.

Defendants answered, and set up four distinct defenses: *First*, that they did not take the water unlawfully; *second*, that plaintiff was not damaged, as alleged in the complaint; *third*, admitting the taking of the water, but justifying under a claim of five shares of stock in the plaintiff company, two of which were the said Moyer shares; and, *fourth*, setting out all the facts on which said Elliott's right to the stock was based, and the other facts which have already been stated in this opinion, and brought into court the sum of \$20 as the price and value of the water taken and used by them, and for which this action was brought. Plaintiff replied to the third defense, ad-

mitting said Elliott's ownership to three shares of stock, as alleged by him in said defense, but denied his ownership to more than the three shares, and to the fourth defense filed its demurrer. The court overruled the demurrer, and plaintiff electing to stand thereby, the court rendered judgment for defendants, that the suit be dismissed, and that they be allowed to take out of court the \$20 which they had tendered.

In defending the action, defendants relied upon Elliott's ownership of the Moyer stock, and the right to 20 inches of water thereunder, as a contract right, growing out of the relation of said Elliott to the plaintiff company as a stockholder therein. He relied upon his right as a contract right, by virtue of the stock, and a compliance with the regulations of the plaintiff set up in his fourth defense. If Elliott had been the owner of the stock, and the company had accepted the tender of \$20 made to it by him on the nineteenth of May, 1883, he would have been entitled to water, upon proper application or proceeding therefor; and the defense rests upon the assumption that he was such owner, and that the tender made was equivalent to payment of the water dues. Having used the water after tender, and brought the money into court, they acknowledged that they were indebted to the company to that extent, and the duty of payment.

It is evident that in its judgment the court sustained defendant's defense, recognizing his contract rights, and held the tender equivalent to payment, and that by the tender the defendants were the owners of so much water, which they had taken from the ditch of plaintiff and used. The legal effect of a plea of tender is an irrebuttable presumption of indebtedness to the extent of the tender, and when the tender is brought into court for the use of plaintiff, that amount is considered as stricken from the complaint; and if more is claimed by plaintiff, he proceeds for the excess of his demand above the tender only. *Bank v. Southerland*, 3 Cow. 336; *Spalding v. Vandercook*, 2 Wend. 431; *Johnston v. Insurance Co.*, 7 Johns. 315; *Hubbard v. Knous*, 7 Cush. 556. After a plea of tender, a plaintiff may be nonsuited in proceeding to recover beyond the tender. *Jenkins, v. Cutchens*, 2 Miles, 65; *McCredy v. Fey*, 7 Watts, 499. From this position, it follows inevitably that, if the court were right in finding the defense made out, it erred in adjudging the money brought into court in support of the tender of May 19th to defendants. The effect of the judgment, in such case, was to give to defendants under the contract both the water and the money, which, by their fourth defense, they confess the payment or security of was a condition precedent to their right to use the water. But, as we shall hereafter see, defendant wholly failed to sustain his alleged defense.

The first assignment of error—"That the court erred in overruling the plaintiff's demurrer to the further and separate answer and defense contained in defendants' answer"—presents a question that will be best disposed of by first referring to a few rules and principles of pleading, and to some of the settled rules of the law of corporations.

As to the rules of pleading which it is necessary to examine here, it may be said that it is elementary that a demurrer admits all the material facts well pleaded in the pleading to which the demurrer applies, and all the necessary intendment and inferences of, and from such facts, but no more, and that, as to all facts not alleged in a pleading attacked by a demurrer, or arising from necessary inference out of the facts alleged, they are assumed not to exist. *Jones v. Lathan*, 70 Ala. 164, in which case a demurrer was filed to a bill in equity, and the court held the following language: "It is our duty to construe the bill most strongly against the pleader, and, on such a motion as this, to hold that every material fact not averred does not exist;" citing *Cockeral v. Gurley*, 26 Ala. 405; *Lucas v. Oliver*, 34 Ala. 631. In the next place, argumentative pleading is bad, under all systems of pleading in this country. The application of these rules will be made further on in this opinion.

The law of corporations applicable to the questions under discussion will be stated in a few words:

First. The relation of stockholders to the corporation whose stock they hold is that of contract, and the rights and duties of both parties grow out of contract, implied in a subscription for stock, construed by the provisions of the charter or articles of incorporation.

Second. The corporation is a trustee for its stockholders, and is bound to protect their interests. 1 Mor. Corp. § 237, and cases cited; *Lovry v. Bank*, Taney, 310; *Bayard v. Bank*, 52 Pa. St. 232; *Atkinson v. Atkinson*, 8 Allen, 15; *Shaw v. Spencer*, 100 Mass. 382; *Fisher v. Brown*, 104 Mass. 259; *Duncan v. Jardon*, 15 Wall. 165.

Third. Certificates of stock are assignable, and pass from hand to hand by indorsement, as bills of exchange and promissory notes pass, and holders of such certificates are *prima facie* presumed to be the *bona fide* owners thereof, and an innocent purchaser thereof for value will hold them against the true owner, where the latter has placed it in the power of the assignor to perpetrate a fraud upon the innocent assignee. *Lanier v. Bank*, 11 Wall. 369. In that case Justice DAVIS, speaking for the court, says: "The power to transfer their stock is one of the most valuable franchises conferred by congress upon banking associations. Without this power, it can readily be seen the value of the stock would be greatly lessened, and obviously, whatever contributes to make the shares of stock a safe mode of investment, and easily convertible, tends to enhance their value. It is no less to the interest of the shareholder than the public that the certificate representing his stock should be in a form to secure public confidence; for without this he could not negotiate it to any advantage. It is in obedience to this requirement that stock certificates of all kinds have been construed in a way to invite the confidence of business men, so that they become the basis of commercial transaction in all the large cities of the country, and are sold in open market the same as other securities. Although neither in form or character negotiable paper, they approximate to it as nearly as practicable. If we assume that the certificates in question are not different from those in general use by corporations, (and the assumption is a safe one,) it is easy to see why investments of this character are sought after and relied upon. No better form could be adopted to assure the purchaser that he can buy with safety. He is told under the seal of the corporation that the shareholder is entitled to so much stock, which can be transferred on the books of the corporation in person or by attorney, when the certificates are surrendered, but not otherwise. This is a notification to all persons interested to know that whoever in good faith buys the stock and produces to the corporation the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred to him. And the notification goes farther, for it assures the holder that the corporation will not transfer the stock to any one not in possession of the certificates."

Fourth. A corporation is ordinarily justified in treating the assignee and holder of certificates of stock as the legal and equitable owner thereof. *Lanier v. Bank*, *supra*.

Fifth. Any transfer of stock by a corporation, upon its books, in the absence of the original certificate, is made at its peril, and the real owner of the stock, evidenced by such certificate, loses nothing thereby; but upon the stock so issued by wrong or mistake, the corporation is liable to a *bona fide* holder thereof. *Davis v. Bank*, 2 Bing. 393; *Pollock v. Bank*, 7 N. Y. 274; *Cohen v. Gwynn*, 4 Md. Ch. 357; *In re Railway Co.*, L. R. 3 Q. B. 584; *Donaldson v. Jalliot*, L. R. 3 Eq. 374; *Sewall v. Boston W. P. Co.*, 4 Allen, 277.

Testing the admitted facts of this case by these rules of law, it is manifest that the demurrer to the fourth defense ought to have been sustained. When, on the nineteenth day of May, 1883, defendant in error Elliott applied for the water, and tendered the \$20, the company did not know he was the owner of

this Moyer stock, and he did not so inform it. He did not even declare himself to be such owner, and exhibited no evidence of title. He did not then demand a transfer of the stock to himself on the company books, but made his request for water, as a mere stranger desiring to buy so much water. We say this, because, in the answer, there is no averment that Elliott informed the company of his rights in the premises, either orally or by any written evidence; nor does it appear that at that time he made any demand for a transfer of the stock to himself, nor presented the certificates he claimed by assignment from Phillips. To assume from the averments of the cross-complaint that he did so would be the most vicious kind of argument, which no court will make in favor of the pleader. The absence of all allegations to that effect, by the sound rules of pleading, require the assumption that no such facts existed, and the company was bound, in the absence of such evidence, from its duties to its stockholders, to refuse to recognize Elliott as the owner of the stock, and was justified in refusing to permit him to take any more water from the ditch than he was entitled to under the three shares of stock admitted to belong to him. If on that occasion Elliott did submit to the company proper evidence of his title, he should have so alleged in his pleading. The company, therefore, was not in default in refusing to accept the tender of \$20, and to permit Elliott to take the water for which he applied, and, if not in default, then defendants in error were not justified in taking the water as they did. Hence, unless the conduct of the plaintiff in error in refusing on the first day of June, 1883, to transfer the stock to defendant in error Elliott was so far wrong as to justify defendants in their conduct,—if trespass could be excused,—there is nothing in the case to relieve them from the charge of trespass upon the property of plaintiff in error. To determine this question a brief review of the transactions of June 1st, between the company and the defendant in error Elliott, Moyer, and the two Phillips, is necessary. From the admitted averments of the cross-complaint, it appears that on June 1st, Elliott did not demand water under these shares, nor offer to pay for it, but only required the transfer of the stock to himself. That he did not then have in his possession the two certificates for this stock, but that they were in the possession of I. M. Phillips; that the latter did not, until about six weeks after this demand by Elliott, surrender these two certificates to the company for Elliott's benefit. As has been seen, a corporation always acts at its peril in issuing stock to an alleged assignee thereof, in the absence of the assigned certificates, because, if new certificates of stock are issued without the surrender of the old ones, and such new stock passes into the hands of an innocent purchaser, it will be good in his favor against the corporation.

Here, then, on June 1st, a demand was made on the company for a transfer of this stock, upon the order of Moyer and the two Phillips, but the certificates were not produced, and no excuse or explanation was given for their non-production. When, on the books of the company, was recorded the certificate of sale of this same stock to Buck on February 8th preceding? The company did right in refusing to make the transfer. But, if the missing certificates had been produced, and offered for cancellation, and the transfer had been made, such act alone would not have entitled defendants in error to the water. They still had to pay or offer to pay or secure, the \$20 due the company for the water, before they could lawfully demand it. This they failed to do, and by reason of such failure, they could have no right to withdraw water from the ditch, and in doing so were trespassers.

The court erred in overruling the demurrer to the cross-complaint; and for this, the judgment must be reversed, and the cause remanded, with directions to proceed according to law.

We concur: RISING, C.; STALLCUP, C.

BY THE COURT. For the reasons assigned in the foregoing opinion the judgment of the district court is reversed, and the cause remanded for a new trial.

(15 Colo. 481)

CALDWELL v. DAVIS.

(*Supreme Court of Colorado*. November 25, 1887.)

1. PARTNERSHIP—RIGHTS OF PARTNERS—FRAUD—ACCOUSING.

Plaintiff alleged a partnership between himself and defendant for the purpose of obtaining an option on and selling certain mining claims. The option was to run from April, 1880, to July 22d. Plaintiff went east to try to sell the claims, but failed, and returned on July 11th, and on the 12th he assigned all his rights to the claims by reason of the option to defendant. On the 13th defendant sold one-half interest in the claims for more than the price the parties had agreed to pay for all the claims. Afterwards plaintiff brought an action to have his assignment set aside, and for an accounting and dissolution of the partnership. The evidence clearly showed that the parties had secured the option by each making one-half of a payment down, and each agreeing to pay one-half of the balance when it became due, and if a sale could be effected before the option run out then they were to share equally the profits or losses. The evidence also showed that the sale of the one-half of the claims by defendant was made during the life of this agreement, and that, when plaintiff returned from the east, defendant concealed from him the sale he had made, and represented that he wanted the assignment of plaintiff's rights, so that he could buy the claims for himself; that plaintiff, relying on these representations, made the assignment. *Held*, that the parties were copartners, and defendant, by his concealment of, or failure to disclose, the facts in regard to the sale he had made, was guilty of actual fraud, and plaintiff was entitled to the relief he asked.

2. FRAUD—ACTION TO SET ASIDE CONTRACT—LACHES.

Plaintiff did not bring his suit to set aside a contract claimed to be fraudulent until 18 months after the alleged fraud occurred. Defendant pleaded that plaintiff by his laches had forfeited his right of action. Plaintiff alleged that he brought his action as soon after the discovery of the facts of the fraud as its nature would admit, and there was no evidence to negative the allegation. *Held*, that no such laches on the part of plaintiff was shown as would defeat the action.

3. WITNESS—PRIVILEGED COMMUNICATIONS—ATTORNEY AND CLIENT.

Plaintiff and defendant had been partners in some options on mining property. The day after plaintiff had sold his interest to defendant, defendant sold a half interest in the property to a third party at a large advance. Plaintiff sued defendant for an accounting, alleging fraudulent concealment of the negotiations with the third party. On the trial the lawyer at whose office defendant and the owners and the third party met, and who drew for them the deed from the owners to the third party, was asked as to conversations had with him at the time of drawing the deed, and also as to conversations between the parties when they met at his office to talk between themselves. Defendant objected to the questions, on the ground that the communications were between attorney and client, and privileged. The evidence showed that the lawyer never made any communication to defendant in the character of legal adviser, and his only employment was to draw the deed. *Held*, that the court erred in rejecting the testimony.

Commissioners' decision. Appeal from district court, Dolores county.

Appellant in his complaint alleged a copartnership between himself and defendant, formed for the purpose of buying and selling an option of the Bullion, Hidden Treasure, and Cleveland mining claims; that on the nineteenth day of April, 1880, H. S. Rutan, Stillman P. Norton, and Ebert Norton, the owners of said mining claims, made to E. L. Davis and H. J. Caldwell, appellee and appellant herein, a bond, conditioned to convey said claims to said Davis and Caldwell, upon payment by them of the sum of \$7,500 on or before July 22, 1880, in consideration of the sum of \$500 paid by said Davis and Caldwell; that plaintiff went east, and expended a large sum of money, to-wit, the sum of more than \$700, in endeavoring to sell said claims; that during plaintiff's absence from this state endeavoring to make such sale, the defendant negotiated a sale of an undivided one-half of said mining claims to Jacob Ohlweiler for the sum of \$8,000, and that said agreement of sale was afterwards carried out; that, upon the return of plaintiff to this state, and on the twelfth day of July, 1880, the defendant, with intent to defraud the plain-

tiff, fraudulently suppressed and concealed from plaintiff that he had made said agreement with Ohlwiler, and kept plaintiff in total ignorance thereof, and said nothing to plaintiff about his having sought or found a purchaser for said claims, and represented to plaintiff that he had not succeeded in finding a purchaser, and that he desired to purchase said mining claims for himself; that plaintiff, relying wholly upon the good faith, honor, and integrity of the defendant, and in total ignorance of said sale to Ohlwiler, assigned all his interest in said bond and property to the defendant for the sum of \$500 and a horse of the value of \$100; that, at the time said assignment was made, there was no accounting or settlements, between plaintiff and defendant, as to their said partnership affairs, and that there never has been such an accounting or settlement; that, on the thirteenth day of July, 1880, the said owners of said mining claims made, executed, and delivered to defendant, and to said Jacob Ohlwiler, deeds to the whole of said mining claims, share and share alike; that said Ohlwiler paid all of the consideration therefor, being the full sum of \$8,000, and that defendant paid no consideration therefor, but that he obtained an undivided one-half interest in and to each of said claims, and the sum of \$500, on account of and by means of said option or title bond on said mining claims; that said undivided one-half of said mining claims and said \$500 are gains and profits legitimately accruing to said copartnership; and plaintiff asks that an accounting may be had between plaintiff and defendant as to all partnership transactions regarding said option and mining claims, and offers to pay to defendant any sum that may be found due from the plaintiff to defendant, but charges the fact to be that defendant will be found to be a debtor to the plaintiff on such accounting; that suspicion of the fraud was first raised in the plaintiff's mind in the summer of 1882, but that the facts were not discovered until the fall of 1882, and that this suit was instituted as soon after such discovery as the nature of the case would admit. Prayed the judgment of the court that said assignment from plaintiff to defendant be declared fraudulent and void; that an account be taken of all copartnership dealings and transactions; that said partnership be dissolved; and that defendant be adjudged to convey by deed to the plaintiff an undivided one-quarter interest in and to each of said mining claims.

Defendant, in his answer, denies the copartnership; denies that, during the absence of the plaintiff from this state, defendant succeeded in finding a purchaser for any portion of said claims, or made with Ohlwiler any agreement as to a sale of said claims, or any interest therein; denies any intent to defraud plaintiff, or that he fraudulently suppressed or concealed the fact of having made any agreement for the sale of said claims, or any interest therein; denies that he induced the plaintiff, by any fraudulent concealments or false representations, to make the assignment to him; alleges that, by agreement between plaintiff and defendant, the duty of selling said claims devolved solely on the plaintiff; alleges, upon information and belief, that plaintiff acquired full and complete knowledge of all circumstances surrounding and affecting the acquirement by said Ohlwiler of an interest in said claims.

Replication of plaintiff denies that the duty of selling said mining claims, or any part thereof, devolved solely upon the plaintiff; denies that in the month of July, 1880, he had knowledge of the circumstances of the sale to Ohlwiler, and avers that he did not and could not obtain such knowledge until 18 months after such date.

Trial to the court, and judgment for defendant, from which plaintiff appealed.

The evidence shows that Davis and Caldwell entered into an agreement to get a bond on the Bullion, Hidden Treasure, and Cleveland lode mining claims, for the purpose of selling the option so acquired at a profit; that they obtained such bond on the nineteenth day of April, 1880, by which bond the owners of said claims, in consideration of the sum of \$500 to them in hand paid by Davis

and Caldwell, agreed to convey to E. L. Davis and H. J. Caldwell said claims, upon the payment of the sum of \$7,500 on or before July 22, 1880; that Davis and Caldwell each paid one-half of said sum of \$500; that Caldwell went east to sell said option immediately after said bond was secured, and returned to this state on the eleventh day of July, 1880, without having made a sale; that before Caldwell returned from the east, and some time in the forepart of June, he wrote to Davis that he had failed to make a sale, and that he did not feel disposed to put the amount of the bonded price of the properties into them; that Davis, upon the receipt of this letter, commenced negotiations with Jacob Ohlwiler for a sale to him of an interest in the bonded property.

The following testimony of Jacob Ohlwiler clearly shows the nature of the transaction between Davis and Ohlwiler: "*Question.* When did you become interested in these claims? *Answer.* In 1880. *Q.* About what time? *A.* July 13. *Q.* How did you come to get interested, and how did you get interested in these claims? *A.* By purchase. *Q.* From whom? *A.* From E. L. Davis,—from the owners through E. L. Davis. *Q.* How were you induced—how did you come—to buy them or obtain an interest in them? *A.* By proposition from E. L. Davis. *Q.* When was that proposition first made to you? *A.* I couldn't tell the date; but I think some time in June,—the latter part of June. *Q.* What was the proposition that you should pay for the half; how much did he propose that you should pay for half? *A.* Eight thousand dollars. *Q.* Did he explain to you, or did you have any conversation with him, in regard to the condition in which the title to the property stood? *A.* Yes, sir; Caldwell and he (Davis) had a bond on it. *Q.* Did he state how much of a bond? *A.* No. *Q.* Did he state the bonded price? *A.* No, sir. *Q.* Did you know what the bonded price was? *A.* Not at that time. *Q.* State, Mr. Ohlwiler, what the substance of the conversation was you had at this time at Columbus or Telluride with Mr. Davis with reference to these mines,—these lodes. State the substance of the conversation you had. *A.* Well, I recollect he stated that he (Mr. Davis) and Mr. Caldwell had a bond on the mine, and if Mr. Caldwell did not make a sale they were for sale, and that I could buy a half interest or more. That was about all that was said at that meeting; that was the substance. *Q.* How long after this conversation with Mr. Davis at Columbia—how long a period elapsed—before you made any preparation to purchase a half interest in this property? *A.* I don't fully recall the time. It was after some several weeks, though I don't know how many,—until several weeks after I talked with Davis upon the subject. *Q.* In the mean time, between the conversation at Columbia and the next conversation you had with Davis, you entered into a correspondence with another person with regard to this one-half interest? *A.* Yes, sir. *Q.* When did you next have a conversation with Davis with reference to this property? *A.* I stated, several weeks hence. *Q.* Where was it? *A.* At Ouray, I think. *Q.* Can you remember about the date, or near the date? *A.* I don't think I can. *Q.* Do you remember how long previous to your buying an interest in the property it was? *A.* No; I can't fix the date. *Q.* Well then, days, weeks, or months? *A.* It may have been two weeks before I made the purchase. *Q.* And what was the substance of this conversation? *A.* That I was to correspond with my friends in regard to it, and see whether I could raise the means to meet the payment. *Q.* Did you have any conversation with Davis at Ouray concerning the condition in which the property was, in which the title of the property stood, and how you were to receive one-half interest in the property for the eight thousand dollars? *A.* I understood that Mr. Caldwell could not sell the property, and that I would look for a straight title from him, or I didn't want the property. *Q.* From whom? *A.* From Davis or any other person,—a straight title for half of the interest. *Q.* Did you have any conversation with Davis in regard to the manner in which you were to receive this straight title to one-half interest,—how Davis was to arrange the

matter so as to give you a straight title? A. I think that was in the presence of Mr. Letcher. Q. Will you state to the court what was the conversation? A. I think Mr. Letcher stated there was— [Defendant's counsel objected to the witness giving Mr. Letcher's statements.] Q. Was Mr. Davis present? A. Mr. Davis was present. [And thereupon the court overruled the objection, and the witness answered.] A. That title may be had, that Mr. Letcher said the title may be had, through making purchase of Mr. Davis, or making purchase of Mr. Caldwell, or they sell a joint interest to me, or that the bond lapses the time, and then get it that way. I told them it didn't make any difference to me so I got a straight title. I don't care how they done it; how it was done. Q. While you were at Ouray, what understanding, if any, did you have with Davis as to your purchase of this property? A. That if I could raise the money, I would take the property, if he could give me a good deed and title. Q. What understanding did you have with Davis as to what you should do with reference to raising the money? A. I was to go on to Lake City, and telegraph to my friend for funds to pay this eight thousand dollars. Q. Was there any understanding with reference to any correspondence? A. There may have been before that,—before I went to telegraph. Q. There may have been? Are you not certain whether there was or not? A. I think there was. Q. When did you buy one-half of this property, and how did you come to buy it? A. On the thirteenth day of July, 1880, by paying eight thousand dollars, and receiving a deed from Nortons and Rutan. Q. How did you pay this eight thousand dollars, and to whom? A. To Rutan and Nortons, two brothers, and Mr. Davis. Q. How much did you pay Mr. Davis? A. I think it was five hundred dollars. Q. On the 12th or 13th did you have any conversation with Mr. Davis in regard to this property? A. I think it was on the morning of the 13th, I told him I was ready to buy the property. Q. What did he state? A. He said he was ready to sell it,—ready to give deed. Q. What did he state with reference to being able to give deed at that time,—to give you a straight title to the property on the 13th? A. That he had purchased Caldwell's interest in the bond, and the transfer would be made direct from the parties owning the property. Q. At what price was the whole property bought from the owners? A. Eight thousand dollars. Q. How much of the eight thousand dollars did the owners receive from you? A. Seventy-five hundred dollars. Q. Is it not a fact that, previous to your going to Lake City, you had an understanding—there was an understanding had between yourself and E. L. Davis—that if Mr. Davis could succeed in buying the interest of Mr. Caldwell in this bond, that you were to buy one-half of this property for eight thousand dollars? A. I think there was."

Upon cross-examination, this witness was asked the following question: "Q. I will ask you if Davis on his part, in communications with you prior to going to Lake City, did not state it as a condition that he should first become the sole owner of the bond; that he should buy the Caldwell interest on his part? A. I think there was such a conversation on his part."

It is also shown by the evidence that Caldwell returned from the east on the eleventh day of July, and on the twelfth day of July assigned his interest in the bond to Davis for \$500 and a horse worth \$100; that Davis did not inform Caldwell, and Caldwell did not know, of the negotiations had between Davis and Ohlwiler, and that the assignment of Caldwell's interest in the bond was made by him in total ignorance of such negotiations. The allegation in defendant's answer, that the duty of selling said mining claims devolved solely on the plaintiff, is not established by the evidence.

T. J. O'Donnell, for appellant. J. F. Vaile, for appellee.

RISEING, C. The numerous assignments of error will not be separately discussed; but, under a general consideration of the case, the rulings of the court below, upon which the errors are assigned, will be passed upon.

The first and most important question for consideration is that of the sufficiency of the evidence to entitle the appellant to the relief demanded. Appellant bases his right of relief upon the conduct of the appellee; and how far the conduct of the appellee affects such right must be determined by the relations of the parties to each other. The plaintiff alleges that they were co-partners for the purpose of buying and selling an option on certain mining claims. Under the decision in *Kayser v. Maugham*, 8 Colo. 232, 6 Pac. Rep. 893, the evidence in this case fully establishes the allegation. The relation existing between partners is one of trust and confidence. Pom. Eq. 963. Partners, when dealing with each other in relation to partnership matters, are required to make full disclosure of all material facts within their knowledge, in any way relating to the partnership affairs. A community of interest exists between the partners, and a community of interest produces a community of duty. This community of interest, by the terms of the bond and the agreement of the parties, was to continue until the twenty-second day of July. The bond having been obtained for the purpose of selling the option so acquired at a profit, for the joint benefit of appellant and appellee, a joint duty and obligation rested upon each, during the full time the bond had to run, to work for the accomplishment of such purpose. We think the evidence clearly shows that appellee did not perform this duty; that, prior to appellant's return from the east, appellee had negotiated a sale to Ohlwiler of one-half interest in the property for his own exclusive benefit; that he deliberately planned to obtain appellant's interest in the bond to enable him to carry out his negotiations with Ohlwiler; that he intentionally concealed from appellant all knowledge of his negotiations with Ohlwiler, and he led appellant to believe that he wanted appellant's interest in the bond for the sole purpose of enabling him to put up the money and take the property.

In Story, Eq. § 329a, it is said: "When the contract is between those who sustain, or have lately sustained, any intimate and confidential relation, the law presumes the existence of that superiority and influence on the one part, and that confidence and dependence on the other, which is the natural result of the relation, and will accordingly decree the cancellation of the contract, unless it appear affirmatively to have been equal and just." In the making of this contract, the parties were not on equal footing. Davis had knowledge of facts relating to the sale of the property which Caldwell did not have, and which knowledge equity and fair dealing required of him to disclose to Caldwell, because such knowledge was obtained under circumstances which made it the common property of himself and Caldwell. The concealment of, or the failure to disclose, these facts to Caldwell made Davis guilty of an actual fraud. Pom. Eq. Jur. § 901; Story, Eq. Jur. § 308; *Dambmann v. Schulting*, 75 N. Y. 55, 61.

The contract between Davis and Caldwell was unequal, in that it enabled Davis to obtain all the benefits under their joint undertaking, and unjust in that such benefits were so obtained by reason of the suppression by Davis of facts which it was his duty to disclose.

In *Fitzsimmons v. Joslin*, 21 Vt. 129, 138, REDFIELD, J., in commenting upon conduct of this nature, says: "Can it be said, then, that when one party acts under a misconception of the facts most material to the contract, which are known to the other party, and studiously kept back, knowing that the other side is acting under this delusion, can it be said that such contract is binding at the bar of conscience, or, indeed, in moral or legal justice? I trust not."

In making the sale to Davis, Caldwell was acting under misconception of most material facts. He was led to believe that a joint sale for the joint benefit of himself and Davis could not be made at a time when the only impediment in the way of a complete sale for the joint benefit of the parties was the desire and intention of Davis to obtain the full benefits of such sale for

himself alone. Davis was under a legal as well as a moral duty and obligation to place Caldwell in possession of all information he had obtained relating to the sale, or probable sale, of the bonded property, during the existence of the copartnership, before he attempted to contract with Caldwell for his interest; and because of his failure to perform this duty and obligation, the contract should be canceled.

The evidence fails to disclose such laches on the part of plaintiff in the bringing of his suit as will defeat his right to relief.

The question of tender is met by the allegations of the complaint that plaintiff offers to pay to the defendant, his copartner, what, if anything, should be found due from plaintiff to defendant upon an accounting and settlement of the partnership affairs, and demanding that such accounting be had, and charging the fact to be that the defendant will be found to be his debtor on such accounting. If in fact the defendant is indebted to the plaintiff in a sum equal to the amount defendant paid for the assignment of plaintiff's interest, we see no reason why the court of equity should require a further tender to be made. *Watts v. White*, 13 Cal. 321.

The question of laches by the plaintiff in bringing his suit was made an issue by the pleadings, and the seventh, eighth, ninth, and tenth assignments of error are based upon the rulings of the court in the rejection of the testimony offered by the plaintiff upon this issue. There was no exception to the ruling of the court upon which the eighth assignment is based. In view of our conclusions upon another branch of the case, it is not necessary to discuss these assignments. The question of laches must be determined upon the knowledge of the plaintiff, and his diligence in obtaining knowledge of the facts upon which his right to relief rests. There was no such laches on his part as will defeat his right to relief.

The errors assigned upon the ruling of the court in rejecting testimony of the witness Letcher may all be considered together; the objection to each of the questions being based upon the proposition that the matter inquired about consisted of privileged communications by Davis, as client, to Letcher as his attorney. It appears from the evidence that Davis went to Letcher between the seventh and tenth days of July, 1880, with one of the Nortons and Mr. Rutan, at which time Letcher drew a release of warranty from Davis to the Nortons and Rutan, or to one of them, and that afterwards he drew a deed, and examined the title to the bonded property. Letcher further says that he presumes the deed he drew was the result of conversation had between Davis, Ohlweiler, Rutan, and the Nortons at his office. To entitle a party to the protection accorded to privileged communications, the communications must have been made to the counsel, attorney, or solicitor acting, for the time being, in the character of legal adviser, and must be made by the client for the purpose of professional advice or aid, upon the subject of his rights and liabilities. 1 Greenl. Ev. §§ 239, 240. The evidence does not show that any communications had been made by Davis to Letcher, as his legal adviser, upon the subject of his rights and liabilities. The only employment of Letcher by Davis was to draw the release and deed. In drawing these instruments, Letcher acted as a scrivener merely, bringing this case directly within the ruling in *Machette v. Wanless*, 2 Colo. 169, 179. In this case, as in *Machette v. Wanless*, the evidence does not show that Letcher was an attorney.

The witness was questioned as to the conversation between Davis and other persons in his presence, concerning matters not relating to his employment, and which were not communications made to him, and as to which no confidence was reposed in him. The court erred in sustaining the objections made to the questions put to the witness Letcher, excepting the one upon which the fourteenth assignment is based.

The judgment should be reversed, and the cause remanded in conformity with the views herein expressed.

We concur: **MACON, C.; STALLCUP, C.**

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment of the district court is reversed, and the cause remanded.

(10 Colo. 383)

HUGHES and others v. FISHER and others.

(*Supreme Court of Colorado.* November 11, 1887.)

1. FRAUDS, STATUTE OF—PROMISE TO PAY DEBT OF ANOTHER—ACCEPTANCE OF ORDER.

Defendants were sureties for a contractor, and, to protect them, all money due him was paid to them, and they disbursed it on his order. Plaintiffs were the holders of an order on defendants payable at a future time. It was presented to defendants, and by them verbally accepted. *Held*, that this acceptance was not a promise to pay the debt of another, but a promise to disburse the funds of another in a certain way, and does not fall within the statute of frauds.

2. ORDERS—CONDITIONAL—VERBAL ACCEPTANCE.

Defendants, as sureties for a contractor, received all moneys due him on his contract, and paid the same out on his order. Plaintiffs were holders of an order for the payment of money which was indorsed, "This order to be paid on final settlement of stone-work." Defendants accepted the order verbally. *Held*, that this was a conditional order, contingent on a certain event, and upon the happening of that event defendants became bound by their acceptance to pay the order.

3. PARTIES—JOINDER—PROCEDURE BEFORE JUSTICE OF THE PEACE.

Code Colo. § 14, provides that persons jointly or severally liable on the same obligation or instrument, including parties to bills of exchange and promissory notes, and sureties on the same, or separate instruments, may all or any of them be included in the same action. *Held* that, under the statute, this joinder of parties can be made in justice's court as well as in courts of record.

Error to county court, Pueblo county.

This action was brought by Fisher Bros. to recover from Hughes Bros. as acceptors, and from H. J. Coy as drawer thereof, the amount specified in the following instrument:

"\$115.09.

DECEMBER 6, 1882.

"*Messrs. Hughes Brothers:* Pay to the order of Fisher Bros., freight advanced on stone, one hundred and fifteen dollars and nine cents. Charge to account of H. J. Coy.

No. 46."

On the back of the instrument was indorsed the following words, to-wit: "This order to be paid on final settlement of stone-work on city hall, and charge to the account of HARDIN & RAMSEY."

Hughes Bros. were sureties for Coy, who was a contractor and builder, upon a certain bond given by him in connection with his contract for the erection of the city hall of Pueblo. To protect them, all moneys due him under this contract were to be paid to them, and they were to disburse the same upon his orders. The instrument in question was duly presented to Hughes Bros., and by them verbally accepted, to be paid out of the moneys aforesaid. In the justice's court, on motion, the action was dismissed as to Coy. On appeal the cause was tried to the county court, a jury being waived, and judgment rendered against Hughes Bros. for the full amount named in the instrument. To reverse this judgment, the present writ of error was sued out. The remaining facts essential to an understanding of the case sufficiently appear in the opinion.

Section 14 of the Code, which receives partial construction, reads as follows: "Persons jointly or severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff."

C. A. Lott, for appellant.

HELM, J. The writing on which this action was brought, and the written indorsement upon the back thereof made at the time it was drawn and before

its presentation for acceptance, must be construed as constituting in law but a single instrument. 1 Daniel, Neg. Inst. § 79, cases. Thus viewed, it is to be regarded as a conditional order; the condition precedent to payment being the "final settlement of stone-work on city hall." The expression, "and charge to the account of Hardin & Ramsey," does not add to or alter the written condition so far as Fisher Bros. are concerned. As interpreted by the conduct and language of the parties themselves, it is a mere direction to Hughes Bros. for their guidance in keeping the accounts between themselves and Coy. But it is shown by uncontradicted testimony that in March, 1883, the final settlement referred to in the indorsement was made. Hence the instrument then became to all intents and purposes an unconditional order, and was therefore to be treated as such. The acceptance by Hughes Bros. was not in writing, but, besides being subject to the written condition mentioned, it was itself conditional in another important particular. By the terms of this acceptance, the order was to be paid out of funds, if sufficient, due or to become due to Coy under his contract with the city; an arrangement having been made by which such moneys were to pass through the hands of Hughes Bros.

It appears that, after the final settlement above mentioned, at which time the order became unconditional, there was still coming to Coy, under the contract, \$2,500. It also appears that on April 23, 1883, Hughes Bros. received the sum of \$2,000 upon this balance of indebtedness. We think that the contingency of the acceptance is fairly shown to have happened. Having received \$2,000 in money belonging to Coy, after the instrument became in effect an unconditional order, it was the duty of Hughes Bros., under their acceptance, to pay this order, unless they could give a legal excuse for not doing so. Such, for instance, as that the whole of the \$2,000 was required to pay other unconditional orders accepted prior to the time of settlement for stone work on the city hall. But no such excuse was offered.

In regard to counsel's objection that the acceptance of Hughes Bros., being verbal, is within the statute of frauds, and no liability attaches, we have this to say: The promise implied from the acceptance was not a promise to pay the debt of another, in the sense of the statute. It was a promise to disburse funds of that other in a particular way; that is, Hughes Bros. agreed, from funds in their hands, or to come into their hands, belonging to Coy, to pay the debt of Coy, mentioned in the order. As the temporary custodian of his moneys, they agreed to pay to one of his creditors, upon the happening of a certain contingency, a specified portion thereof. The personal liability assumed by them was nothing, provided they acted in good faith with reference to their promise. Relying upon this promise the creditor refrained from otherwise pushing his claim against Coy; he left the order with Hughes Bros., and took no other or further steps in the premises. See *Putney v. Farnham*, 27 Wis. 189.

The proposition that there was a misjoinder of parties defendant, and therefore the action should have been dismissed, is without merit. Under section 14 of the Civil Code; it was perfectly proper to unite in one suit both the maker and the acceptor of such an instrument as the one before us. We cannot concede the correctness of counsel's assertion that this provision has no application to cases originally brought before justices of the peace. It is true, the Code deals mainly with pleadings and practice in courts of record; but it is a mistake to assume that it in nowise affects actions before justices of the peace, or practice in justices' courts. The act, prior to 1887, related to "civil actions in the courts of justice" of the state. This language is clearly sufficient to cover legislation pertaining to justices of the peace and their courts. Several provisions—such, for instance, as sections 212 and 441—expressly deal with this class of courts. A number of other provisions, such as section 14, above mentioned, which do not in words speak of justice courts, are broad

and sweeping in their language, and were evidently intended to include proceedings in other tribunals besides courts of record. This objection might, perhaps, be overruled upon other grounds, but we deem the foregoing sufficient.

The assignment of error challenging certain testimony of the witness Byfield, offered to explain the meaning of the written indorsement upon the order, presents no fatal objection. Admitting that the court erred in receiving such testimony, it was error without prejudice. For, ignoring this evidence, and construing the instrument according to its plain and obvious significance, we have arrived at the same conclusion as did the court below. The judgment is affirmed.

(15 Or. 429)

KELLER v. BLEY.

(Supreme Court of Oregon. November 21, 1887.)

1. FRAUDS, STATUTE OF—CONTRACT NOT TO BE PERFORMED WITHIN A YEAR—VERBAL MODIFICATION.

By the Oregon statute of frauds, a verbal contract to do work not to be performed in a year is void. Where a written contract had been made, but altered verbally, and the modified contract was not to be performed within the year, *held*, in an action to recover the value of the work done under the modified agreement, that evidence of such alteration was admissible to give an understanding of the circumstances of the affair.

2. ASSUMPSIT—WORK AND LABOR—EVIDENCE.

In a suit on two causes of action, one for tools sold and one for the value of work, for the performance of which plaintiff obtained tools, evidence as to what tools plaintiff so obtained is material only so far as it tends to show what plaintiff did in performing the work, and is not competent to charge defendant with the expense of obtaining the tools.

3. SAME—GOODS SOLD—EVIDENCE.

In an action to recover the value of tools sold, a list of the tools made by a person whose only knowledge of its correctness was hearsay, was offered to show their value. *Held*, the refusal by the court to admit the list was not error.

4. TRIAL—VIEW OF PREMISES—MISCONDUCT OF ATTORNEYS.

In an action to recover the value of work done on certain premises, the jury, by consent of the parties, viewed the premises. The attorneys had stipulated that one on each side should accompany the jury. Two of plaintiff's attorneys went in their company, but had no communication with them. Besides these two, another of plaintiff's attorneys and one for defendant were in sight of, but not in company with, the jury. Defendant moved to discharge the jury, on account of the alleged misconduct of the attorneys who went in their company. The court investigated the matter, and denied the motion. *Held* that, as there was a possibility that the attorneys accused of misconduct might have had no purpose to influence the jury, and the court below had a better opportunity to investigate the matter than the court above, the denial would be sustained.

5. SAME—MISCONDUCT OF JUROR.

In an action to recover the value of work done on certain premises, the jury, by consent of the parties, viewed the premises, and one juror, who was unable to walk over the premises, remained outside, but in view of the greater part thereof. *Held*, that he was not guilty of misconduct as a juror.

Appeal from circuit court, Multnomah county.

E. Menenhall, F. B. Jolly, A. F. Sears, Jr., H. E. McGinn, and N. D. Simon, for respondent. *F. V. Drake and McDougall & Bower*, for appellant.

THAYER, J. This appeal comes here from a judgment of the circuit court for the county of Multnomah. It appears from the transcript that the respondent brought an action against the appellant in said circuit court counting upon three several causes of action. The *first* cause was upon a contract of sale of certain tools, for the alleged price of \$380; upon which he admitted a payment of \$25; the *second* one was for work and labor performed by respondent for the appellant, alleged to have been at the agreed value of \$29; and the *third* one was for work and labor upon a certain written contract, and subsequent parol modification, to clear and grub a tract of 85 acres of land, and to cut into cord-wood all fallen timbers thereon and all timbers he should cut down in clearing the tract. Said contract contained the mutual agreements of the parties, and the respondent alleged in his complaint, in reference thereto, that he performed the same on his part; that he provided himself with over \$400 worth of tools and apparatus to be used in said work, and was progressing therewith, and in compliance with the terms and conditions of the contract, when the appellant refused to comply with his part of it; that he cleared a portion of the tract, and cut into cord-wood 282 cords of wood from the timber referred to; that the clearing at the contract price amounted to \$1,112.50, and the cutting of the cord-wood to \$352.50, which sums were respectively the reasonable value of the work; that the appellant had paid thereon

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the sum of \$746, leaving unpaid a balance of \$719, which the appellant agreed to pay respondent on demand, and the latter agreed to accept in satisfaction thereof the sum of \$662.50, and to remove from the premises, and did remove therefrom; that he had frequently demanded payment of said sum of \$662.50, but the appellant had failed to pay any part of it. This sum, with the two other claims, amounting to \$1,046.50, he demanded judgment for.

The appellant denied the first cause of action. He admitted the second one, but denied the value of the work, and denied the parol modification of the written contract as alleged. He also denied that respondent was progressing with the work, and in full compliance with the terms and conditions of the contract, when the former refused to comply with his part of it; denied that the respondent cleared the amount of land alleged, or that he cut the 282 cords of wood; denied the value of the work as alleged by the respondent, or that he agreed to pay therefor, or that the respondent agreed to accept, in full satisfaction thereof, the sum of \$662.50, or any sum. And for a further answer, after admitting that the parties modified the terms of the written agreement so far as cutting the wood was concerned, alleged that by the terms of such modification the respondent was to cut all the best wood at the rate of \$1 a cord; that respondent entered upon the performance of the agreement, and did work in clearing, worth, in the aggregate, \$450, and cut 108 cords of good wood, and 133 cords of rotten, unsound, and unmarketable wood, which was wholly worthless; that respondent so unreasonably delayed the performance of the contract on his part, that he gave him notice to quit the premises, and finally put him out by proceedings of forcible entry and detainer, and respondent wholly abandoned the work; that appellant paid him the sum of \$738; that respondent did not complete the work in time for a crop as provided in the written contract, and so unskillfully and in such an unworkmanlike manner performed the clearing, and the cutting of the wood, that appellant was damaged in the sum of \$50, and, by reason of the delay, in the sum of \$150.

The bill of exceptions shows that respondent gave evidence at the trial tending to show that the first and third causes of action were an account stated, and of his performance of the work, and the appellant's refusal to comply with the contract upon his part; that the appellant gave evidence tending to show that some of the wood cut was unsound, decayed, and that the land claimed to have been grubbed was full of hidden stumps; that it would cost a considerable sum of money to clear it in accordance with the contract, and that the use of the land for a crop would have been worth \$15 an acre if it had been properly cleared. It further appears from the bill of exceptions that, after the oral testimony had been produced, upon request of respondent and consent of appellant, the jury impaneled to try the issues were allowed to view the premises upon which the work had been done. Before retiring they were properly instructed by the court, and a special bailiff appointed to accompany them and point out the premises, and were put in charge of a regular bailiff of the court; that the jury proceeded to view the said premises accordingly, and the next morning appeared in their proper places in court; and the case being ready for further proceedings, counsel for the appellant moved the court that the jury be discharged from the further consideration of the cause, and that it be set for hearing before another jury, upon the grounds that there had been misconduct on the part of the jury upon the occasion of the view, and that two of the counsel for the respondent had conducted themselves improperly on said occasion, which misconduct consisted in the fact that Chris. Nolan, one of the jurors, did not go onto the premises with the other jurors, but remained separate and apart from them, and that two of the respondent's attorneys had, during the view, accompanied and mingled with the jury, and had made communications with them concerning the cause or matters connected with the case; whereupon the court made a summary investigation of the charges, and found the fact to be that

it had been stipulated among the attorneys that one attorney on each side should accompany the jury on the view, but that, by some misunderstanding, three attorneys on behalf of the respondent had accompanied the jury, viz., Sears, Menenhall, and Jolly, and one attorney, Drake, for the appellant; that Drake and Sears went together, and were not in company with, but were in sight of, the jury; that Jolly and Menenhall walked over the premises, mingling with or being near the jury; that no conversation with the jurors was had, and no communications were made by them, or either of them, to the jury during said view; that the juror Chris. Nolan, by reason of lameness, was unable to walk over the premises, but remained in a carriage on the highway alongside of, and in view of, the greater portion of the premises; thereupon the court overruled the said motion; to which ruling said counsel excepted.

Several exceptions were taken to the admission of testimony, also to the refusal to admit testimony, and to the charge of the judge to the jury. The case involved, mainly, questions of fact, of a character which a jury were peculiarly suited to determine.

Proof of Verbal Alteration of Contract. It is claimed by the appellant's counsel that the court erred in allowing evidence of the verbal alterations of the written contract. He contends that the contract was not to be performed within a year after the alleged verbal agreement adding conditions to it, and that the latter comes within the statute of frauds. That cause of action, as I understand it, was not to enforce the contract, but to recover for work and labor, upon a promise to pay for the same. Proof of the contract was a circumstance in the particular case, was a part of the general facts, and the proof was merely to give an understanding of the circumstances connected with the affair. It is only when an agreement is sought to be enforced in accordance with its terms, that the objection to its validity upon such a ground can be raised. If the work had all been done under a void contract, it would not prevent a party from recovering its value, though he would not be entitled to recover damages for the breach of the contract. A verbal contract to do work which, by its terms, is not to be performed within one year, is void; but, if the parties treat it as valid until after a part of the work is done, it cannot then be avoided so as to avoid payment of the reasonable value of the work that has been performed. The law, in such case, will imply a promise to pay for work, or other valuable thing obtained under such an agreement, although the terms of the agreement cannot be enforced in a court of justice.

Evidence as to Value of Tools. Said counsel also claims that the court erred in admitting evidence as to what tools respondent got, in order to perform the contract. This evidence was clearly immaterial under the issues of the case, except so far as it tended to prove what the respondent had done in the performance of labor. If it had been offered and received for the purpose of charging the appellant with the expense of the tools, it would have been erroneous; but I do not understand that it was offered for any such purpose. There is a count in the complaint for tools sold, but this evidence was not offered to prove that count. The counsel makes a point, upon the court's refusal to admit a list of the tools, offered by him to rebut the evidence of the value of the tools the respondent claimed pay for in the latter count, but I do not think that a production of a list of the tools would prove their value. The question was, what were they worth? A schedule of them would prove nothing, and could not be used except as a matter of convenience. The counsel claims that it would have shown the improbability of the appellant's having offered to pay the amount therefor claimed by the respondent in the complaint. In order to show that, it was not necessary that a list of the tools should be made out and given in evidence. Besides, it appeared that the list was made by a person whose knowledge of its correctness was only hearsay.

The court has considered the other exceptions alluded to, and deems them untenable, and I do not think it necessary to refer to them particularly.

Misconduct of Counsel. The exception, however, to the ruling of the court upon the motion to discharge the jury is entitled to more consideration. I attach no importance to the fact that the juror Nolan did not go on the premises. He went to a place where he could view them, and had a good excuse for not walking over the land, and, as long as he did not intend to disregard his duties as juror, his verdict cannot be impeached. If he had failed to view the premises through a designed indifference as to what might have been ascertained, he would probably have been chargeable with such misconduct as would have required the granting of a new trial. But the act of the two counsel, "who walked over the premises, mingling with or being near to the jury," is a different matter. I cannot see that they could have had any excuse whatever for being where they were. It was highly improper, and could not fail to leave the impression that their object in mixing in with the jury was to influence them to favor their side of the case. It left a very strong impression that their purpose was to ingratiate themselves into the confidence and goodwill of the jury, and practice cunning and artifice to bias their minds. Nor would any protest on their part that it resulted from accident or thoughtlessness be likely to be received in extenuation of their conduct. Such occurrences are not apt to arise except by design. It is needless to say that they were wrong, and merit severe rebuke. Every sense of propriety and instinct of common decency condemns such performances. Any attempt, upon the part of an attorney, to gain an underhanded advantage over the opposite party in a lawsuit, in any manner, is disgraceful, and when it consists in an effort to tamper with a jury, in the slightest degree, it is infamous. If such practices were to receive the least countenance from the court, and encouragement from the bar, they would soon grow into such a monstrous evil that it would corrupt the fountain of justice. An attorney has no right to regard a lawsuit as a scramble to obtain a favorable decision, nor to adopt unscrupulous means to accomplish any such ends. Such a course is not only a violation of the duty enjoined upon him by the law, but is dishonest and nefarious *in se*, and will always be despised by honest people. It secures a following, but it is necessarily of that class who deal in knavery, and who regard a retainer of an attorney as an employment to do all kinds of dishonorable and dirty work.

I think that the court, when the matter was brought to its attention, and it was ascertained that two of the respondent's counsel "walked over the premises mingling with or being near the jury," unless there was a reason beyond what we can see, should have promptly set aside the panel, and taxed the respondent with the disbursements incurred by the appellant on account of the trial. The latter was injured in his defense in consequence of the affair. His counsel, in bringing the matter to the attention of the court, did right. Such things should not be allowed to pass unchallenged. But the course taken no doubt prejudiced the client's defense. I have witnessed the trial of too many lawsuits to believe that such a digression in the proceedings would not have that effect. The court's finding that no conversation with the jurors was had, and no communications made by the two counsel, was hardly a sufficient reason for denying the motion. It did not find that said counsel had any excuse for being where they were, nor that they did not employ arts and insinuations calculated to induce a belief in the minds of the jury that the respondent had done the work well, which it might reasonably be inferred was their purpose in being on the ground. Besides, their presence upon that occasion gave rise to a suspicion that justice was not being fairly administered, and tended to incite a general belief that the law is lax and ineffectual in the adjustment of controversies between parties, a sentiment that is in contravention of the public good. And again, it is not always a decisive question, in such cases, whether the conduct that is objected to did injure or not. The language of

the authors in *Thomp. & M. Jur.* expresses the view I am endeavoring to put forth, which is as follows: "But where the successful party to the suit is shown to have attempted, by improper means, to influence the verdict in his favor, whether by corrupting or intimidating particular jurors, by arousing prejudice in their minds against the opposite party or his cause, or by undue hospitalities or civilities, the verdict will be set aside, on grounds of public policy, as a punishment to the offender, and as an example to others, without reference to the merits of the controversy, and without considering whether the attempt was successful or not." Rule 3, § 348. Were the question here involved before this court as an original question, we should unhesitatingly determine it as before indicated, and we regret that the circuit court did not find it consistent with its views to pursue that course. The question, however, is one in which the trial court has a better opportunity to judge of the motives of the parties, and there is a possibility that the counsel referred to might have been in company with the jury with no purpose to influence their determination. The parties were before that court, and it had a better opportunity to ascertain the incidents and surroundings of the transaction than this court has, and for that reason we have been inclined to defer more to its decisions upon such questions. In view of the latter considerations, we feel constrained to affirm the judgment appealed from.

(15 Or. 437)

OATMAN v. EPPS.

(Supreme Court of Oregon. November 23, 1887.)

APPEAL—JUDGMENT AT LAW—COMPLAINT IN EQUITY.

The defendant in an action at law filed a complaint in equity in the nature of a cross-bill. To this plaintiff demurred, and the demurrer was sustained. On the hearing of the law action, judgment was rendered for the plaintiff. Defendant appealed, assigning as error the sustaining of the demurrer to the cross-bill. *Held*, that the filing of a complaint in equity as a cross-bill in an action at law gives rise to a proceeding separate and distinct from the action at law, any errors in which cannot be reviewed on an appeal from the judgment in law case.

Appeal from circuit court, Jackson county; L. R. WEBSTER, Judge.
H. K. Hanna, for respondent. W. R. Andrews, for appellant.

THAYER, J. This appeal comes here from a judgment of the circuit court for the county of Jackson. The respondent commenced an action in that court against the appellant to recover the possession of certain real property, alleging in his complaint that he was the owner thereof in fee, and that the appellant wrongfully withheld the same from him. The appellant filed an answer to the complaint denying the respondent's ownership of the property, and also filed a complaint in equity in the nature of a cross-bill as provided by the Code. The respondents demurred to the complaint, and the court sustained and dismissed the complaint. The proceedings in the action at law were then taken up, and finally resulted in the respondent recovering a judgment against the appellant to the effect that he was entitled to the possession of the property; from which judgment the appeal was taken.

The object in taking the appeal was to obtain a review of the decision of the circuit court upon the demurrer to the complaint in equity. The counsel for the appellant was led to believe, I suppose, that the decision could be reviewed as an intermediate order involving the merits and necessarily affecting the judgment, and he specified the said decision as a ground of error. But an examination of the Code will show that when such complaint is filed it stays the proceedings at law, and the case thereafter proceeds as a suit in equity, and in which said proceedings at law may be perpetually enjoined by final decree, or allowed to proceed in accordance with such final decree. The effect of filing such a complaint is the commencement of a suit in equity

which subordinates the proceedings at law, until the relief arising out of the facts requiring the interposition of a court of equity, and material to the defense in the action at law, is obtained. The proceeding is wholly independent of and separate from the proceedings at law, although its object is to obtain relief that can be made available as a defense to the law action; not by way of plea or answer, but through the plenary power of the court, sitting as a court of equity. For instance, A. commences an action against B. to recover the possession of real property. The former has the legal title to the property, while the latter has the equitable title to it, but cannot assert it in the law action. He therefore files a complaint in equity, with his answer at law, to obtain a decree that the legal title be conveyed to him, or that his right be determined, and that the plaintiff in the law action be enjoined from proceeding therein. By that means a defendant in an action at law may have the benefit of an equitable defense, and the two procedures, law and equity, be kept separate and distinct. When a defendant in a law action files such a complaint, he institutes a suit which must be determined before any further proceedings in the law case can be had; and if he is unsuccessful in the circuit court in his equity case, and desires that a review of the decision of that court be had in this court, he must appeal the same as in any other equity suit. He has no occasion to look after the action at law until he exhausts his efforts to obtain the equitable relief sought. The former remains dormant during the interval, and cannot be pursued until the latter is finally terminated. But he cannot wait until the law action is tried, and, by appealing from the judgment therein, have the decree in the equity case reviewed. The judgment at law and the decree in equity are entirely distinct, and cannot be grouped together, as the mode of review of the two may be entirely different,—one comes here upon pure questions of law; the other may come on a question of fact, and the review be a trial *de novo*.

Some matters were discussed at the hearing which we are not required to consider; but we would suggest that the practice in cases of this character ought to be liberal. A technical view in such cases serves no purpose, except to deny a party justice, or, at least, impress him with a belief that he has been unfairly dealt by. It would have been much more in consonance with equity in this case to have retained the complaint filed by the appellant, and ascertained whether or not the allegations contained therein were true. If they were true, the appellant was clearly entitled to relief. It would have been a denial of justice to hold otherwise. If the fact of Jane Epps not being a party to the litigation interfered with or embarrassed the adjudication of the rights of the parties, the court should have required that she be brought in and made a party. Equity is no narrow, cramped affair. It is expansive in its nature, and adapts itself to all manner of complications. It is said that when Chancellor KENT entered upon the discharge of the duties of chancellor of the state of New York, he threw the doors of his court wide open. He changed the stinted policy that regarded formalities and niceties into a broad system of jurisprudence; extended it so as to afford a practical and efficient remedy in all cases where the common-law remedy was inadequate and incomplete. By such a course he conferred a lasting benefit upon all English-speaking people, while if he had contented himself in haggling over trifling doubts, and in making hair-splitting distinctions, his reputation as a jurist would have never been known beyond the limits of his own state, or remembered by an after generation.

The errors alleged in the proceedings in the law case are untenable, and those in the equity proceeding cannot, for the reasons mentioned, be considered: The judgment appealed from must therefore be affirmed.

(15 Or. 440)

PUTNAM and others v. WEBB, Sr.

(Supreme Court of Oregon. November 23, 1887.)

1. REPLEVIN—ALTERNATIVE JUDGMENT—ERRONEOUS ENTRY—REMEDY.

In an action of replevin before a justice of the peace, judgment was entered for a return of the property, but the alternative part was not entered. The defendant appealed to the circuit court, but voluntarily dismissed his appeal, and the circuit court failed to enter final judgment at the time of the dismissal. The justice, of his own motion, corrected his docket, and subsequently the circuit court entered final judgment for the recovery of the property or the value thereof. Defendant now seeks to enjoin the execution of the judgment. *Held*, that as a portion of the judgment is admitted to be rightful, there can be no complaint against the alternative until it is shown that the rightful judgment cannot be complied with.

2. JUDGMENT—ERRONEOUS ENTRY—REMEDY.

An erroneous entry of judgment cannot be corrected by an action in equity. The only remedy is by appeal.

Appeal from circuit court, Klamath county; L. A. WEBSTER, Judge.
Warren Truitt, for appellants. P. P. Prim, for respondent.

STRAHAN, J. This is a suit in equity to enjoin the enforcement of a judgment of the circuit court of Klamath county. It appears from the transcript that in May, 1883, the respondent commenced an action of replevin before a justice of the peace of Linkville precinct, against Charles Putnam, who was then sheriff of the county, to recover the possession of a mare of the value of \$200; that such proceedings were thereafter had in said action; that the plaintiff recovered a judgment therein for the possession of said mare, or \$200, the value thereof, in case delivery could not be had; but the justice failed to enter in his docket the alternative part of said judgment at the time, but entered it simply for the recovery of the mare. The defendants appealed to the circuit court, but voluntarily dismissed their appeal. By some oversight said circuit court failed to enter final judgment in favor of the respondent in the appeal at the time the same was dismissed. Thereafter the justice, of his own motion, wrote in his docket the alternative judgment, not in precise technical form, but substantially. Subsequently the circuit court entered a final judgment therein, for the recovery of the mare, or \$200, the value thereof, in case delivery could not be had; and this is the judgment which the plaintiff seeks to enjoin by this proceeding.

1. The case made by the complaint is without equity. Here is the judgment of two courts that the plaintiffs have wrongfully taken and detained the defendant's mare, and awarding a return thereof. Until this judgment as to the return of the mare is complied with, or some good and sufficient reason shown for not complying with it, the plaintiffs shall not be heard to complain of the entry of the alternative judgment. Until they comply with or perform so much of the judgment as is admitted to be rightful, they shall not be allowed to complain of the other part of it. "He who seeks equity must do equity."

2. It is claimed that the circuit court erred in entering the judgment sought to be enjoined. If it be conceded that the entry of this judgment was erroneous, it would not follow that the error could be corrected by a suit in equity. An appeal is the proper remedy in such case, and it would seem the only proper remedy. Hill, Code, § 535. We do not, at this time, enter into the question as to whether the action of the justice in attempting to correct his errors in the manner described was regular or not, nor as to whether there was error in the judgment of the circuit court. In the view entertained by the court, these questions are not now material. The plaintiffs show no equity to enable them to attack either of said judgments. The decree will be affirmed.

LORD, C. J., (*concurring*.) The admitted facts upon this record are fatal to the relief sought. The plaintiff knew of the error or defect of which he now complains, and seeks relief by injunction at the time of the entry of judgment in the original action, and his refusal to rely upon this defect by the voluntary dismissal of his appeal, deprives him of the right now to be heard in equity to contest on this ground the validity of the judgment. In this view it is not necessary to consider or determine what may have been the duty of a court of law in the premises, as his knowledge and subsequent conduct in refusing to avail himself of a remedy at law, to which he had resorted, is a bar to the relief sought. The bill was properly dismissed.

(2 Ariz. 308)

STILES, Assignee, etc., v. WESTERN UNION TEL. CO.

(*Supreme Court of Arizona*, December 1, 1887.)

1. TELEGRAPH COMPANIES—DELAY IN DELIVERING MESSAGE—MEASURE OF DAMAGE.

A banker having made an assignment, the assignee telegraphed a branch establishment, and brought this action to recover damages caused by the message not being delivered in due course. The message was received by the defendant's agent at its destination at 9:15 P. M., but was not delivered until between 9:15 and 9:30 the following morning; the usual time for delivering messages received over night being between 8:30 and 9 A. M. The bank opened at 9 A. M., and before delivering the message the defendant's agent withdrew from the bank money owned by himself and the defendant, and other sums were paid out by the bank to unpreferred creditors. *Held*, that defendant was liable for the money paid out during the interval which elapsed from the time when the message should have been delivered until delivery, but not for what was paid out after delivery. BARNES, J., dissenting.

2. SAME—LIMITING LIABILITY BY CONTRACT—NEGLIGENCE AND MISCONDUCT OF AGENT.

When an agent of a telegraph company has been guilty of negligence and misconduct in not delivering a message, the company will not be exonerated from liability for the consequence of non-delivery by any terms which may be annexed to the message.¹

Appeal from district court, Pima county; BARNES, Judge.

J. A. Anderson and John Haynes, for appellee. C. C. Stevens and R. B. Carpenter, for appellant.

PORTER, J. This cause comes here on motion for a new trial on the grounds of insufficiency of the evidence, the findings and decisions being against law, and errors in law. This action was brought by T. L. Stiles, as assignee of Hudson & Co., against the Western Union Telegraph Company, to recover damages for the delay in the delivery of a telegraphic message sent by the plaintiff from Tucson to Tombstone. It appears that Hudson & Co., on the ninth day of May 1884, had a banking-house in Tucson, with a branch establishment at Tombstone. Mr. M. B. Clapp, to whom the message was sent, was the cashier of the branch house, and there managed the bank. That on the evening of the ninth of May an assignment of all the property of Hudson & Co., both at Tucson and at Tombstone, was made to T. L. Stiles. Thereupon, on acceptance of the trust, the plaintiff, assignee, on the evening of the ninth of May, sent by defendant a telegram to Clapp, and with directions to forward the telegram immediately. The telegram was received by the operator at Tombstone at 9:15 of May 9th, and not delivered till the morning of the 10th, between 9:15 and 9:30, and after the bank was opened for business. The telegraph office at Tombstone was less than two blocks from the bank. Clapp's residence was in the same town, and he was there on the evening of the 9th. The usual time for delivering dispatches, when too late the night before, was from 8:30 to 9 A. M. The office of the telegraph company was opened at 8 o'clock A. M. The bank opened at 9 o'clock A. M. Before the delivery of the message the telegraph operator (Kingsberry) drew

¹See note at end of case.

from the bank the sum of \$1,167.71, and other smaller sums were withdrawn from the bank before the message was delivered.

On the opening of the bank on the 10th, the money in the vaults had been placed upon the trays on the counter for the day's business. On the reception of the dispatch, Clapp, the cashier, told the employes of its contents, and directed to have the money put back in the vaults, and then went to see plaintiff's attorney, and in the mean time directed the bank to be kept open. The business went on till the attorney came, and put up a notice, which was one-half hour after the delivery of the message. The sum of \$5,102.19 was paid out to unpreferred creditors, including the sum of \$1,167.71 paid on the check of the operator. The operator testified that \$1,000 of the \$1,167.71 belonged to him, and the balance to defendant. The books of the bank show an itemized statement of the amounts drawn out by each depositor, and among them is Western Union Telegraph Company, \$1,167.71. But that fact is immaterial. There can be no dispute but that the conduct of the operator was grossly negligent, and the defendant cannot be relieved of responsibility caused by his misconduct. No terms annexed to the message can excuse this failure to deliver the message before the opening of the bank; such failure to deliver being gross negligence and palpable misconduct, and the telegraph company must bear every legitimate consequence of its non-delivery.

But does that consequence involve anything which in this case happened after the message came to the hands of the bank? The telegraph company must be held for every dollar paid out before the message was delivered. We can see no good reason why it should be for the money afterwards paid, for any payments made after the delivery of the message were entirely voluntary on the part of the bank. A justification is sought because of the fear of a mob. No such exhibition existed, and the excuse cannot be sustained. The teller testifies that he paid checks because he feared, if he did not, that a rush would be made on them; that when he left the bank a large crowd had assembled there; but while the bank remained open for business there was no excitement, and but four people there outside of the employes. Why could not the employes of the bank have closed the outside doors, and then put the money in the vaults? Besides, it would only take a few moments to handle \$20,000 or \$30,000, which amount was in the trays in which coin is usually kept in banks. It not being otherwise shown, we take it that most of the money, as is the custom of banks in Arizona, was in gold coin, and only silver enough to make change.

We must conclude that the finding "that, by reason of said failure to deliver message, the plaintiff paid out to unpreferred creditors the sum of \$5,102.19," is erroneous. The record does not disclose the full amount paid out before the delivery of the message, saying only it was "other smaller sums," and there must be a new trial, unless plaintiff will, by written consent, accept from defendant the sum of \$1,167.71, with legal interest from the ninth day of May, 1884, in which case judgment for that sum is ordered to be entered.

WRIGHT, C. J., (*concurring*.) We are clearly of the opinion that the defendant should not be held liable for amounts of money paid out after the dispatch was received at the bank. It required only a moment's time to step to the front door of the bank, and close it. The law in such case does not hold the defendant responsible for avoidable damages. Undoubtedly a large portion of the money paid out would have remained in the bank if it had been closed immediately upon the reception of the dispatch. I therefore concur.

BARNES, J., (*dissenting*.) The evidence in this case shows that the operator of defendant at Tombstone withheld the message from about 9 o'clock in the evening, "on purpose," as he swears, that he might draw out the money de-

posited to credit of defendant in the bank; that he waited until the bank opened, then went in, and drew out the funds of defendant. He kept the fact of the assignment a secret until then. He then went to his office, and handed the telegram to the messenger boy, who had to make a letterpress copy and enter it on the delivery-book, put it in an envelope, and address it, and then go to the bank and deliver the message. Meantime the bank was open in due course of business. This was a willful, and not a negligent act of the operator. He was not simply speculating on the information contained in the message to his profit, but he was using the information to his profit and the customer's injury. The defendant, after full knowledge of the facts, ratified the act, and refused to refund the money so wrongfully drawn out. The defendant is liable for all injury to plaintiff consequent upon this willful wrong. Smart money or punitive damages would have been proper. 2 Thomp. Neg. 851; *Davis v. Western Union Tel. Co.*, 1 Cin. Rep. 100; 2 Thomp. Neg. 1264; *Edelmann v. St. Louis T. Co.*, 3 Mo. App. 503; *Leavenworth Co. v. Rice*, 10 Kan. 426; *Jackson v. Schmidt*, 14 La. Ann. 807; *Railroad Co. v. Welch*, 52 Ill. 184; *Murphy v. Railroad Co.*, 29 Conn. 496; *Welch v. Durand*, 36 Conn. 182; *Whipple v. Walpole*, 10 N. H. 130; *Hawes v. Knowles*, 114 Mass. 518; *Jacobs v. Railroad Co.*, 10 Bush, 263; *Bass v. Railway Co.*, 39 Wis. 636; *Peoria R. Co. v. Loomis*, 20 Ill. 251; *Wallace v. New York*, 2 Hilt. 442; *Wallace v. New York*, 18 How. Pr. 169.

True, the officers of the bank ought to have closed the bank when informed of the message; but if they did not, who should suffer? They were not plaintiff's agents. They were joint and several wrong-doers with defendant after the message was delivered. Before that they were his unwitting instruments. The wrong-doer who wrongfully and willfully caused the bank to open, should be responsible for his agents, or the instruments of his wrong. To say that a telegraph company, a common carrier of messages, may use the information so received to the injury of a customer, and not be responsible for the injuries consequent to the customer, is monstrous. For these reasons I dissent from the opinion of the court.

NOTE.

TELEGRAPH COMPANIES—LIMITATION OF LIABILITY. While telegraph companies are not charged with all the duties and responsibilities of common carriers, they cannot contract for a restriction of liability for injuries occasioned by the culpable negligence or gross carelessness or willful misconduct of their employees. *White v. Telegraph Co.*, 14 Fed. Rep. 710. A stipulation limiting the liability of a company for any mistake or delay in the transmission or delivery of a message, unless the message is repeated at an additional expense, is held to be valid to exempt the company from liability beyond the amount named, for any cause except gross negligence or willful misconduct. *Hart v. Telegraph Co.*, (Cal.) 6 Pac. Rep. 637; *Becker v. Telegraph Co.*, (Neb.) 7 N. W. Rep. 868; *Jones v. Telegraph Co.*, 18 Fed. Rep. 717. See, also, *Akin v. Telegraph Co.*, (Iowa,) 28 N. W. Rep. 419. Under such a contract, the exemption from liability is confined to such mistakes as are incident to the service, and which may occur where the employees of the company are culpable in only a slight degree. *Pegram v. Telegraph Co.*, (N. C.) 2 S. E. Rep. 256. The stipulation does not relieve the company from the duty of exercising ordinary care and diligence. *Marr v. Telegraph Co.*, (Tenn.) 3 S. W. Rep. 496; *Thompson v. Telegraph Co.*, (Wis.) 25 N. W. Rep. 789. See, also, *Telegraph Co. v. Richman*, (Pa.) 8 Atl. Rep. 171. On the other hand, a stipulation like that recited above is held to be void, as being against public policy. *Ayer v. Telegraph Co.*, (Me.) 10 Atl. Rep. 485. A telegraph company may make reasonable stipulations as to the time within which claims for damages shall be presented, failing to observe which, an action against the company cannot be maintained. *Heiman v. Telegraph Co.*, (Wis.) 16 N. W. Rep. 32; *Cole v. Telegraph Co.*, (Minn.) 22 N. W. Rep. 385.

(10 Colo. 408)

DENVER CIRCLE R. CO. v. NESTOR.

(Supreme Court of Colorado. November 15, 1887.)

1. MUNICIPAL CORPORATIONS—CONTROL OF STREETS—TITLE ACQUIRED BY DEDICATION.

Under Rev. St. Colo. 1868, p. 619, § 5, by the dedication to the city of Denver of the streets of an addition thereto, platted in accordance with the provisions of

the statute in force in May, 1876, the said city acquired only a qualified fee therein, in trust for the public for the *ordinary and necessary* purposes to which the streets of a city are usually subjected.

2. SAME—RIGHT TO LICENSE OCCUPATION BY RAILROAD COMPANIES.

The charter of April 7, 1874, of the city of Denver, Colorado, giving to the city council power to control its streets, to regulate the construction and operation of street railways, and the running of locomotive engines and cars, and the location and construction of railroad tracks within the city, does not confer upon the council such authority to license the construction of railroad tracks lengthwise of its streets and thoroughfares generally, as to charge the purchasers of abutting property with notice that they may be so used by railroad companies for the running of their trains, in common with every other mode of conveyance.

3. SAME—RIGHTS OF ABUTTERS.

Under the authority of the charter of April 7, 1874, of the city of Denver, Colorado, defining the powers of the city council with regard to the railroads within the city, and Rev. St. Colo. 1868, p. 619, § 5, limiting the city's title to the streets dedicated to it, to a qualified fee, the license given by the city council to a railroad company to construct a track and run its trains lengthwise of a street of an addition, is an appropriation of such street to an extraordinary use, not within the contemplation of the act of dedication, nor authorized by any legislative sanction for general application throughout the city and cannot afford immunity from liability for actual injuries thereby resulting to the property of abutting owners.¹

4. SAME—COMPENSATION FOR INJURY.

An action was brought by an owner of property abutting on one of the streets of a certain addition to the city of Denver, to recover damages for injuries done to his property by a railroad company in constructing a road and running its trains the length of the street in front of his premises. *Held*, that since the injuries to the property were done after the state constitution went into effect, its provisions in regard to compensation for the taking or damaging of private property for public or private use may properly be invoked in aid of recovery.

5. CONSTITUTIONAL LAW — RE-ENACTMENT OF STATUTES — JURISDICTION OF SUPERIOR COURT.

The Colorado act of February 10, 1883, § 3, providing that in all civil cases, both at law and in equity, the superior courts shall, within the cities and towns for which they are created, have concurrent jurisdiction with the district court, and that the proceedings, practice, and pleadings therein shall be the same as in the latter court, is not in violation of the state constitution, article 5, § 23, which provides that "no law shall be revived or amended, or the provisions thereof extended or conferred by reference to the title only, but so much thereof as is revived, amended, extended, or conferred shall be re-enacted and published at length."

6. COURTS—FAILURE OF JUDGE TO ATTEND—ADJOURNMENT BY CLERK.

Under Colorado act of February 10, 1883, § 3, prescribing the jurisdiction and practice of the superior courts, it is proper for the clerk of said courts, upon the failure of the judge to appear on the first day of the term, to adjourn the court from day to day, in accordance with the practice of the district court.

7. PLEADING—FAILURE TO REPLY—CONCLUSIONS OF LAW.

A failure to reply to matters set up as a defense to an action is an admission of the truth of the facts alleged, but *not* of the legal conclusions deduced therefrom.

Appeal from superior court of Denver.

The complaint alleges damages done to appellee's property, consisting of two lots with dwelling-house and other improvements thereon, abutting on a street called "Willow Lane," in Witter's first addition to the city of Denver, by the construction of appellant's railroad track, and the running thereon in

¹The dedication of a street to the public does not authorize it to be used for a railroad track. *Railroad Co. v. Heisel*, (Mich.) 11 N. W. Rep. 212. And though the city owns the fee in its streets, it can not authorize a steam railroad company to build its tracks in them without making compensation to abutting owners specially injured thereby. *Railroad Co. v. Reinbackle*, (Neb.) 18 N. W. Rep. 69.

In general as to the right of railroad companies to lay their tracks on the public streets, and the right of abutting owners to compensation, see *Slough v. Railway Co.*, (Iowa,) 33 N. W. Rep. 149; *Pratt v. Railway Co.*, (Iowa,) 33 N. W. Rep. 666; *Frankle v. Jackson*, 30 Fed. Rep. 398; *Railroad Co. v. Bissell*, (Ind.) 9 N. E. Rep. 144, and note; *Drucker v. Railroad Co.*, (N. Y.) 12 N. E. Rep. 568; *Railroad Co. v. Brown*, (Fla.) 1 South. Rep. 512; *Railroad Co. v. Goldberg*, (Tex.) 5 S. W. Rep. 824. See, also, *Lohr v. Railroad Co.*, (N. Y.) 10 N. E. Rep. 528, and note.

said street of their trains of cars propelled by steam-engines. The injuries and annoyances complained of are the excavation and obstruction of the street in front of appellee's property, so as to prevent ingress and egress to and from the same, casting upon and invading the premises with dirty steam, live cinders, dust, and smoke, disturbing appellee and his family day and night by the noise of the cars, and the whistles and bells of the engines, by reason whereof the safety of his property was put in danger, its convenient and comfortable enjoyment interrupted and impaired, and its value greatly diminished. A question of jurisdiction is raised here, it being claimed that the superior court was wholly without jurisdiction, under the law and the constitution, to entertain the cause. The main ground of defense relied upon aside from the question of jurisdiction, is that said Witter's addition was dedicated to the city of Denver before the state constitution went into effect, and under the statutes then in force the title to the streets was thereby vested in the city in fee-simple; that the city charter, granted prior to the adoption of the constitution, empowered the city to authorize and license the construction of steam railroads in all the streets of the city, and that the city did license the defendant, by an ordinance duly enacted, to grade said street, and to lay down its track, and operate its railroad therein. It was also alleged in this connection that the established grade of the street was not altered; that appellant operated its road with care, and that the license of the city afforded it complete immunity from liability for damages on account of the construction and operation of its road. These matters were set up in the third defense, and no reply was filed thereto. The appellant not appearing at the trial, the case was tried by the court without a jury, and the judgment rendered in favor of the appellee.

J. P. Brockway, E. L. Johnson, and C. E. Gast, for appellant. Brown & Putnam, for appellee.

BECK, C. J. The first and fifth assignments of error attack the jurisdiction and practice of the superior court. The first alleges that the court did not have jurisdiction of the subject-matter of the action; the fifth is to the effect that no term of said court existed at the time of the trial below, in October, 1884, the September term having lapsed for failure of the judge to appear on the first day of the term. That the practice provided by law for the district courts, in such cases, not being applicable to said superior courts, the clerk thereof was without any authority to adjourn the court from time to time as he did until the appearance of the judge. In the discussion of these assignments, appellant's counsel take the position that the superior court was never constitutionally clothed with any jurisdictional practice whatever. In support of this proposition it is argued that the act creating superior courts, and prescribing their powers, proceedings, and practice, is in direct conflict with the provisions of section 23, art. 5, of the state constitution, and therefore null and void. The legislative act in question is entitled "An act to provide for the creation and organization of superior courts in cities, and incorporated towns; to prescribe the jurisdiction, powers, proceedings, and practice of such courts, and to define the duties and qualification of the judges and other officers connected therewith." This act is composed of 20 sections, the jurisdiction and practice of said superior courts being defined in section 3, which reads as follows: "Section 3. Such superior courts shall have original and concurrent jurisdiction within the limits of the several cities and incorporated towns for which they are created, with the district courts of the states in all civil causes, both at law and in equity, and such appellate jurisdiction in such causes as is provided by law for the district courts, and shall be governed in all proceedings, with reference to practice and pleadings by the laws now or hereafter to be enacted for the district courts. All process issued out of the superior court shall be issued and served in like

manner as similar process is issued and served from the district courts of the state." Additional appellate jurisdiction and power to regulate the practice and proceedings in other respects, not provided by law, is given in other sections. The provisions of the constitution with which the section quoted is supposed to conflict, being section 23, art. 5, are: "No law shall be revived or amended, or the provisions thereof extended or conferred by reference to the title only, but so much thereof as is revived, amended, extended, or conferred, shall be re-enacted and published at length." The first proposition is, the act violates that clause of the preceding section which prohibits the amending of laws without publishing at length the portion amended. A single reading of these provisions of the statute, and of the constitution, might seem, at first view, to sustain the proposition of counsel, but a careful examination of the subject, with a view to ascertain the object of the requirements, and a consideration of the consequences which would result from adopting the interpretation contended for, will show that the views of counsel cannot be sustained. Counsel is mistaken in saying that the act of the legislature in question is a direct attempt to amend all the laws relating to the district courts. It does not in terms assume to amend, or change in any particular, any law whatever. The declaration that the superior courts shall have original and concurrent jurisdiction in civil cases with the district courts of the state, within their territorial limits, is a reference to the constitution for such jurisdiction. Article 6 of that instrument confers this jurisdiction on district courts, and it is to be found nowhere else. It would seem to be an irrational construction of a constitutional provision to require the legislature, whenever it becomes necessary, in the passage of laws, to refer to that instrument for powers or procedure to execute a law, to go through the idle and senseless form of re-enacting and publishing at length the constitutional provision referred to. The appellate jurisdiction of the district courts, and the provisions concerning the practice and pleadings of said courts, are to be found in the General Statutes. And while no direct attempt was made to amend these statutory provisions by the passage of the act in question, the legal effect is an amendment thereof by implication. Amendments of this character are not within the constitutional provision which requires so much of the act as is amended to be re-enacted and published at length. Cooley, Const. Lim. 181.

But our attention is directed to another provision of said section 24, viz.: "No law shall be * * * extended or conferred by reference to its title only, but so much thereof as is * * * extended or conferred shall be re-enacted and published at length." This is a provision not usually found in constitutions. Considered and construed in connection with the rest of the section in which it appears, and with reference to other portions of the constitution relating to the same subject-matter, it is a wholesome provision. It is well understood by the profession that certain constitutional provisions, and especially those of sections 24 and 25 of the legislative article, and section 28 of the judiciary article, were designed to remedy and prevent well-known abuses of legislation existing at the time of the framing of this instrument. These were the evils of special legislation, and the vicious practice of amending statutes by referring to the title, and then declaring that certain words and phrases appearing in certain lines and sections be stricken out, and certain other words and phrases inserted therein. The clause of section 24, last quoted, goes further than the clause previously considered, and extends to cases of amendments by implication. They were not intended, however, to apply alike to all legislative enactments, including those wherein a reference to the general laws becomes necessary for the means of enforcing and carrying their provisions into effect. Such an unrestricted interpretation is not admissible, because it would be an unreasonable construction, and one that would impose upon the people more serious evils than those sought to be cured or avoided by the several sections and clauses of the constitution referred

to. We recognize the force of the maxim that if the natural signification of the words employed involves no absurdity, the meaning apparent upon the face of the constitution is the only one intended to be conveyed, and that it is not lightly to be inferred that any portion is so ambiguous as to require extrinsic construction. We also indorse the salutary rule that the argument *ab inconvenienti* is not to be permitted to influence the courts to defeat by construction a constitutional mandate. It is not our purpose to defeat but to enforce the mandate in question, and to enforce it according to its reason and spirit, and the causes which led to its enactment. We agree with Judge Story that no construction of a constitutional provision is to be allowed which plainly defeats or impairs its avowed objects. "If there are," says that eminent jurist, "words which are fairly susceptible of two interpretations, according to their common sense, the one of which would defeat one or all of the objects for which it was obviously given, and the other which would promote all, the former interpretation ought to be rejected, and the latter held to be the true interpretation." Story, Const. § 428. All the authorities agree that where the words employed are capable of a construction which involves a manifest absurdity, it should not be adopted, but the intent, if it be properly ascertainable, is to govern. To this end resort may be had to the prior state of the law for the purpose of ascertaining the mischief designed to be remedied, or the object sought to be accomplished. With Judge Cooley we hold that a reasonable construction is what the constitution demands and should receive; that the real question is what the people mean, and not how meaningless their words can be made by arbitrary rules. Cooley, Const. Lim. 74.

That the construction contended for involves not only an absurdity, but the most serious evils, a little reflection will show. The manner and forms of proceeding for executing laws on general subjects of legislation are all provided in the General Statutes of the state. Ordinary subjects of legislation are dealt with at every session of the general assembly, and reference to the General Statutes is often necessary for the means by which they are to be carried into effect. To re-enact and publish at length these various forms and proceedings on the passage of such acts would serve no useful purpose whatever. Take, for example, an act imposing a tax upon a new subject of taxation; to require the legislature to ingraft on such an act the numerous details of proceeding and forms provided by the revenue laws for the valuation of property, the levy of assessments and collection of taxes, would be as useless as it would be senseless, expensive, and oppressive. Considering the many subjects of legislation concerning which the machinery for executing the law of the legislature is already provided, the consequences of enforcing the constitutional provisions under the construction here contended for would be far-reaching and serious. The bulky proportions which the laws would soon attain would be, of itself, an intolerable evil. In this connection the remarks of Judge Cooley on the subject of amendments by implication are in point. Section 25 of article 4 of the Michigan constitution provides that "no law shall be revised, altered, or amended by reference to the title only, but the act revised, and the section or sections altered or amended, shall be re-enacted and published at length." Judge COOLEY, in a learned opinion in *People v. Mahaney*, 13 Mich. 481, held that amendments by implication were not within the purview of the above section. Among other reasons assigned are the following: "If, whenever a new statute is passed, it is necessary that all prior statutes modified by it by implication should be re-enacted and published at length as modified, then a large portion of the whole code of laws of the state would be required to be republished at every session, and parts of it several times over, until, from mere immensity of material, it would be impossible to tell what the law was. If, because an act establishing a police government modifies the powers and duties of sheriffs, constables, water and sewer com-

missioners, coroners, mayors, and justices, and imposes new duties upon the executives of the cities, it has thereby become necessary to re-enact and republish the various laws relating to them all as now modified, we shall find, before the act is complete, that it not only embraces a large portion of the general laws of the state, but that it has become obnoxious to the other provisions referred to, because embracing a large number of objects, only one of which can be covered by its title." The same difficulties exist in the present case, and the same consequences would follow the arbitrary construction which we are asked to make. In referring to the prior state of the law for light as to the intent of the constitutional provision, we are not left to vague conjectures as to the objects intended to be accomplished, and the mischief designed to be remedied. They are clearly ascertainable by an inspection of the acts themselves. One of the evils designed to be remedied was the vicious system then prevailing of *extending*, at different sessions of the legislature, the operation of a special statute, enacted for a certain county or town, to other counties or towns by reference to its title merely, and in many cases publishing no law whatever. Thus, on February 9, 1874, the territorial legislature declared "that the provisions of an act entitled 'An act concerning *certiorari* to justices and probate courts, approved February 2, 1872, being a special act applied to Gilpin county alone,' be extended and made applicable to Boulder county." Laws 1874, p. 65. This is the entire act as published, save the title. Another act illustrating this sort of legislation reads as follows: "That the act entitled 'An act to regulate ditches used for farming purposes in the counties of Costilla and Conejos,' approved February 5, 1866, be and the same is hereby extended to and made applicable in the county of Huerfano." Laws 1872, p. 143. By the foregoing and similar legislation, no laws on the subject-matter of the titles employed were either enacted or published. It is merely the extension, by reference to titles, of laws enacted for certain localities to other localities. In such cases these acts, *as published*, were incomplete and unintelligible.

We will now give an example illustrating all the evils designed to be cured, an example of the manner in which statutes are sometimes *revited*, *amended*, and *extended*, by reference to the title only, without publishing the acts in the form so left, showing the changes therein made. We refer to the act of March 11, 1864, (Laws 1864, p. 139,) which prescribes rules and regulations for executing the trust arising under the act of congress of May 23, A. D. 1844, and any amendments that were made thereto "for the relief of citizens of towns upon lands of the United States, under certain circumstances." This was an act consisting of 22 sections, and was applicable to the whole territory. On February 10, 1865, another act was passed, purporting to be amendatory of the former act. The first section is as follows: "That section two of said act be amended by inserting the words, 'his or their successors,' between the words 'congress' and 'shall,' in the third line from the top of said section." The remaining sections provide for the sale of unclaimed lots and blocks of land in the town of Boulder, under the provisions of the original act as amended. The seventh section of the amendment is as follows: "That this act shall be construed to apply alone to the town of Boulder, in the county of Boulder, territory of Colorado." Laws 1865, p. 130. Another act, purporting to amend the original act, was passed February 9, 1866, the amendments all relating to lots in the city of Denver. Laws 1866, p. 87. By this time the legislature appear to have entertained doubts as to the existence of the original act. Accordingly, on February 11, 1870, an act was passed "to *revite* and *amend*" the original act, "so as to provide for the disposition of lands and lots in the town of Georgetown, under the act of congress entitled 'An act for the relief of the inhabitants of cities and towns upon the public lands.'" The first section declares that the "act, approved March 11, 1864, be, and the same is hereby revited, and declared to be in full force and effect:

provided that said act shall be taken and held, in its different provisions, to intend an act of congress entitled 'An act for the relief of the inhabitants of cities and towns upon the public lands,' approved March 2, 1867;" which, it will be observed, was a different act of congress from that mentioned in the original act. Sections 8, 15, 18, and 21 are then declared to be stricken from the original act. Certain words are then stricken out, and certain others inserted in lines 1 and 2 of section 9, in lines 4 and 5 of section 14, in lines 7 to 18, and 23 to 28 of section 12, and certain words stricken out of the last line of section 11, and the twenty-ninth line of section 12. Finally, it is declared "that the act hereby revived shall have no other or further effect than to provide for the disposition of lands and lots in the town of Georgetown * * * under said act of congress, approved March 2, 1867." The foregoing examples will be sufficient to illustrate the evil system of legislation existing at the date of the constitution. Acts of the legislature were often incomplete in themselves, and in order to ascertain what the law was on a given subject, it was necessary to collect the amendments made thereto at successive legislative sessions, and out of the scattered fragments to construct an act which should express the final will of the legislature. It was this state of bewilderment and confusion into which the laws had been thrown by *special legislation*, by amendments made by reference to *lines and sections*, and by the *wholesale extension* of laws, that was designed to be corrected and guarded against by section 24 of the constitution.

The constitution of New York contains a provision which is the same in substance and effect. It is: "No act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or any part thereof, shall be applicable, except by inserting it in such act." Section 17, art. 3. In construing this section the court of appeals said: "It is not necessary, in order to avoid conflict of this article of the constitution, to re-enact general laws whenever it is necessary to resort to them to carry into effect a special statute. Such cases are not within the letter or spirit of the constitution, or the mischief intended to be remedied. By such a reference a general statute is not incorporated into or made a part of the special statute. The right is given, the duty declared, or burden imposed, by the special statute, but the enforcement of the right or duty, and the final imposition of the burden, are directed to be in the form, and by the procedure of the other and general laws of the state. Reference is made to such laws, not to affect and qualify the substance of the legislation, and vary the terms of the act, but merely for the formal execution of the law." *People v. Banks*, 67 N. Y. 568.

We think it clear that the act organizing and prescribing the jurisdiction and procedure of the superior courts is not obnoxious to the constitutional objections made. We are also of opinion, for the same reasons, that the term of the court below did not lapse, as claimed, and that the court had jurisdiction to render the judgment appealed from.

The remaining errors assigned question the authority of the court to render judgment against appellant upon the law and the evidence. The main ground of defense is the license granted the appellant by the city ordinance of January 23, 1881, which, it is contended, afforded it, under the charter of February 18, 1874, the same rights and immunities in the streets as the proprietors of other modes of conveyance. In so far as the legal points raised and discussed involve a construction of the state constitution, they are settled in the case of *City of Denver v. Bayer*, 7 Colo. 113, 2 Pac. Rep. 6. And so far as the attempt is here made to obtain a reconsideration of the construction there given to the constitution, it must fail. That question was thoroughly investigated by the court, and the decision made after a careful consideration of all the authorities bearing thereon. We are satisfied with the construction adopted, and adhere thereto.

The argument here is largely based on the proposition that the constitution does not control the questions arising in this case, for the reasons that it went into effect subsequent to the passage of the law under which the street in question was dedicated to public uses, subsequent to the act of dedication, and subsequent to the date of the city charter by virtue of which the ordinance was passed, licensing the appellant's occupation of the street in question. The first questions which we will proceed to consider, are what was the nature and extent of the title acquired by the city of Denver in and to the streets of additions thereto, which, prior to the constitution, were surveyed, laid out, platted, and made part of the city under the provisions of the General Statutes then in force, and in conformity with its charter, and what rights and interests in said streets, if any, remained with the proprietors of the land, or their grantees, the abutting lot-owners? The constitution went into effect August 1, 1876. Daniel Witter's first addition to the city of Denver, in which the appellee's lots are situate, was legally surveyed, laid out, and the plat thereof recorded in the manner provided by statute, and became, by force of the statutes, part of the city, May 9, 1876. Rev. St. 1868, p. 616, § 12; Rev. St. 1868, pp. 618, 619, §§ 1-5; Charter 1861-1874, art. 1, § 3. It will be observed that the statute in such cases does not vest in the city an absolute fee in the streets. Section 5, p. 619, Rev. St., is as follows: "Upon the filing of any such map or plat the fee of all streets, alleys, avenues, highways, parks, and other parcels of ground reserved therein for the use of the public, shall vest in such city or town, if incorporated, in trust, for the uses therein named and expressed; or if such town be not incorporated, then in the county until such town shall become incorporated, for the like uses." The effect of this provision is to vest in the city a qualified fee in the streets, for the use of the public. The alleged power of the city to authorize the occupation of the public street called "Willow Lane" by an ordinary railroad, with trains of cars propelled by steam-engines, without liability for injuries to property occasioned by the construction and operation of the railroad, seems to be based on the proposition that the city, by virtue of the dedication mentioned, was vested with title to the streets in fee absolute under the statutes then in force. This proposition is defeated by the express words of the statute just cited. The effect of the dedication proceedings was merely to vest in the city the title to the streets in trust for the general public, for street purposes. As to all other purposes there remained in the proprietor of the addition reserved rights in the streets, which were capable of being transferred by deed to the purchasers of abutting lots, as rights appurtenant thereto. These are property rights, and are held by the courts to constitute property. All public dedications, said the supreme court of the United States, must be considered with reference to the use for which they are made. *Cincinnati v. White's Lessee*, 6 Pet. 431.

A dedication for street purposes constitutes a contract between the proprietor of the land, on the one hand, and the representative of the public on the other. *Cooley*, Const. Lim. (5th Ed.) 331-335. In the present instance an absolute fee in the streets not having passed to the city, it becomes important to construe the contract of dedication, in order to ascertain the respective rights and privileges of the parties thereto. The weight of authority is to the effect that when the fee of a street is in the municipality in trust for the public for street purposes, the paramount control thereof is in the legislature, as the representative of the public, and the municipality may apply them to such uses as are authorized by statute. In the absence of legislation on the subject, the municipal government may appropriate the streets to the ordinary purposes of business and travel. The usual modes of travel and the usual means of conveyance may be employed by which the inhabitants are accustomed to pass or be conveyed through the streets of a city. Appropriation of the streets to such uses is authorized by the common law. The abutting lot-

owner is presumed to purchase with knowledge of this servitude, and for injuries to his property necessarily incidental to those uses he cannot complain. When the legislature vests in the municipal authorities a general control of the streets, judicial opinion is divided concerning the extent of such power. The better view would seem to limit the authority to the ordinary uses of the streets. This includes such modes and means of passage upon and over the streets as are usual in cities, and such additional uses as the health and convenience of the city, in view of the extent of its population, may require; as the construction of sewers, the laying down of gas and water pipes, the grading and paving of the streets, and the like. But this general supervisory power is not to be enlarged by construction, so as to authorize an extraordinary use of the streets, or their use by extraordinary or unusual means, without express or clearly implied legislative sanction. If the municipality, without statutory authority therefor, authorizes their use for or by extraordinary purposes or means, in such a case as the present it would be inconsistent with the contract of dedication, for the lot-owner does not purchase with notice that the streets may be put to such uses. *Cooley*, Const. Lim. 676; 2 Dill. Mun. Corp. §§ 680-683; also, §§ 713-717; *Mills*, Em. Dom. §§ 202-207; *Pierce*, R. R. 242-246. The decisions of the court of appeals of New York are recognized by law writers and courts as weighty authority on these questions. The decision in *Story v. Railroad Co.*, 90 N. Y. 122, and the reaffirmance of its doctrines (in February of the present year) by the case of *Lohr v. Railroad Co.*, 10 N. E. Rep. 528, sustain the views above advanced.

The following general deductions may be made as to the *status* of cases similar to the one before us, considered, as counsel suggests it ought to be, under the territorial organization and statutes alone: *First*. That the city council might properly authorize the streets of an addition to the city to be used for all ordinary and necessary purposes to which city streets are usually subjected, and to such further *local* uses and means of conveyance as the legislature may have authorized for the streets and thoroughfares of the entire city. *Second*. That the proprietor of the addition and his grantees must be held to have anticipated all these uses; and that incidental injuries arising from a careful exercise of those rights are *damnum absque injuria*. But as to extraordinary uses, those not authorized by legislative sanction for general application throughout the city, including its additions, no such immunity exists. A license from the city, in the latter class of cases, would be no defense to an action for damages to abutting property.

But it is asserted, and the assertion frequently repeated throughout the extended brief of counsel for appellant, that the legislature conferred on the city, by its charter of April 7, 1874, in force at the time of the dedication, full power to appropriate these streets to all modes of travel, including railroad cars propelled by ordinary steam-engines. Upon this assertion is based the proposition that abutting lot-owners must be held to have purchased their lots with notice that the streets might be appropriated to such uses.

We do not think these views are sustained by the provisions of the city charter. That instrument empowered the city council, "by ordinances not repugnant to the constitution of the United States, or the organic law of this territory, to open, alter, abolish, widen, extend, establish, grade, pave, or otherwise improve and keep in repair, streets, avenues, lanes, alleys, sidewalks, drains, and sewers." Article 6, § 3, cl. 6. It authorized the city "to regulate and run horse-railway cars, or cars propelled by dummy engines, laying down tracks for the same, transporting passengers thereon, and the form of rail to be used: provided, that no ordinance shall be passed conflicting with any rights vested in the Denver City Railway by their charter." Section 3, cl. 45. Clause 47 of the same section is as follows: "To regulate and prohibit the use of locomotive engines, require railroad cars to be propelled by other power than that of steam, to direct and control the location of rail-

road tracks, to require railroad companies to construct, at their own expense, such bridges, tunnels, or other conveniences at public railroad crossings as the city council may deem necessary, and to regulate the speed of all railroad trains."

These are all the provisions of the charter bearing upon the subject, aside from the provisions concerning condemnation proceedings. It is clear that the power alleged is not contained in either the sixth or the forty-fifth clause of said section 3. The forty-seventh clause does not mention streets, although it may include them, nor does it purport to regulate the use of any mode of conveyance mentioned in the other clauses, or ordinarily employed for the purposes of local travel throughout the city. This latter clause relates to railroad companies, and to the ordinary railroad tracks on which trains of freight and passenger cars, propelled by ordinary steam-engines, are hauled back and forth between distant *termini*. This clause was not intended to authorize cars or trains of cars drawn by steam-engines to occupy and use the streets and thoroughfares generally, in common with all other modes of conveyance. The general scope of the clause, as indicated by the language employed, is the regulation of ordinary railroads, whose lines shall be extended into and through the city. And while it was within the contemplation of the legislature that they might enter and pass through the city, the power to regulate, direct, and control them in the particulars specified was not confined to such as should be constructed longitudinally through the streets, but included as well those built wholly or in part through other ground, and only crossing the streets, diagonally or otherwise. There is no evidence of any intention in this clause of the charter to authorize the city council to license railroad corporations to lay their tracks, and operate their roads into and through the city, so as to afford them immunity from liability for the actual injuries thereby resulting to the property of citizens. There being, then, in the charter, no authority to use the streets generally for these purposes, nor any intention to grant immunity against injuries for the invasion of private property, the provisions of the charter constitute no defense to this action. If the grant of power to license the corporations last mentioned be inferable from the forty-seventh clause, it would necessarily be applicable to a few only of the numerous streets of the city. Being, therefore, a special power, it could not be held to have been within the contemplation of the act of dedication. The law is well settled that for the diversion of streets from the purposes regularly contemplated when they were dedicated, compensation must be made for injuries inflicted upon the property of abutting lot-owners. The license to the defendant set up in the answer, therefore, constituted no bar to the action for damages.

Another point made and strongly urged is that the state constitution affords no remedy to the abutting lot-owners in this case. The reasons assigned are—*First*, that the entire title to the street in question had passed to and vested in the city prior to the time the constitution went into effect; *second*, that the constitution does not, even by implication, divest the municipality of any powers over its streets previously conferred by its charter. It is not material to the right of action in the present case whether the constitutional provisions be applicable or not, since the right of action exists without reference thereto; yet, since the injury was done to appellee's property after the constitution went in effect, its provisions may be properly invoked. It may be conceded that the adoption of this instrument neither modified nor curtailed the powers previously conferred on the city council over the streets; also that the legal rights and interests of the lot-owners in the street remain as established by the act of dedication. The constitutional provision "*that private property shall not be taken or damaged for public or private use without just compensation*," while not intended to disturb vested rights, nor in itself prohibitory of the exercise of powers previously granted by the legislature, is

remedial in its nature and effect respecting existing property rights. Its mandate is that, where they are taken or injuriously affected subsequent to the day on which the constitution went into effect, just compensation shall be made. That the appellee had a legal interest and vested rights in the street we have already decided. That his property was injuriously affected by the construction and operation of appellant's railroad in the street on which his lots abutted, after the constitution went into effect, sufficiently appears in the record before us. The phrase of our constitution, "or damaged for public or private use without just compensation," is an extension of the common constitutional provision designed for the protection of private property. It is a recognition of a new right of recovery, which is not limited to cases where an action would have lain at common law.

A point is made that no replication being filed to the third defense set up in the answer of the appellant, the same was admitted by appellee, and that on this ground the judgment should be for the appellant. This defense sets up the facts of dedication of Witter's first addition to the city, on May 9, 1876, and the license from the city to the appellant. In so far as the facts stated in this defense are concerned, the failure to reply admits the same. It does not, however, admit the conclusions of law, and the argumentative propositions therein contained. No exceptions were saved to the evidence, and it cannot be considered for any other purpose than to determine whether the court was authorized thereby, under the law, to find the issues for the plaintiff, and to render judgment in his favor. The evidence was ample for these purposes.

There being no reviewable error in the record, the judgment will be affirmed.

ELBERT, J., concurs in the conclusion.

HELM, J., (*concurring.*) I do not think the ownership of the fee of the street by a municipal corporation operates, in cases like this, to cut off the abutting lot-owner's right to compensation under the constitution. But, be this as it may, the chief justice has demonstrated in the principal opinion that the fee to Willow Lane is, by the very terms of the dedication and statute, conveyed to the city of Denver in trust. If, therefore, under existing laws, there can be such a thing as a wholly unqualified fee in the city to a street, there is no room for contention that this title is such a fee. And the argument based upon the absolute ownership by the city of the fee to Willow Lane requires no further notice.

We may concede that the statute under which Witter's addition was recorded permits the granting of a right of way by the city council for the construction of an ordinary railroad through the street in question; and we may concede, but without intending to pass upon its correctness, counsel's conclusion that the power thus given originally carried with it, when exercised, immunity from damages for injury to the abutting owner; still it would not follow that such immunity exists in the case at bar. The ordinance granting defendant a right of way through Willow Lane street was adopted after the constitution took effect, and the injury of which plaintiff complains was inflicted with that instrument in force. If the statute theretofore existing avoided liability for injuries like those here complained of, it was to that extent inconsistent with the constitution, and to that extent repealed by the constitution. Section 15, art. 2, Const.; section 1, Schedule to Const.

Concerning the exact force of the expression, "or damaged," as used in section 15, art. 2, of the constitution, I desire to add a few words. This expression, or its equivalent, has received two different interpretations from the courts: *First*, that it merely recognizes a right of action *where one would have existed at common law* but for condemnation statutes, or statutes enacted with a similar design. This is the view taken by the English courts, not without strong dissenting opinions, of a similar statutory phrase, and of the same constitutional provision, by at least one American case. See *City v.*

Bayer, 7 Colo. 113, 2 Pac. Rep. 6. *Second*, that these words are the recognition of a *new right of action* not necessarily known to the common law. This seems to be the construction given, though without discussion, by the supreme courts of several states in the Union. But as declared by us in *City v. Bayer, supra*, it makes no difference which of these views be adopted in cases like this; for a careful examination of the decisions adhering to the former shows that they would justify the recognition of a right of action at common law under the facts of this case, were there no statute and ordinance permitting the use of the street by the defendant corporation. While, if the latter view, to which I am strongly inclined, be accepted, plaintiff's right to compensation is clear.

The principal reason for the position that the phrase in question, and phrases of similar import, only give a right of action where one would, in the absence of such statutes as those above mentioned, have existed at common law, is the consequences to which the opposite view might lead. It will be observed that the constitution inhibits the damaging, without compensation, of private property for either public or private use. By giving these phrases a literal and wholly unqualified construction, we not only forbid the necessary and careful improvement of a street by the city, without compensation for incidental injuries to the abutting owner, but we also forbid the lot-owner himself improving his premises in a legal and careful manner, without compensating an adjoining lot-owner for incidental injuries occasioned by such "prudent exercise of his right of dominion." This would be to announce the rule that one must so use his own as to inflict absolutely no injury or inconvenience upon another; and that, if he do not, he must expect to respond in damages to that other; it would be practically to say that in this state there can be no injuries to realty covered by the doctrine of *damnum absque injuria*.

This court has uniformly declined to find in the constitutional language under consideration any such unqualified meaning. We know, and it is a proposition that will not permit of serious discussion, that such was not the intention of the people in adopting this language, or of the convention in using it. We think, and have so said, that it was the intention to permit a recovery for injuries inflicted upon an abutting owner through the occupation and use of a street by an ordinary railroad. And with equal confidence we have announced the view that it was *not* the intention to allow compensation to an abutting owner for injuries occasioned through a reasonable and careful improvement of the street by the city, for the benefit of the local public. *City v. Vernia*, 8 Colo. 399, 8 Pac. Rep. 656; *City v. Bayer, supra*. The framers of the constitution, and the people who voted for its adoption, understood that, with this instrument in force, certain injuries suffered by the proprietor of land through the legitimate and careful improvement of adjoining ground, would continue to be wrongs for which the law provides no remedy. So, also, did the convention and the people understand that the abutting lot-owner would anticipate, in making his purchase, that the street would necessarily be occupied by the local public for all the *usual and ordinary* uses of a highway; that the city would, from time to time, under the statutory powers conferred, so change and improve the street as to render it more convenient and useful for such purposes; and that incidental injuries indirectly resulting to him from such improvements would still be, as they were before the constitution, wrongs without a legal remedy. But it cannot be reasonably asserted that, in framing and adopting this constitutional provision, it was understood that the abutting owner would anticipate such an *unusual and extraordinary* use of the street as the one under consideration in this case; or that he would make allowance for such use in his purchase of the lot, or dedication of the street, as the case might be. A distinction was, in my judgment, intended between those uses to which *every* street is primarily and necessarily dedicated, and those extraordinary uses which are tolerated in but

very few, probably not more than one in a hundred, of the many streets required for its convenience by the local public.

I indorse the views of the chief justice concerning the jurisdiction of the superior court in the premises, and regularity of the proceedings before it. Upon the foregoing grounds, I also approve of the conclusion reached by him on the other branch of the case.

(10 Colo. 426)

DENVER CIRCLE R. Co. v. WIGGINS and Wife.

(*Supreme Court of Colorado*. November 18, 1887.)

Appeal from superior court of Denver.

J. P. Brockway, E. O. Wolcott, E. L. Johnson, and C. E. Gast, for appellant. *T. A. Greene and H. B. Johnson*, for appellees.

PER CURIAM. We discover no reversible error in the trial of this cause. The questions of law involved were passed on in *Railroad Co. v. Nestor*, ante, 714, (decided at the last sitting.) It was there held that the ordinance of the city permitting the appellant to lay down its track in the street, and to operate its cars and engines therein, constituted no defense to an action for real injuries done to abutting property. We are likewise of opinion that the evidence in this cause warranted the judgment, and it is therefore affirmed.

(10 Colo. 427)

DENVER CIRCLE R. Co. v. CLARK.

(*Supreme Court of Colorado*. November 18, 1887.)

Appeal from superior court of Denver.

J. P. Brockway, E. L. Johnson, and C. E. Gast, for appellant. *Brown & Putnam*, for appellee.

BECK, C. J. The appellant in this case alleges that appellee was the owner of three lots with dwelling-house and improvements thereon, situated in Summers' First addition to the city of Denver; that these lots abutted on Clark and Carson streets, and that appellee constructed and operated its railway on Clark street in front of said lots and property. The injuries for which damages are claimed are the same as in *Railroad Co. v. Nestor*, ante, 714, (just decided.) And in addition, damages are asked for the destruction by fire, ignited by sparks from one of appellant's engines, of a store-room on the premises.

Owing to an oversight in making up the transcript, perhaps, it does not appear that any answer was filed in this cause; but since the respective counsel have treated the case in their briefs and stipulations as if the same defenses had been interposed as in the case just decided, and since the same errors are assigned, we too feel warranted in so treating it. There was no appearance for the appellant at the trial. The testimony on the part of the appellee warranting a judgment in his favor, it is therefore ordered that judgment be affirmed.

(10 Colo. 428)

DENVER CIRCLE R. Co. v. BIGLER.

(*Supreme Court of Colorado*. November 18, 1887.)

Appeal from superior court of Denver.

J. P. Brockway, E. L. Johnson, and C. E. Gast, for appellant. *Brown & Putnam*, for appellee.

BECK, C. J. The same questions are presented in this case as in the case of *Railroad Co. v. Nestor*, ante, 714, (decided at the present sitting.) They arise also on substantially the same state of facts, save that the property injured is situated in Elmwood's addition to the city of Denver, which was dedicated to the city after the state constitution went into effect. We are of opinion that the law and evidence warrants an affirmation of the judgment, and it is accordingly done.

(10 Cal. 428)

DENVER CIRCLE R. Co. v. MARTIN.

(*Supreme Court of Colorado*. November 18, 1887.)

Appeal from superior court of Denver.

J. P. Brockway, E. L. Johnson, and C. E. Gast, for appellant. *Brown & Putnam*, for appellee.

BECK, C. J. This case presents the same questions, based upon a similar state of facts, as *Railroad v. Nestor*, ante, 714, (decided at the present sitting.) That case is decisive of this, and the judgment is accordingly affirmed.

(10 Colo. 387)

HARDING v. PEOPLE.

(*Supreme Court of Colorado.* November 11, 1887.)

1. CRIMINAL PRACTICE—VERDICT—RETURN AND DISCHARGE OF JURY DURING ADJOURNMENT—AGREEMENT OF DEFENDANT.

Gen. St. Colo. § 962, provides that, in cases of misdemeanor, the parties can agree that the jury, when they have agreed upon their verdict, may write and seal the same, and, after delivering to the clerk, may separate, and this verdict shall be received as a lawful verdict. In a trial for misdemeanor, when the only agreement between the parties was that the verdict might be rendered without the presence of the defendant, when the jury retired the court adjourned until the following day. During the adjournment the jury returned to the court-room, and, in the presence of the judge and clerk, returned their verdict, and were discharged. The following day the court ordered the verdict recorded as the verdict in the cause. *Held*, that, in the absence of the agreement provided for in the section cited, there is no authority for the judge to receive the verdict and discharge the jury during the adjournment.

2. INDICTMENT AND INFORMATION—DESCRIPTION OF OFFENSE.

Gen. St. Colo. § 2620, provides that no person shall practice medicine in that state without a certificate from the state board of medical examiners that he possesses certain prescribed qualifications. *Id.* § 2627, provides that nothing in the act shall be construed to prohibit gratuitous services in cases of emergency. *Held*, that in an information for violating the provisions of section 2620, it is not necessary to negative the exception made by section 2627, it being a matter of defense.

3. SAME—ALLEGATION OF INTENT.

Where a statute creating an offense is silent concerning the intent, no criminal intent need be alleged in an information for violation of the statute.

4. CONSTITUTIONAL LAW—RIGHTS AND IMMUNITIES OF CITIZENS—ACT REGULATING PRACTICE OF MEDICINE AND SURGERY.

Gen. St. Colo. §§ 2617-2631, regulating the practice of medicine and surgery, and providing that persons engaging in the practice of medicine and surgery must possess certain qualifications, are not in conflict with Const. U. S. art. 4, § 2, nor with the provision of the fourteenth amendment, to the effect that "no stateshall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."¹

5. SAME—TITLE OF LAWS.

Const. Colo. art. 5, § 21, provides that no bill except general appropriation bills shall be passed containing more than one subject, which shall be clearly expressed in the title. *Held*, that the act entitled "An act to protect public health and regulate the practice of medicine in the state of Colorado," (Gen. St. Colo. §§ 2617-2631,) is not in contravention of the provisions of the constitution.

6. STATUTES—CONSTRUCTION—TIME OF GOING INTO EFFECT.

Const. Colo. art. 5, § 19, provides that no act shall take effect until 90 days after its passage, except in case of emergency. Gen. St. Colo. § 2621, provides that "the state board of medical examiners, within 90 days after the passage of the act, shall receive * * *" *Held*, that the expression "after the passage of the act" refers to the time when the act goes into effect.

7. PHYSICIANS AND SURGEONS—RIGHT TO PRACTICE—CERTIFICATE OF QUALIFICATION.

Before any person can practice medicine in any of its departments in the state of Colorado, he must apply for and receive a certificate of qualification from the state board of medical examiners, as provided by Gen. St. Colo. § 2620.

Error to criminal court, Arapahoe county.

Eliza J. Harding was arraigned and tried on an information filed by the district attorney in the criminal court of Arapahoe county, in which information

¹A statute, which prescribes the qualifications necessary for a person to possess in order to engage in the practice of medicine and surgery, requiring him to have learning and skill, is an exercise of police power inherent in the state. *Eastman v. State*, (Ind.) 10 N. E. Rep. 97; *Orr v. Meek*, (Ind.) 11 N. E. Rep. 787; *Richardson v. State*, (Ark.) 2 S. W. Rep. 187. And, in the exercise of its police power, the state has the same right to require the medical practitioner to be possessed of a good moral character as it has to require that he shall be learned in the profession. *State v. Examining Board*, (Minn.) 20 N. W. Rep. 238. Such a statute is not unconstitutional because it exempts those engaged in practice at the time of the passage of the law from the necessity of possessing the prescribed qualifications. *Fox v. Territory*, (Wash. T.) 5 Pac. Rep. 604.

she was charged with unlawfully practicing medicine and surgery, without having received from the state board of medical examiners of the state of Colorado a certificate authorizing her to practice medicine and surgery in said state. The information contained two counts, the second of which charges her with unlawfully practicing medicine and surgery without having presented to the state board of medical examiners for verification a diploma from a legally chartered medical school, and without having furnished to said board other evidence conclusive of her being a graduate of a legally chartered medical school in good standing. In other respects the second count is like the first. The trial ended in conviction, and the imposition of a fine of \$100, and costs. The defendant below brings the cause to the supreme court by writ of error. The further facts sufficiently appear in the opinion of the court.

Matt Adams, for plaintiff in error. *The Attorney General*, for defendant in error.

ELBERT, J. It appears that after the jury in this case had retired to consider their verdict, the court adjourned until the following day; that during the adjournment the jury returned into the court-room, and, in the presence of the judge and clerk, returned their verdict of guilty, and that thereupon the judge discharged the jury from further attendance in the cause, and, on the incoming of the court the following day, ordered the verdict to be recorded, and to stand as the verdict in the cause. We think this was error. The agreement of counsel, which was entered upon the minutes of the court, was limited to the one stipulation, viz.: "That the verdict herein may be received though the defendant be not present." It does not appear to have been made with reference to, and does not comply with, section 962, Gen. St., which provides "that, in every case of misdemeanor only, if the prosecutor for the people and the person on trial, by himself or counsel, shall agree, which agreement shall be entered on the minutes of the court, to dispense with the attendance of an officer upon the jury, or that the jury, when they have agreed upon their verdict, may write and seal the same, and, after delivering the same to the clerk, may separate, it shall be lawful for the court to carry into effect any such agreement, and receive any such verdict delivered to the clerk as the lawful verdict of any such jury." A similar provision in the statutes of Illinois has been held to allow the jury, its provisions having been complied with, not only to withdraw from the charge of the officer, but to seal their verdict and separate as an organized jury. *Reins v. People*, 30 Ill. 272. In the absence of the agreement provided for by this section, we know of no authority that authorized the judge to receive the verdict and discharge the jury during the adjournment. At common law, in trials for misdemeanors, a privy verdict was allowed, and there was no occasion for the presence of the defendant. 1 Chit. Crim. Law, 636. But a privy judgment only contemplated the separation of the jury until the meeting of the court, when their verdict was received in open court from the lips of the foreman, and recorded in the usual way. This finding in open court was what decided the rights of the parties, and was what was admitted to record. *Dornick v. Reichenback*, 10 Serg. & R. 90. Except in the case of the agreement provided for in the section to which we have referred, we think the law requires in all criminal cases that the jury return to and declare their verdict in open court. Whether, in cases not capital, the jury may not be allowed, upon agreement of parties, to deliver their verdict when found, to the judge or clerk, and separate until the incoming of court, is a question we are not to be understood to be deciding. *Reins v. People*, 30 Ill., *supra*.

For the following reasons the judgment of the court below must be reversed, and the cause remanded. Some of the other assignments of error present questions which will necessarily arise upon a new trial, and in that view we deem it advisable to notice them.

The act under which the plaintiff in error, the defendant below, was convicted, is entitled "An act to protect the public health and regulate the practice of medicine in the state of Colorado." Gen. St. 773. By its provisions, the legislature has attempted to protect the public from the evils arising from the practice of medicine and surgery by persons not qualified. No question is made respecting the general power of the legislature to pass acts of this character, nor can any question be made touching the wisdom and necessity of laws securing protection to the public in this most vital matter. We do not see, as is claimed, that the provisions of the act are in conflict with section 2, art. 4, of the constitution of the United States, which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," or with that part of the fourteenth amendment which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

The act we are considering makes medical qualification the test of the right to practice medicine and surgery, and the field is open to all persons who possess the qualifications prescribed by the act. We find nothing in its provisions inconsistent with that rule of equality which the constitutional provisions we have quoted prescribe. Touching a like question, under a similar statute, it is said: "Under the provisions of the constitution of the United States, every citizen has the undoubted right to pursue any lawful profession, calling, or employment, in a lawful manner; but these pursuits are always subject to such restrictions as may lawfully be prescribed by the legislature of each state, in order to protect the public health and promote the general interests of society, and, as long as such restrictions leave the field open for every citizen of the United States who comes endowed with all the necessary qualifications to practice his profession, pursuit, or calling, the law cannot be declared unconstitutional." *Ex parte Spinney*, 10 Nev. 336.

It is also urged that the title of the law contains two subjects of legislation, in contravention of section 21, art. 5, of the constitution, which declares that "no bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title. * * *" The objection is to two subjects in the "title," not to two subjects in the "act." The constitutional inhibition goes to "acts" containing more than one subject. With respect to the title, the only requirement is that it clearly express the subject of the act. It is very clear that the act concerns but one subject of legislation, viz., the regulation of the practice of medicine within the state of Colorado. There is no union in the act of incongruous matters, having no necessary connection or relation, and the subject of the act is clearly expressed in the title. These were the two purposes the constitutional provision which we have quoted was intended to accomplish. It is true that the title expresses both the general and special character of the act; but we see no objection to this. It none the less clearly expresses the subject of the act.

Our attention is also called to section 5 of the act, which provides that "the state board of medical examiners, within ninety days after the passage of the act, shall receive, through its president, applications for certificates and examinations. * * *" In this connection we are cited to section 19, art. 5, of the constitution, which provides that "no act * * * shall take effect until ninety days after its passage, unless in case of emergency. * * *" In the absence of any emergency clause, in view of this constitutional provision, the expression "after the passage of the act," as used in the law, can have but one meaning, namely, after the act goes into effect. In the construction of statutes, general terms are to receive such reasonable interpretation as leaves the provision of the statute practically operative. *Electro-Magnetic M. & D. Co. v. Van Auken*, 9 Colo. 207, 11 Pac. Rep. 80.

The objection made in this connection to the regularity of the appointment and organization of the board need not be construed. It is enough that

the board was *de facto* the state board of medical examiners, acting under the provisions of the statute, and that its certificate would have protected defendant from prosecution under the statute.

It is claimed that the act nowhere prohibits the practice of medicine without a certificate from the board of medical examiners. This objection appeals alone to the letter of the law. The provisions of the act show beyond any question that the clear intention of the legislature was to require all persons desiring to practice medicine or surgery within the state after its passage to apply for and receive a certificate of qualification from the state board of medical examiners before they were authorized to do so. This is the essential requirement of the statute, and all its provisions are substantially to this end.

Section 4 of the act declares that every person practicing medicine in any of its departments shall possess the qualifications required by this act. Whether a person possesses the qualifications required can be determined only in one way, viz., in the mode prescribed by the statute, and can be proven only in one way, viz., by the evidence prescribed by the statute. The provisions respecting the mode of determining this fact, and the evidence of the determination are exclusive. The party wishing to practice must appear before the state board of medical examiners established by the act, must present the requisite diploma, or stand the examination prescribed. If his diploma or his examination, as the case may be, is satisfactory to the board of examiners, they "shall issue their certificate in accordance with the fact," "and the holder of the certificate shall be entitled to all the rights and privileges mentioned in the act." Until he does this, he is without the requisite and only admissible evidence that he possesses the qualifications required by the act, so as to entitle him to practice medicine within the state, and cannot say that he has complied with the provisions of the act.

This is not a law which comes within the rule that penal laws are to be construed strictly. Justice STORY says: "In one sense every law imposing a penalty or forfeiture may be deemed a penal law. In another sense, such laws are often deemed, and truly deserve to be called, remedial." The judge was therefore strictly accurate when he stated "that it must not be understood that every law which imposes a penalty is therefore, legally speaking, a penal law; that is, a law which is to be construed with great strictness in favor of the defendant. Laws enacted for the prevention of fraud, for the suppression of a public wrong, or to effect a public good, are not, in the strict sense, penal acts, although they may inflict a penalty for violating them. * * * It is in this light I view the revenue laws, and I would construe them so as to most effectually accomplish the intention of the legislature in passing them." *Taylor v. U. S.*, 3 How. 210. This is the enlightened and reasonable rule by which the act we are considering is to be interpreted.

Section 20 provides "that nothing in this act shall be construed to prohibit gratuitous services in case of emergency." It was not necessary, as is claimed, to negative this exception in the information against the defendant for a violation of the provisions of the act. The exception is not embraced within the same clause that defines and creates the offense, and constitutes no part of the description of the offense. It is contained in a distinct section, and is matter for defense. 1 Whart. Crim. Law, § 378; *State v. Barker*, 18 Vt. 195.

Nor was it necessary to allege any criminal intent. The rule is that, if the statute creating the offense is silent concerning the intent, there need be no intent alleged. Bish. Crim. Proc. § 523.

The points which we have decided are believed to cover all the important assignments respecting the admission or rejection of evidence and the giving and refusing of instructions. The court below tried the case substantially upon the view of the law which we have presented. The evidence showed that the defendant was engaged in the practice of medicine by the administra-

tion or application of electricity as a curative agent, and without having first obtained a certificate from the state board of medical examiners as required by the act. If it be true that the board of examiners arbitrarily refused her application for a certificate to practice, her remedy was *mandamus*. *Deitz v. City of Central*, 1 Colo. 332.

For the error we have discussed in the first part of the opinion, the judgment of the court below must be reversed, and the cause remanded.

(74 Cal. 219)

LITTLE v. SUPERIOR COURT. (No. 12,188.)

(*Supreme Court of California*. November 30, 1887.)

APPEAL—REVERSAL—NEW TRIAL—PARTIES NOT PARTIES TO THE APPEAL—INJUNCTION.

In a proceeding to restrain the trial court from retrying a case, so far as the petitioners were concerned, it appeared that in a foreclosure case in 1878, the mortgagor's (petitioner's) property was sold to pay two mortgages. The decree was satisfactory to the mortgagors, but not to one of the mortgagees, whose lien was subordinated to the other, and he appealed to the supreme court, where the mortgagors objected that, as to them, no appeal had been taken. The supreme court reversed the decree, and ordered a new trial, and in the course of the decision stated that, in considering the case, they had regarded the appeal as to the mortgagors not well taken. *Held*, that though the mortgagor's objection was not directly passed upon, yet the statement was in effect a decision that, as to the mortgagors, no appeal had been taken; that the only question on appeal was as to which mortgage had priority, in which question the mortgagors had no interest, and a new trial as against the mortgagees would be restrained.

In bank. Appeal from superior court, Monterey county; J. K. ALEXANDER, Judge.

M. Delmas, for petitioner. T. O. Houghton, for respondent.

PATERSON, J. This is a proceeding to restrain the superior court of Monterey county from trying the case of *Withers v. Little*, so far as these petitioners are concerned therein. The action referred to is a foreclosure suit, commenced by Withers against David Jacks and petitioners herein, Milton Little and Mary Little, in 1878. It is alleged there that the Littles are indebted to Withers upon a certain promissory note; that they gave a mortgage on lots 1 and 2, in Monterey, to secure the payment of the note, and that Jacks claims some interest in the property. The Littles made default, Jacks put in an answer denying that his mortgage was subsequent in time or in equity to that of Withers upon lots 1 and 2, and in a cross-complaint, alleged that the Littles were indebted to him upon a promissory note secured by a mortgage upon said lots 1 and 2, and also upon lots 3, 4, 5, and 6. The Littles consented in open court to the entry of judgment against them as prayed for by Jacks in his cross-complaint. The cause was tried by the court, and a decree entered in favor of Withers against the Littles for the sum claimed by him, and in favor of Jacks for the sum claimed in his cross-complaint. It was further adjudged that the Withers mortgage upon lots 1 and 2 had priority. At the foreclosure sale, Withers purchased lots 1 and 2. Jacks purchased lots 3, 4, 5, and 6, and certificates of sale were regularly issued to them, and were duly recorded. Thereafter Jacks filed a notice of appeal, which reads as follows:

"[Title of court and cause.] You will please take notice that the defendant, David Jacks, in the above-entitled action, hereby appeals to the supreme court of this state from the judgment made and entered in said district court on the twenty-fifth day of July, 1878, in favor of plaintiffs in said action, and against the defendants therein, and from the whole thereof.

"Dated this twenty-first day of July, 1879.

"HOUGHTON & REYNOLDS, Attorneys for Defendant David Jacks."

An objection was made by the Littles in the supreme court to the hearing of the appeal, on the ground that as to them no appeal had been taken. The

decision of this court is printed in 56 Cal. 370 *et seq.* The court did not directly and fully sustain the objection thus made, but in the opinion said: "In considering this cause we have regarded the appeal as to the administrator of Milton and Mary Little, his wife, not properly taken." The judgment was reversed and cause remanded, with directions to enter judgment, giving Jacks' mortgage priority. A rehearing was asked, which was denied, but the court remanded the case for a new trial. See report of the case.

The court below (respondent herein) has evidently been in doubt as to the effect of this decision upon future proceedings in the case to determine the rights of Withers and Jacks, respectively, and is now of opinion that it is necessary to proceed against all the parties, as if the case had never been tried. But the judgment rendered *against the Littles* is final. They have never been heard on appeal.

There was but one issue over which there was any contest, viz., as to which was the prior mortgage. That issue was between Withers and Jacks, and was the only issue considered by this court. Furthermore, the statement in the opinion as to the appeal is in effect a decision holding that the appeal, so far as the Littles were interested, was ineffectual,—there was no appeal as to them. That portion of the decision is not affected by the order made upon the petition for a rehearing. No other conclusion could have been reached than that the judgment, so far as it affected the Littles, was not before the court on appeal. The Littles were not before this court, and the reversal and order for a new trial affected only those who were before the court,—Withers and Jacks. *Nichols v. Dunphy*, 58 Cal. 605.

The court below will not be embarrassed because of the absence of the Littles as parties in determining the rights of Withers and Jacks as the case stands. The only question between them is which mortgage takes priority. The Littles care nothing how that is decided. But the Littles are interested in the question as to whether the judgment fixing the amount due to Jacks shall stand. It has stood for nine years; was entered by their consent; no one appealed from it; and the property, lots 3, 4, 5, and 6, was sold to satisfy the debt. It would be a manifest injustice to now reopen the judgment, put the note with accrued interest in a new judgment, and again sell the property (which Jacks purchased) to pay the increased amount of indebtedness and costs, or docket a personal judgment against the Littles for the deficiency.

Let the writ issue as prayed for.

We concur: SEARLS, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; TEMPLE, J.; MCKINSTRY, J.; THORNTON, J.

(74 Cal. 224)

BATES v. PORTER, Treasurer, etc. (No. 11,575.)

(*Supreme Court of California*. December 1, 1887.)

1. MUNICIPAL CORPORATIONS—CORPORATE LIABILITIES—SINKING FUND—"REVENUE" DEFINED.

Act Cal. 1858, § 35, incorporating the city and county of Sacramento, provides that 55 per cent. of the revenue derived from the water-rents, when paid into the treasury, shall be set apart and appropriated to the interest and sinking fund, which shall be applied for the payment of the annual interest and the final redemption of bonds issued for the city indebtedness of Sacramento. By section 28 it is made the duty of the water-works collector to pay into the treasury every week all the moneys collected. In an application by a bondholder for a writ of mandate to command the treasurer to set apart and appropriate to the sinking fund 55 per cent. of all moneys received by him, collected for water-rents in the city of Sacramento, *held*, that the meaning of the word "revenue," is not the excess of receipts over expenditures, but, as clearly denoted by the context of the statute, is the gross revenue derived from the water-rents collected and paid into the treasury, and that a writ of mandate should be issued. SEARLS, C. J., PATERSON and MCFARLAND, JJ., dissenting.

2. SAME—MANDATE TO SET APART FUND—MONEYS EXPENDED BEFORE APPLICATION.

The city treasurer of Sacramento had collected the water-rents, and, after paying all expenses, including salaries for operating the water-works, set apart and appropriated 55 per cent. of the amount remaining to the interest and sinking fund. Upon petition that the court issue a mandate to the treasurer to set apart and appropriate to the interest and sinking fund 55 per cent. of the amount received from the water-rents since the first Monday in April, 1885, (a date prior to the filing of the petition,) *held*, that as that amount had already been paid out by the treasurer, although in violation of the law, the court could not grant the relief sought in that portion of the petition.

In bank. Appeal from superior court, Sacramento county; T. B. MCFARLAND, Judge.

W. C. Belcher, Freeman, Bates & Rankin, Rosenbaum & Sheeline, and S. C. Denson, for appellant. *A. P. Catlin and W. A. Anderson*, for respondent.

THORNTON, J. This is an application for a writ of mandate to command the respondent to set apart and appropriate to a fund known as the sinking fund, 55 per cent. of all moneys received by him collected for water-rents in the city of Sacramento. It is urged on behalf of respondent that the treasurer is bound to set apart the net receipts of the moneys above mentioned; that is, what remains of such receipts after deducting therefrom various items of expense in conducting the water-works, including salaries of its officers and employes. The contention of appellant is that the respondent is bound to set apart the gross receipts without deducting anything. We are of opinion that the contention of appellant is sustained by the law, which we shall proceed to show.

The city of Sacramento was incorporated by an act passed on the twenty-seventh of February, 1850. See St. 1850, p. 70. This act is referred to in the opinion in the case of *Meyer v. Brown*, 65 Cal. 583, 4 Pac. Rep. 25, 625, and some of the features of the organization of the city are there detailed. See 65 Cal. 584, 4 Pac. Rep. 25, 625. This act was amended as to the fifth and twentieth sections at the same session of the legislature by an act passed on the twenty-sixth of March, 1850. St. 1850, p. 96. By an act passed in 1851, (St. 1851, p. 391,) which became a law by permission of the governor, who neither approved nor vetoed the bill, a new act of incorporation was enacted. This act repealed the former acts above mentioned, (section 44, Act 1851, p. 401.) The act of 1851 was modified by the act of April 28, 1852, (see St. 1852, p. 19,) by amending the seventh and sixteenth sections thereof. On May 3, 1852, (St. 1852, p. 196,) an act was passed authorizing the mayor and common council of the city to contract, by special ordinance, in such manner as they might choose, with any association, person, or persons, to supply the said city with water, the act declaring that "any contract or contracts so made and entered into, shall be valid and binding in law." The act of 1851 above mentioned was again amended in 1855 by the act of thirty-first of March, (St. 1855, p. 63.) By section 9 of this act, the common council was empowered on their first meeting after a general election, or as soon thereafter as the same could conveniently be done, to appoint, in such manner as the council might prescribe, the following officers, *inter alia*, to serve during the pleasure of the council, to-wit, one superintendent of water-works, and one engineer of water-works, the salary of the latter office not to exceed \$150 per month. By section 4 of this act, amending section 30 of the act of 1851, the salary of the superintendent of the water-works was fixed at \$2,000 per annum. St. 1855, p. 64. By section 12, provision was made for the collection of water-rents by the city collector, with power in the common council by ordinance, to require the superintendent of the water-works to collect the water revenue. St. 1885, p. 66. The powers conferred in the act of incorporation of the city on the city council, (see act of 1851, § 7, St. 1851, p. 393,

and the amendatory act of 1852, p. 195, amending section 7 of the act of 1851) and the act of May 3, 1852, above stated, are ample to enable the authorities of the city of Sacramento to erect and maintain water-works, and to charge and collect water-rents.

Frequent references in subsequent acts of the legislature are made to the water-works as existing, and the revenue arising therefrom in the shape of water-rents. These may be found by examining the statutes. On the point of authority in the city authorities in the matter of erecting and maintaining the works above mentioned, and to collect water-rents, therefore, it is unnecessary to make more particular reference to these enactments. All the statutes affecting the city and county of Sacramento may be found mentioned in 1 Hitt. Gen. Laws, on pages 970-972.

Early in its existence the city became indebted. It had power to borrow money which it had used for purposes not improper, and it had creditors who, as is usually the case, demanded payment. Provision was made by the legislature empowering the city to fund its indebtedness, and to issue bonds therefor. The legislation on this subject, so far as regards the case in hand, (for the action here was brought by a creditor and bondholder of the city,) will be referred to in the further progress of this opinion.

The main question in this case turns upon the construction of the act of 1858, (St. 1858, p. 267.) This act is entitled "An act to repeal the act passed March 26, 1851, entitled 'An act to incorporate the city of Sacramento,' and the several acts amendatory and supplementary thereto, and to incorporate the city and county of Sacramento."

By its first section the city and county of Sacramento were consolidated, and for the government of the territory then known as the city and county of Sacramento there was created a board of supervisors, and this board of supervisors and their successors in office it was declared should be a body politic and corporate, under the name and style of "The City and County of Sacramento," and by that name shall be known in law. It was in the same section invested with extensive powers. It was further provided in the same section that "the city and county shall not be sued in any action whatever, nor any of its lands, buildings, improvements, property, franchises, taxes, revenues, actions, choses in action, and effects be subject to attachment, levy, or sale, or any process whatever, either mesne or final."

By the second section of this act, the corporation constituted by it was made the successor of the corporation by this act dissolved, and heretofore known as "The Mayor and Common Council of the City of Sacramento." It was declared to be the owner of all the property, actions, rights of action, moneys, revenues, income, and trust at that time vested in or belonging or in anywise appertaining to the corporation known as "The Mayor and Common Council of the city of Sacramento."

The act of 1858 contains, *inter alia*, the following sections:

"Sec. 12. The treasurer of said city and county shall receive and safely keep in a secure, fire-proof vault, to be prepared for the purpose, all moneys belonging to, or which shall be paid into, the treasury, and shall not loan, use, or deposit the same, or any part thereof, with any banker or other person, nor pay out any part of said moneys, except upon demands authorized by law, and after they have been duly audited and ordered paid. He shall keep the key of said vault, and not suffer the same to be opened, except in his presence. At the closing up of the same each day, he shall take an account, and enter in the proper book the exact amount, of money on hand; and at the end of every month he shall make and publish a statement in one of the daily papers published in the city of Sacramento, of all receipts into, and payments from, the treasury, and on what account. If he violate any of the provisions of this section, he shall be considered a defaulter, and shall be deemed guilty of a misdemeanor in office, and he shall be liable to removal, and shall be pro-

ceeded against accordingly. If he loan or deposit said moneys, or any part thereof, contrary to the provisions of this section, or apply the same to his own use, or to the use of any other person, in any manner whatsoever, or suffer the same to go out of his personal custody, except in payment of audited demands upon the treasury, he shall be deemed guilty of felony, and on conviction thereof, shall suffer imprisonment in the state prison for a period not less than three nor more than ten years.

"Sec. 13. The treasurer shall keep the moneys belonging to each fund separate and distinct, and shall in no case pay demands chargeable against one fund out of moneys belonging to another. The said treasurer shall give his personal attendance at his office during office hours; and if he absent himself therefrom, except on account of sickness or urgent necessity, he shall lose his salary during his absence. For the purpose of collecting licenses he may employ a deputy, whose compensation shall be fixed by the board of supervisors, at a rate not exceeding \$5 per day when necessarily and actually employed."

"Sec. 16. Every demand upon the treasury, except the salary of the auditor, and including the salary of the treasurer, must be acted on by the board of supervisors, and allowed or rejected in the order of presentation, and must, after having been approved by the board of supervisors, before it can be paid, be presented to the auditor of the city and county to be allowed, who shall satisfy himself whether the money is legally due and remains unpaid, and whether the payment thereof from the treasury is authorized by law, and out of what fund. If he allow it, he shall indorse upon it the word 'allowed,' with the name of the fund out of which it is payable, with the date of such allowance, and sign his name thereto. No demand shall be approved, allowed, audited, or paid, unless it specify each several item, date, and value composing it, and refer to the law, ordinance, contract, or authority, by title, date, and section, authorizing the same: provided, that in all cases demands shall be paid in the order of their approval by the board of supervisors.

"Sec. 17. The auditor must number and keep a record of all demands allowed by him, showing the number, date, date of approval, amount, and name of the original holder, on what account allowed, and out of what fund payable. The demand of the auditor, on account of his monthly salary, may be audited and allowed by the board of supervisors. The auditor is required to be constantly acquainted with the exact condition of the treasury, and every lawful demand upon it, and shall report to the president of the board of supervisors on the Monday of each week, or oftener if required, the condition of each fund in the treasury. He shall keep a complete set of books for the city and county, in which shall be set forth, in a plain and business-like manner, every money transaction of the city and county, so that he can, at any time when requested, tell the state of each and every fund, where the money came from, to what fund it belonged, and how and for what purpose it was expended; and also the collections made and the money paid into the treasury by each and every officer. He shall issue all licenses and permits, except as otherwise provided in this act, and countersign all warrants on the treasury. And until the general election, in the year 1859, he shall receive for his compensation at the rate of \$3,000 per annum, payable from the salary fund, as provided in section 36 of this act.

"Sec. 18. No demand upon the treasury shall be allowed by the auditor, or approved by the board of supervisors, in favor of any person or officer in any manner indebted thereto, without first deducting the amount of such indebtedness; nor to any person or officer having the collection, custody, or disbursement of public funds, unless his account has been duly presented, passed, approved, and allowed, as required in this act; nor in favor of any officer who shall have neglected to make his official returns, or his reports, in writing, in the manner and at the time required by law, or by the regulations established by the board of supervisors; nor to any officer who shall have

neglected or refused to comply with any of the provisions of this or any other act of the legislature regulating the duties of such officer, on being required in writing to comply therewith, by the president of the board of supervisors, or the supervisor of his respective district."

"Sec. 28. Every officer, or other person, having the control, collection or custody of any money collected for taxes, licenses, water-rents, fees of office, or for any other account not otherwise herein provided, shall pay the same into the treasury on the Saturday of each week; and shall on the same day file the treasurer's receipt with the auditor; and shall at the same time file with the auditor a statement, under oath, of the sources from whence the money came, and that the money so paid over is the total amount collected since his last payment; and such statement shall also be filed in duplicate with the clerk of the board of supervisors. If the county clerk, recorder, sheriff, clerk of water-works, harbor master, or any other officer or person having the control or custody of any money collected for or belonging to the state or city and county, or any money collected for fees which this act provides shall be paid into the treasury, shall fail or neglect to pay over the fees or moneys collected by him, as required by the preceding section, or shall fail to make his affidavit, he shall forfeit his office; and it shall be the duty of the auditor to inform the president of the board of supervisors, in writing, of such failure; and at the next meeting of said board, after the said president shall receive such information, the said board shall enter an order requiring such officer to show cause, on a certain day, why such office should not be declared vacant; and, upon the return-day of such order, or at such time as the matter may be adjourned to, they shall proceed to hear and determine the matter; and, if such officer shall be found guilty of such failure, his office shall be declared vacant."

"Sec. 34. The board of supervisors shall not have power to levy any greater taxes than as follows, viz: On the real and personal estate, except such as is exempt by law, throughout the city and county, a tax of 100 cents on the \$100; such state taxes as the laws may require, and, in addition thereto, they shall levy for municipal purposes, on all real and personal property within the city limits, except such as is exempt by law, a tax of 100 cents on the \$100; also, a tax for road purposes of 5 cents on the \$100 on the property outside the city limits. All of which taxes shall be levied and collected strictly in accordance with the revenue laws of the state, except as may be otherwise provided in this act: provided, that nothing contained in this section shall prevent the board of supervisors from levying, in addition, a tax in accordance with an act passed February, 1858, entitled 'An act to amend an act passed April 27, 1857, entitled "An act to submit to the people of the counties of Sacramento and El Dorado, a proposition for the construction of a wagon road."'

"Sec. 35. The revenue derived from and within the city limits for municipal purposes, viz., taxes, licenses, harbor dues, water-rents, and fines collected in the mayor's court, or otherwise, when paid into the treasury, shall be set apart and appropriated as follows: 55 per cent. to an interest and sinking fund, which shall be applied for the payment of the annual interest and the final redemption of bonds issued for city indebtedness, in accordance with the provisions of this act; 15 per cent. to a salary fund, which shall be applied to the payment of the salaries of municipal officers as provided in this act; 8 per cent. to a school fund, which shall be applied to the support of schools within the city limits; and the balance, 22 per cent., to a fund to be used for all such necessary municipal expenses as are not otherwise provided for in this section, and shall be called the 'Contingent Fund.'

"Sec. 36. The revenue collected or accruing prior to the first day of January, 1859, throughout the city and county, except such as may be collected for municipal purposes within the city limits, is hereby set apart and appropriated

as follows, viz.: Twelve per cent. to a school fund, to be used for school purposes as provided by law; 8 per cent. to the pauper and indigent sick fund; 18 per cent. to the salary fund; 12 per cent. to the contingent fund; and the balance to a general fund, which shall be applied to the payment of the outstanding auditor's warrants lawfully drawn on the treasury, and payable in the order of their registry; and the revenue accruing and collected for the county after the first day of January, 1859, when paid into the treasury, 25 per cent. shall go to the interest and sinking fund; 10 per cent. to the school fund; 8 per cent. to the pauper and indigent sick fund; 25 per cent. to the salary fund, and the balance, 32 per cent., to the general fund, all of which shall be exclusively applied to the several purposes for which such funds were set apart; and if, at the close of any fiscal year, there shall remain a surplus in either of the funds mentioned in section 35, such surplus moneys shall be transferred to the interest and sinking fund provided in such section 35; and if a surplus shall be found at the end of any fiscal year in either fund mentioned in section 36, such surplus shall be transferred to the interest and sinking fund mentioned in said section 36, and any transfer of any sum or surplus from one of the funds mentioned in section 35 and section 36 to another fund made at any other time, or in any other manner than as provided in this act, is hereby strictly prohibited, and any violation of such provision, on the part of any officer, shall constitute a misdemeanor, punishable by fine of not less than \$500, or imprisonment in the county jail not less than three months. All money now in the treasury shall be appropriated as provided in this section.

"Sec. 37. For the purpose of liquidating, funding, and paying the claims against the city and county of Sacramento hereinafter specified, the treasurer shall cause to be prepared suitable bonds of the county of Sacramento, not exceeding the sum of \$600, and for the city of Sacramento, not exceeding the sum of \$1,600,000, bearing interest at the rate of 6 per cent. per annum, from the first day of January, 1859, and payable at the office of the treasurer. Said claims shall be funded in the order of their reception; shall, in the order of reception, be entitled to the shortest time; and one-fourth of the whole amount made payable on the first day of February, 1888; one-fourth on the first of February, 1893; one-fourth on the first of February, 1898; and the balance on the first of February, 1903. The interest on said bonds shall be made payable at the office of the treasurer, on the first day of January of each year. Said bonds shall be signed by the president of the board of supervisors, countersigned by the clerk of the board of supervisors, and indorsed by the treasurer, and shall have the seal of the city and county affixed thereto. Coupons for the interest shall be attached to each bond, so that they may be removed without injury to the bond. Said coupons consecutively numbered, shall be signed by the treasurer. It shall be the duty of the book-keeper of the city and county, and the treasurer, each, to keep a separate record of all bonds issued, showing the number, date, and amount of each bond, to whom issued, upon what claim, and its amount; and none of the claims herein specified shall be liquidated or paid, except in the manner herein provided.

"Sec. 38. The following claims shall be received and funded under the provisions of this act: *First.* All legal debts or liabilities against the county of Sacramento, which may be unpaid and unprovided for by this act on the first day of January, 1859. The annual interest and principal of all bonds issued for claims mentioned in this section shall be paid from the interest and sinking fund, as provided in section 36, and in the manner otherwise provided in this act. *Second.* All legal debts or liabilities against the city of Sacramento, which may be unpaid and unprovided for by this act on the first day of January, 1859. The annual interest and principal of all bonds issued for claims against said city, shall be paid from the interest and sinking fund provided in section 35, and in the manner otherwise provided in this act."

By section 24 the salaries of certain officers are fixed, and it was declared that these salaries shall be paid out of the salary fund provided in the act. See sections 35, 36, St. 1858, p. 279. The salaries of the president, members and clerk of the board of supervisors, county auditor, and treasurer were to be paid one-half out of the salary fund provided for in section 35 and one-half out of such fund provided for in section 36 of the act, and the salaries of the sheriff, county clerk, assessor, district attorney, county judge, and superintendent of public schools were to be paid out of the salary fund provided for in section 36. By the last clause of section 24 it was provided that "all municipal officers shall be paid out of the salary fund provided for in section 35 of this act." Among the officers mentioned in section 24 are clerk and engineer of the water-works. Laborer at water-works is also mentioned. The salary of the clerk is fixed at \$1,500 per annum, of the engineer at the same sum, and the pay of the laborer at \$75 per month. The board of supervisors is, by section 7, of the act, empowered to elect a clerk and engineer of water-works. These are all of the municipal officers who are to be paid out of the salary fund provided in section 35. The laborer of the water-works is doubtless to be paid out of the same fund.

It will be seen that all moneys collected by any officer who has the control, collection, or custody of any money collected for taxes, licenses, *water-rents*, fees of office, or any other account not otherwise provided in the act, *are required to be paid into the treasury* on the Saturday of each week. Section 28. This duty is enforced under the heaviest penalties, which are prescribed by section 28. It must be further observed that the revenues of the city and county are set apart and appropriated to certain funds therein mentioned. By section 35, *the revenue* derived from and within the city limits for municipal purposes is to be set apart and appropriated as follows: *First*, 55 per cent. to an interest and sinking fund; *second*, 15 per cent. to a salary fund; *third*, 8 per cent. to a school fund; *fourth*, 22 per cent. to a contingent fund.

A perusal of section 36 will show the funds created by that act, and the distribution to be made between them. But let it be noted that of the sinking and interest fund of section 35 (55 per cent. of the revenue mentioned therein) it is enacted in these words: "Which shall be applied to the payment of the annual interest of and final redemption of bonds issued for city indebtedness, in accordance with the provisions of this act." Section 35. The most cursory perusal of sections 35 and 36 will show that the funds therein mentioned were to be devoted strictly and exclusively to the payment of the demands on them as defined by the act. The revenue mentioned in section 35, derived from and within the city limits for municipal purposes, is clearly defined by section 35 as follows: "Taxes, licenses, harbor dues, *water-rents*, and fines collected in the mayor's court, or otherwise," and "when paid into the treasury" they shall be set apart and appropriated to the several funds as set forth above. It should be further noted that the annual interest and principal of all bonds issued for claims against the city of Sacramento are by section 38 to be paid *from the interest and sinking fund* provided in section 35 of the act. By this means the interest and sinking fund thus created is exclusively devoted to the payment of the interest and principal of the bonds mentioned.

The plaintiff in this action is the holder of such bonds issued under the act of 1858. The act of 1858 was before this court in *Meyer v. Brown*, 65 Cal. 583, 4 Pac. Rep. 25, 625, and it was there held to be a contract between the bondholders and the city of Sacramento which could not be changed to the hurt of the bondholders by subsequent legislation of any sort. The court, in its opinion, drawn up by Justice Ross, after quoting several sections of the act, among others section 35, and referring to others, said: "Having thus made provision for the payment annually of the interest on the bonds,

and ultimately for their redemption, the legislature offered them in payment of the legal claims against the old city government. The offer was accepted, and the holders of the latter surrendered their claims, in consideration of which the consolidated government issued to them its bonds, pursuant to the provisions of the act. The bonds carried with them the pledge of an annual tax for municipal purposes, on all real and personal property within the city limits, except such as is exempt by law, of 100 cents on the \$100, 55 per cent. of which to be set apart and appropriated to an interest and sinking fund, to be applied to the payment of the annual interest upon the bonds, and to their final redemption. The tax was the chief security offered the creditors as an inducement to accept the bonds in payment of their claims. When the bonds for whose payment, with interest, provision was thus made, were issued and accepted by the creditors of the old city government, a contract was made, as solemn and binding and as much beyond subsequent legislation as it would have been if made between private persons. These views will be found sustained and amplified in an able opinion recently rendered by the supreme court of the United States, in a case entitled *Louisiana v. Pillsbury*, reported in 105 U. S. 278."

This should be regarded as settling the law on this point. Regarding it, then, as settled to be a contract between the city and the bondholders, the question arises as to the terms of this contract. The point, then, to be considered is whether this contract extends to and embraces within its terms the gross receipts from *water-rents*, or does it only include the net receipts after deducting salaries, expenses, etc.? This must be determined by the language of the act. That part of the act to which our attention is particularly called is the first clause of section 35. That clause is as follows: "The revenue derived from and within the city limits for municipal purposes, viz., taxes, licenses, harbor dues, water-rents, and fines collected in the mayor's court, or otherwise, when paid into the treasury, shall be set apart and appropriated as follows," etc. The section then proceeds to designate the funds, as stated above.

Now, it is said that the word "revenue" is defined by Worcester to mean: "(1) Income or annual profit received from lands or other property;" and "(2) the income of a nation or state derived from the duties, taxes, and other sources for the payment of the national expenses;" and we are referred to the definitions given by Bouvier and Burrill. Webster gives several definitions, as follows: "(1) That which returns, or comes back, from an investment; the annual rents, profits, interest, or issues, of any species of property, real or personal. (2) Hence, return, reward; as a rich *revenue* of praise. (3) The annual product of taxes, excise, customs, duties, rents, etc., which a nation or state collects and receives into the treasury for public use." According to the last definition given by Webster, the annual produce of taxes, excise, customs, duties, *rents* collected and received into the treasury for public use is revenue. Then whatever of taxes is received into the treasury is revenue, and this accords with the contention of appellant here.

BRONSON, J., in explaining the word "income," used in a statute, in *People v. Supervisors Niagara*, 4 Hill, 20, said: "It is undoubtedly true that 'profits' and 'income' are sometimes used as synonymous terms, but, strictly speaking, 'income' means that which comes in, or is received from any business or investment of capital, without reference to the outgoing expenditures, while 'profits' generally mean the gain which is made upon any business or investment when both receipts and payments are taken into the account. 'Income,' when applied to the affairs of individuals, expresses the same idea that 'revenue' does when applied to the affairs of a state or nation; and no one would think of denying that our government has any revenue because the expenditures for a given period may exceed the amount of receipts."

The word "revenue" is used in many senses. It is like thousands of

words in our language,—ambiguous in meaning, the significance of which can only properly be determined by the words with which it is connected. Let it be conceded that the usual and ordinary meaning of the word when used alone is net income,—that which remains of the annual income of property after deducting from gross receipts the expenses incurred in producing the gross income: still we must resort to the context to find the sense in which it is used in the writing presented for interpretation. If the context indicates a meaning different from its ordinary and popular signification, we must adopt the meaning so indicated; that is, indicated by the words of the statute or instrument in which it is used. And here the context clearly denotes its meaning. It is the revenue derived from water-rents, collected and paid into the treasury which is spoken of. It is so said in the thirty-fifth section. By section 28 all water-rents are to be paid into the treasury. None can be held back. The collecting officer who fails to pay in all the water-rents, forfeits his office. This officer must pay into the treasury all such moneys on Saturday of each week, and must on the same day file the treasurer's receipt for such payment with the auditor, and shall at the same time file with the auditor a statement, under oath, of the sources from whence the money comes, and that the money so paid over is the total amount collected since his last payment; and such statement shall also be filed in duplicate with the clerk of the board of supervisors. The above provisions are enacted in section 28 of the act of 1858, quoted above in full. The penal provisions above referred to follow in the succeeding part of section 28.

The word "revenue" has the same meaning in section 36. The intent is a plain one. That the above represents its terms and stipulations we have no doubt. Any act or acts of the legislature making any change in it, to the detriment of the creditor, without the consent of the bondholder, are utterly void. This court so held in *Meyer v. Brown*, *supra*, and still adheres to that judgment.

Much is said as to the expense of constructing the water-works, and that the city has been obliged to build a new water-works. We cannot hold that any such considerations can alter the contract, or abridge the right of the creditor. The payment of the expenses of conducting the works is provided for in the act. The officers and employes are salaried, (section 24,) and there is a fund, called a "Salary Fund," created for their payment, (see section 35;) and it is declared of the salary fund that it "shall be applied to the payment of the salaries of municipal officers, as provided in the act," and for all other expenses, if any there shall be, a contingent fund of 22 per cent. of the taxes, licenses, harbor dues, water-rents, etc., is provided for their payment. Of this it may be said that if the funds provided for in the act are not sufficient to pay such expenses, resort must be had to the legislature to procure further powers to raise the money by a constitutional act of that body, which is not allowed by any act to divert from the interest and sinking fund any portion of it, without the consent of the creditor.

As to the new water-works, and the payment of the expense of building them, it may be said that the act of 1858 has no reference to such a matter. If new water-works had to be built, the legislature could provide for their erection without interfering with the funds set apart for the payment of the bonds, and, if it did not do so, the act must stand as it passed. It would not be held that if a person mortgaged the gross proceeds of his farm to his creditor, that he could take part of these funds to build a new house, when the old one, from decay, had fallen and ceased to be habitable, without the consent of the creditor; or, if fertilizers were required to make his farm productive, that he could spend any portion of the gross proceeds to purchase the fertilizing material. The necessities of the farmer may have great weight with his mortgagee, and induce him to consent to the expenditure; but the contract would bind him without such consent.

It is hardly necessary to refer to the position that for a long time the bondholder consented to a withholding of the moneys due him. The embarrassment of the city may have induced this waiting on the part of the bondholder; but we know of no rule of law which would authorize us to hold that this conduct on the part of the bondholder abridged or altered his rights under the contract as made. The foregoing conclusions are strengthened by the fact that the bondholder took his securities without the right to sue the city and county. Section 1. The city had no existence as a corporation after the act took effect, and could not, therefore, be sued. In accordance with the foregoing views, the judgment must be reversed.

The prayer of the complaint, which was filed on the twenty-ninth of January, 1886, is as follows: "Wherefore this petitioner prays that a writ of mandate issue from this court, ordering and directing the respondent, the treasurer, James N. Porter, to set apart and appropriate to said interest and sinking fund 55 per cent. of the amount received from the water-rents since the first Monday in April, 1885, and for general relief in the premises, and for costs. Also that the respondent, as treasurer as aforesaid, be ordered, and directed, from time to time, as money collected from water-rents is received by him as treasurer, to set apart and appropriate 55 per cent. thereof to the interest and sinking fund of said city."

The court, among other facts, finds the following: "That since the first Monday in April, 1885, (the beginning of the fiscal year for the city of Sacramento,) and prior to the filing of petitioners' petition herein, there had been collected for water-rents within the city of Sacramento the sum of \$43,763.15, and said sum had been paid to the respondent as treasurer of said city. Of this sum there has been set apart and appropriated to the interest and sinking fund the sum of \$6,600, which sum is 55 per cent. of the amount remaining of said sum of \$43,763.15 after paying all expenses, including salaries for operating and maintaining the water-works of said city. That all of said \$43,763.15, except the said sum of \$6,600, and except \$5,400 paid to other funds, the balance, to-wit, \$31,763.15, was paid out by said treasurer upon warrants drawn by the auditor to pay bills for the expenses of carrying on said water-works, which bills were audited and allowed by the board of trustees."

It appears from this finding that the sum of \$43,763.15 had, since the first Monday in April, been collected for water-rents and paid into the treasury. Of this sum \$6,600, 55 per cent. of the amount, remained "after paying all expenses," including salaries of operating and maintaining the water-works. That of this larger sum, except \$6,600 and \$5,400 paid to other funds, all of it had been paid out by the treasurer upon warrants drawn by the auditor, to pay bills for the expense of carrying on the water-works, which bills were audited by the board of trustees.

That the creditors were entitled to have 55 per cent. of the sum of \$43,763.15 set apart to the interest and sinking fund under the law we have no doubt. But all the money, except the sums mentioned, has been paid out as above stated, and though it was a violation of law and of the rights of the bondholders, such wrong cannot be redressed in this action. That portion of the prayer of the complaint cannot then be granted. The only relief which we can grant is to command the treasurer, as money collected from the water-rents above mentioned is, from time to time, paid to and received by him as treasurer, he shall set apart and appropriate 55 per cent. of all such moneys, without any deduction whatsoever, to the interest and sinking fund of the city of Sacramento.

The judgment is reversed, and the cause remanded to the court below, and said court is directed to enter judgment as above stated. Ordered accordingly.

We concur: TEMPLE, J.; MCKINSTRY, J.; SHARPSTEIN, J.

PATERSON, J., (*dissenting*.) I dissent. The legislative acts upon which petitioner bases his demand for a writ of mandate herein are fully set forth in *Meyer v. Brown*, 65 Cal. 584, 4 Pac. Rep. 25, 625. The court did not in that case define the word "revenue" as used in the act of 1858. In this case the meaning of that word is the direct question in the controversy. By an act approved, and which took effect May 20, 1861, section 35 was amended by adding the following provision: "Provided, however, that all moneys received from water-rents shall be applied, so far as may be necessary, to the payment of the current expenses of the water-works, exclusive of the salaries and fees of the officers thereof, and the balance, if any, shall be distributed as is hereinafter in this section provided."

The act of April 25, 1863, repealed the act of April 24, 1858, consolidating the city and county governments, and the acts amendatory thereof, and emancipated the one from the other, and incorporated the "City of Sacramento." In section 26 of this act the language of section 35 of the act of 1858 is used, except that the word "*net*" is inserted before the words "water-rents," and in section 27 it is provided that "all revenues derived from the water-works shall be paid into a fund to be known as the 'Water-Works Fund,' and at the end of every three months, after the payment of all necessary expenses, including salaries, to carry on and keep in order the said water-works, it shall be the duty of the auditor to apportion the residue, if any there may be, in the same proportions as the other funds of the city, provided in section 26." St. 1863e p. 426.

The court found that, "from and after the twenty-fifth day of April, 1863, there has been apportioned to the interest and sinking fund only 55 per cent. of the amount of moneys collected from water-rents, which remained after the payment of all expenses, including salaries, to carry on and keep in order the water-works, as is provided for by the act of April 25, 1863, referred to in the pleadings in this cause."

Assuming that the meaning of the word "revenue" must be gathered from the provisions of the act of 1858, it is by no means clear that it was intended to be there used in the sense claimed for it by appellant. "Revenue" and "income" are used interchangeably. Thus Bouvier defines "revenue" to be "the income of the government arising from taxation, duties, and the like," and defines "income" by saying: "The word 'income' means the gain which proceeds from property, labor, or business. It is applied particularly to individuals. The income of the government is usually called revenue." Burrill says it is "that which returns or is returned; a rent, income; amount of profit received from lands or other property." He defines "income" to be, "in a strict sense, that which comes in, or is received from any business or investment of capital, without reference to the outgoing expenditures. In a looser sense, income is used as synonymous with profits."

Under a will which required the executor to pay the income of the estate to the widow during her life, Chief Justice SHAW decided that "the 'income' mentioned in the will must be considered the *net* income, after deducting the taxes, repairs, and ordinary current expenses attending the estate, from the gross receipts for rents." *Watts v. Howard*, 7 Metc. 482.

In *Andrews v. Boyd*, 3 Metc. 434, the court said: "It does not appear to us that any fair distinction can be raised between 'income' and 'net income.' 'Net' is a term used among merchants, to designate the quantity, amount, or value of an article or commodity, after all tare and charges are deducted. The income of an estate means nothing more than the profits it will yield after deducting the charges of management, or the rent which may be obtained for the use of it. The rents and profits of an estate, the income or the net income of it, are all equivalent expressions."

In view of the uncertainty as to the meaning the legislature intended to attach to the word "revenue," in the act of 1858, the mandatory and supple-

mental acts may be regarded as simply rendering its true meaning certain, and as in no way changing, adding to, or taking from it. They should not be declared void because of the insertion of the word "*net*," unless it is clearly repugnant to the sense in which the words "revenue from water-rents" had been used in the original act.

But conceding that a change in the meaning and operation of the act has been worked, we think it is one the legislature might make without impairing the obligation of the contract. As was said in *Meyer v. Brown*, "the tax was the chief security offered the creditors as an inducement to accept the bonds in payment of their claims." That fund is fixed, certain,—at least to a minimum,—and can never be made less until the bonds are paid. Section 34.

The receipts to be derived from the other sources are not fixed, but depend upon ordinance or statutory regulation as to rates, and are subject to be discontinued at any time. The city authorities may, subject to legislative control, fix water-rates as they deem best, without violating any vested right. The city was not bound to keep up the water-works for any time by any provision in the act of 1858. When the old works became worn out and useless, the city was under no obligation to put up new works. But it is said in answer to this that the city did build new works, and is receiving rents, and so long as the rents are received, the city is bound to set apart 55 per cent. of the gross receipts. This answer would be sound if there were anything in the act of 1858 requiring the city to fix any particular rates, or any provision fixing a minimum, as in the matter of taxes. The contract still exists, its obligations are still as solemn and binding as they were under the act of 1858, and, for aught appearing to the contrary, the changes, if the new provisions can be regarded as changing the original, not only have worked no injury to the creditors, but have been a benefit to them as well as to the inhabitants of the city. The contract being one which by its nature, so far as certain sources of revenues or receipts are concerned, depends upon contingencies and expectancies, we think it clear that the mode and manner of its performance is within the control of the legislature.

There has been no attempt to repudiate. On the contrary, the interests of both creditor and city have been advanced. In 1876 the net receipts exceeded the gross receipts of 1863. If new water-works had not been erected, the revenue from this source would long since have ceased entirely. That the acts of the legislature and of the city authorities have operated beneficially to all interested is apparent, we think, from the second finding of the court below, which is as follows: "That the water-works of the city of Sacramento, which supplied the inhabitants thereof with water at the time of the passage of the act of April 24, 1858, and at the time of the issuance of the bonds for city indebtedness provided for by said act, gradually became, by reason of decay and the growth of said city, insufficient to supply the necessary amount of water; and in 1872 the city of Sacramento, in pursuance of an act of the legislature of said state, entitled 'An act to provide the city of Sacramento with a better supply of water,' which act was approved March 30, 1872, adopted the Holly system of water-works, and purchased a new site, and built thereon another building, and put in the necessary machinery of that system.

"By the old system for supplying water, the water was pumped from the Sacramento river into tanks or reservoirs, and from thence it flowed into the city mains or water-pipes by gravitation pressure. By the Holly system, the water was pumped from the Sacramento river and forced directly into the city mains by means of force pumps used by said system. Two new and costly pumps were purchased for this purpose. By said Holly system, the pressure on the mains or pipes was greatly increased, and a new main pipe of increased strength was laid along I street of said city for the purpose of conducting the water to the lesser pipes running throughout the city and in use under the old system, and other new pipes were provided when necessary."

The petition shows that for the 10 years, including and next preceding the fiscal year 1872-73, the gross receipts from the water-works amounted to the sum of \$417,891, and the net receipts \$79,650; and for the 10 years following the gross receipts were \$662,307, and the net receipts \$258,664.

There is nothing in the decision in *Meyer v. Brown* opposed to the views herein expressed. That was a proceeding to compel the municipal authorities to levy a tax of 100 cents on the \$100, as required by the act of April 24, 1858. The petitioner alleged that said officers, "although requested by plaintiff to levy a tax of 100 cents on the \$100 as required by said act passed April 24, 1858, have failed and refused to levy the tax for the year 1883 as required by said act, but have levied a diminished tax of 50 cents on \$100." The defendants denied that they were required to levy the tax claimed by petitioner, and averred "that the tax required to be levied by section 34 is not an annual or continuing tax, and that the same was levied in the year 1859, and the power to levy a further tax under said section is exhausted." That was the issue and the only issue in that case, and what is said in the opinion must be considered as referring only to the question there determined.

I concur: SEARLS, C. J.

MCFARLAND, J., (*dissenting*.) I dissent from the conclusion of the majority of the court, and concur in the dissenting opinion of Mr. Justice PATERSON. It must be remembered that the water-works in question are conducted by the city of Sacramento *as a business*, just like the business of any other water company, or of any mining, manufacturing, railroad, or mercantile company. In such a case the "revenue" is, of course, the excess of receipts over expenditures. If other financial miracles could be wrought as easily as the turning of the gross proceeds of a business into revenue, "then chapels had been churches, and poor men's cottages princes' palaces."

(74 Cal. 188)

PEOPLE v. BITANCOURT. (No. 20,234.)

(*Supreme Court of California*. November 30, 1887.)

1. EXCEPTIONS, BILL OF—SETTLEMENT—APPLICATION TO SUPREME COURT—PETITION.

Pen. Code Cal. § 1174, provides that, when the judge in any case refuses to allow an exception in accordance with the facts, the party may apply to the supreme court to prove the same. Defendant's counsel moved the supreme court to have a bill of exceptions settled according to the facts, but did not set out in the petition wherein the bill as settled was incorrect, nor specify the facts to be proven, and their materiality. *Held*, that the application was defective and must be denied.

2. BURGLARY—INDICTMENT—OWNERSHIP OF BUILDING—VARIANCE.

An information charged that the defendant burglariously entered the building of one B., "situated," etc. The proof was that another party was interested in the building with B. It did not appear that there was any other building in the locality corresponding to the description in the information. *Held*, under Pen. Code Cal. § 956, providing that, where the offense involves the commission of a private injury, an erroneous allegation as to the person injured is not material, that the variance was immaterial.

In bank. Appeal from superior court, city and county of San Francisco; D. J. TOOHY, Judge.

G. H. Perry, for defendant. Geo H. Johnson, Atty. Gen., for the People.

BY THE COURT. In this case there is a preliminary matter as to the bill of exceptions, concerning which the facts are as follows: The proposed bill was presented to the judge of the court below on June 6, 1887. On June 7th the appellant's counsel filed a verified petition stating the presentation of the proposed bill, and that the judge "refuses to allow certain exceptions of said defendant," and praying for leave to make proof of said exceptions. Upon this petition an order was made on the same day referring the bill to the Honorable WILLIAM T. WALLACE for settlement. On June 15th the appellant's

counsel filed another verified petition in the appellate court, stating that when he appeared before Judge WALLACE on June 14th, in pursuance of notice, "it was then and there discovered" that the bill of exceptions had been settled by the judge before whom the case was tried on June 13th, and forwarded by him to the appellate court; and that "said bill of exceptions, as settled, does not conform to the truth," and praying for an order directing Judge WALLACE to proceed with the settlement of a bill in conformity with the facts. Upon this second petition the judge of the court below filed an affidavit stating, in substance, that he never had refused to allow any exceptions, but had taken the whole matter under advisement; and that the bill had been settled by him on June 6th, "before the issuance of the order herein by the supreme court." The statement that the judge never refused to allow any exceptions is corroborated by the affidavits of the district attorney and the short-hand reporter. On June 28th the appellate court rendered a decision that the order of June 7th be set aside for insufficiency of the petition, and because no notice of the application had been given to the judge or the district attorney, and that the petition of June 15th was insufficient, and that it be denied without prejudice. On June 20th the appellant's counsel, pursuant to notice, made a motion "for an order to have the bill of exceptions in the above-entitled action settled according to the facts;" and this motion was submitted.

It is settled that if the judge before whom a case was tried, refuses to settle any bill of exceptions,—that is to say, if he refuses to take any action in the matter,—and the refusal is without cause, he may be compelled to take action by a writ of *mandamus*, (*People v. Lee*, 14 Cal. 510; *People v. Keyser*, 53 Cal. 184; *Lin Tai v. Hewill*, 56 Cal. 117; *People v. Crane*, 60 Cal. 279,) although the writ will not issue to compel the settlement in any particular way, (*People v. Judge of Tenth District Court*, 9 Cal. 20.) If the refusal is not to take any action whatever, but merely to settle the bill in accordance with the facts, application may be made to the appellate court for redress. The provision is that, "if the judge in any case refuses to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same. The application may be made in the mode and manner and under such regulations as that court may prescribe." Pen. Code, § 1174. Where, however, as in the present case, the bill has been settled by the judge, the application to this court for leave to prove the facts in support of the bill of exceptions should set forth distinctly wherein the bill as settled is incorrect, and specify the facts which it is desired to prove, as well as their materiality. It may well be that the facts which the applicant desires to substantiate, and the exceptions founded thereon, are of no importance to an adjudication of the cause. The remedy provided by section 1174 of the Penal Code should be resorted to only in aid of justice, and upon such affirmative showing as proves the judge of the court below derelict in some particular whereby the rights of the applicant are jeopardized.

The application is defective in all the particulars indicated, and must be denied.

Upon the merits, the question is whether there was a variance between the information and the proof. The information charged that the defendant burglariously entered the building "of one C. E. Benedict, situated on Nineteenth avenue, between K and L streets, south of Golden Gate park, in the city and county of San Francisco." The proof was that one J. S. Benedict was interested in the building with C. E. Benedict. It is argued that the ownership of J. S. Benedict was matter of essential description. It does not appear that there was any other building in the locality which would correspond to the description in the information, and we think the variance was immaterial. Pen. Code, § 956; *People v. Edwards*, 59 Cal. 359.

The motion for an order of reference is denied, and the judgment and order appealed from are affirmed.

(74 Cal. 217)

In re Estate of McCONNELL, Deceased. GRAHAM v. SUPERIOR COURT OF COLUSA CO. (No. 12,246.)

(Supreme Court of California. November 30, 1887.)

CERTIORARI—WHEN LIES—REVIEW OF ORDER AUTHORIZING EXECUTOR TO MORTGAGE—DECEDENT'S ESTATE.

Leg. Acts Cal. 1887, p. 115, provide for the mortgaging by an executor of his decedent's land. Code Civil Proc. § 963, provides for an appeal to the supreme court from an order in favor of, or against the sale or "conveyance" of, real property. Section 1215, which is part of the article treating of recording written instruments, provides that "conveyance," as used in this article, includes every instrument in writing by which any estate in real property is created, aliened, or mortgaged. *Held*, that the word "conveyance" in section 963 included mortgages, and that a writ of *certiorari* will not lie to review an order of the superior court allowing an executor to mortgage his decedent's estate.

Commissioners' decision. In bank.

In superior court, Colusa county; E. A. BRIDGFORD, Judge.

Geo. A. Blanchard, for appellant. H. M. Abbey, for respondent.

FOOTE, C. The petition in this case is for a writ of *certiorari* to review the decision of the superior court of Colusa county, in making an order authorizing an executor to mortgage the lands of his decedent, under a statute approved March 15, 1887, to be found on page 115 of the Legislative Acts of the year 1887. It is contended that the petition should be dismissed, because a right of appeal exists (under section 963, Code Civil Proc.) from the order of the court, which it is sought to have reviewed by this tribunal. The words of that section pertinent to the matter in hand are: "An appeal may be taken to the supreme court from a superior court in the following cases: (1) * * * (2) * * * (3) From a judgment or order granting or refusing a new trial, * * * or against or in favor of directing the partition, sale, or conveyance of real property."

If the word "conveyance," as above used, can be held to include "mortgage," then undoubtedly the right of appeal existed from the order made in the premises, and the petition filed herein must be dismissed. It is true that it is a well-settled rule of this court that a mortgage "is merely a lien upon and passes no estate or interest in the mortgaged premises, except for purposes of taxation." *Williams v. Mining Ass'n*, 66 Cal. 201, 5 Pac. Rep. 85, and cases cited. But that was intended merely to define the nature of the interest which passed to the premises included in the mortgage. It did not declare what the legislative intent was in using the word "conveyance" in section 963, *supra*, as affecting the right of appeal. Section 1215 of the Civil Code, which is a part of the article treating of the recording of written instruments, is as follows: "The term 'conveyance,' as used in sections 1213 and 1214, embraces every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or incumbered, or by which the title to any real property may be affected, except wills."

In *Hassey v. Wilke*, 55 Cal. 528, the word "conveyance," as used in sections 1213 and 1215 of the Civil Code, is held to embrace mortgages. From this it will be perceived that the word "conveyance" has been used by the legislature in a sense which would include the term "mortgage." And, considering that much importance must necessarily be attached to such an order as that which authorizes the "mortgaging" of a decedent's land by his executor, it would appear that when the legislature placed the word "conveyance" in section 963, *supra*, it must have intended it to be taken in a broad and comprehensive sense, similar to that given to it in the sections of the Civil Code, *supra*.

Since the right of appeal existed from the order under consideration, it follows that the writ of *certiorari* cannot be invoked. Section 1068, Code Civil Proc; Hayne, New Trials, § 302.

For these reasons the writ prayed for should be denied, and the petition dismissed.

I concur: BELCHER, C. C.

HAYNE, C., took no part in this decision.

BY THE COURT. For the reasons given in the foregoing opinion the writ is denied and the petitioner dismissed.

(2 Cal. Unrep. 812)

PEOPLE v. CITY AND COUNTY OF SAN FRANCISCO. (No. 11,456.)

(*Supreme Court of California.* November 30, 1887.)

1. PUBLIC LANDS—DECREE AND PATENT—BOUNDARIES—CONFLICTING TITLES.

A decree of the United States circuit court, confirming a Mexican grant of lands, described them as a tract lying above high-water mark, bounded on three sides by the sea, and on the other by a direct line to be so run as to include the required quantity. The patent, issued by virtue of the authority of the decree and in pursuance thereof, granted a tract of land described by courses and distances which, if followed, would include a large tract lying below high-water mark, to which the state claimed title by virtue of act of congress of September 28, 1850. *Held*, in an action by the state to quiet its title, that the patent was not conclusive, but that the decree, by virtue of which it was issued, was entitled to be read in connection therewith in determining what lands were conveyed, and that the natural boundaries called for in the decree would overrule the courses and distances of the patent.¹

2. SAME—ACTION TO QUIET TITLE—PLEADING.

In an action to determine an adverse claim to certain lands wherein the state was plaintiff, the complaint alleged that the lands were below high-water mark, and consequently belonged to the plaintiff as swamp lands, by virtue of act of congress of September 28, 1850; that the defendant, as successor in interest to a Mexican citizen, obtained a decree from the United States circuit court, confirming its title to a tract of land described as included between certain boundaries, and as lying above high-water mark. The patent, issued by virtue of this decree, described a tract of land by courses and distances which, if followed, would include the lands in dispute. *Held*, that the complaint stated a good cause of action, in that if the allegations were true the plaintiff would be entitled to a decree, and a demurrer thereto should be overruled.

In bank. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Phillip G. Galpin and *E. C. Marshall*, Atty. Gen., for appellant. *John Lord Love*, City & Co. Atty., and *Garber, Thornton & Bishop*, for respondents.

PATERSON, J. This is an action to determine an adverse claim to 150 acres of land, more or less, situated at the northern extremity of the peninsula of San Francisco, and the appeal is from a judgment rendered in favor of the defendant on demurrer to the complaint.

It is alleged in the complaint that the premises in dispute were below ordinary high-water mark at the date of the purchase from Mexico, and ever since have been; that on September 28, 1850, the congress of the United States passed an act granting to the state the swamp lands within her limits; that the lands in dispute were and are swamp lands, and that the title thereto is in the state; that by the treaty of Guadalupe Hidalgo and the act of March 3,

¹In cases of conflict in the description of land in a deed, between courses and distances on the one hand, and monuments on the other, the latter must control. *Church v. Stiles*, (Vt.) 10 Atl. Rep. 674; *McAnninch v. Freeman*, (Tex.) 4 S. W. Rep. 369, and note.

1851, the United States guaranteed the protection of the property of all Mexican citizens within the state at the date of the conquest; that under said act of March 3, 1851, the city of San Francisco, claiming to be successor in interest of the pueblo of San Francisco, a Mexican citizen, filed a petition before the board of commissioners established by the act for a determination of its claim to four leagues of land on the peninsula of San Francisco; that the board, after due proof, made a decree in the premises; that the cause was afterwards appealed to the United States district court for the Northern district of California, and was thence transferred to the circuit court of the United States for the circuit of California under a special act of congress of July 1, 1864; that the circuit court made a final decree, adjudicating the case as between the United States and the city of San Francisco, and confirming the claim of the city to the lands therein described, which decree is recited in the amended complaint, and describes the premises confirmed as a "tract situated within the county of San Francisco, and embracing so much of the extreme upper portion of the peninsula above ordinary high-water mark (as the same existed at the date of the conquest of the country, namely, the seventh day of July, 1846) on which the city of San Francisco is situated, as will contain an area of four square leagues, said tract being bounded on the north and east by the bay of San Francisco, on the west by the Pacific Ocean, and on the south by a due east and west line drawn so as to include the area aforesaid, subject to the following deductions," etc. It is then alleged that the premises in question are not within these boundaries, and that under the laws of Mexico the pueblo could not and did not own land below ordinary high-water mark, nor said premises.

The complaint further avers that, for the purpose of carrying out the decree, a survey was made and approved by the United States surveyor general in 1867-68, of which notice was duly given and advertised as required by statute; that objections were made to the survey by parties interested in lands embraced therein, and affidavits and proofs were taken in support of the survey; that the surveyor general forwarded to the commissioner of the general land-office a copy of the survey and objections and proofs, with his opinion thereon; that after a full hearing of the parties interested, the commissioner, in November, 1878, decided in favor of the survey, but allowing an appeal to the secretary of the interior; that no appeal was taken by the city, but the military authorities appealed from that part of the decision which related to the Presidio Reservation, within which the premises in dispute were not included; that on the appeal the secretary reversed the commissioner's decision, disapproved the survey, and ordered a new survey, and transmitted his decision, directions, and instructions to the commissioner; that a new survey and plat were therefore ordered by the commissioner, and in December, 1883, a new survey and plat were made by the surveyor general, which included the premises in controversy; that the surveyor general indorsed on the new survey his certificate that the same was made in accordance with the instructions of the commissioner, and then, having signed and sealed the same with his official seal, returned it and the field-notes of the survey to the commissioner of the general land-office; "that thereafter a patent in due form of law, based upon the said last-mentioned plat and survey, was issued under the great seal of the United States, and signed by the president thereof, which purported, by virtue of the authority of said decree, and in pursuance thereof, to grant and convey to the city of San Francisco" the land embraced in said last-mentioned survey, and including the premises in controversy. The complaint then alleges the consolidation of the city and county, and its succession to all the rights, title, and interest of the city under the decree, survey, and patent; that under the patent and otherwise the defendant claims an interest in the premises, and that the patent is a cloud on plaintiff's title. The premises are then described by courses and distances referring to "Alardt

and Minto's survey of the pueblo of San Francisco, filed in the office of the surveyor general of the United States, in the city of San Francisco, June 23, 1882."

The only question is, does the complaint state facts sufficient to constitute a cause of action? Upon her admission into the Union, the state of California became the owner by virtue of her sovereignty of all tide-water lands within her borders, lying below high-water mark, except such as had been disposed of by the Mexican government prior to the treaty of Guadalupe Hidalgo. The territory acquired from Mexico was by the express terms of that treaty taken by the United States subject to the trust of protecting all legal and equitable interests of prior grantees under the former sovereign. The state could not take more than the United States received. Necessarily, therefore, the claim of the state by virtue of her admission and her sovereignty was subordinate to such prior equities, and subject to the power of the federal government to confirm prior Mexican grants, and to locate grants of specific quantities of land within the extreme boundaries of larger tracts. *Teschmaker v. Thompson*, 18 Cal. 11; *Luz v. Haggin*, 69 Cal. 255, 10 Pac. Rep. 674; *Le Roy v. Dunkerly*, 54 Cal. 452.

There is a distinction between the case of *Goodtitle v. Kibbe*, 9 How. 471, and cases like the one at bar, which is clearly shown and explained by Chief Justice FIELD in *Teschmaker v. Thompson*, *supra*.

The United States government has exercised the power vested in it, and has, through its courts, and the officers of its land department, attempted to define the boundaries of the four leagues of land to which the city of San Francisco, as successor in interest of the pueblo of San Francisco, a Mexican citizen, was entitled. The court, having jurisdiction to hear and determine the right of this claimant, finally confirmed its claim to four square leagues of land in the extreme end of the peninsula, giving as the boundaries thereof on the west, the north, and the east the natural lines of high-water mark, leaving the southern boundary to be fixed by the surveyor on such a line as would include between it and the high-water lines north of it said four square leagues of land. This, it seems, the surveyor did not do; but ignoring the natural boundaries, fixed by the court in its decree for the west, north, and east, ran his lines into the sea below high-water mark, and included within his description of the tract by *metes and bounds* about 150 acres of land belonging to the state. Following the survey, the patent describes the land by metes and bounds, and the only questions to be considered—if it be true that the United States has the power which we have said it possesses—are, can the decree be read in connection with the patent? And which shall control, the boundaries given in the decree, or those given in the patent?

It is claimed by respondent that the patent is conclusive against the state as to location and boundaries of the pueblo grant, and it must be conclusively presumed in this action that the description by metes and bounds conforms to the decree. We do not think that this contention can be maintained in reason or upon authority. In the cases cited there was no variance between the decree of confirmation and the patent. In *Teschmaker v. Thompson*, *supra*, the grant was *assumed* to be one of *quantity* only. The grant was confirmed by the court; and its boundaries as defined in the decree were followed in the patent, which was issued in November, 1857, at which time the federal courts controlled the surveys, and were empowered and expected to make them conform to the decree. The provisions of the act of March 3, 1851, had been regularly followed by the tribunals appointed to determine the claim and to fix the boundaries of the land. There was no variance or conflict between the decree and the patent as to description, and the court there held that the power of the government to determine the question as to the validity of the claim, and the extent and boundaries of the land having been regularly pursued, the patent was conclusive, although it appeared that it in

fact included lands lying below high-water mark. The defense in that case was that the land belonged to the state of California absolutely, by virtue of its sovereignty, and that the government of the United States could not by any proceeding had under the act of March 3, 1851, deprive the state of its title thereto. *Ward v. Milford*, 32 Cal. 365, was in all respects like *Teschmaker v. Thompson*, *supra*, page 370.

Many of the cases cited relate to grants with no specific boundaries whatever. In none of the cases cited by respondent is the question of the power of the officer to issue a patent for land not embraced in the decree considered. That question is important here, because the land in controversy, unlike the public domain of the United States, was not within the jurisdiction of the land department of the government, unless placed there by the decree of confirmation, and because the only unknown or undetermined line is that which bounds the tract on the south side. Upon all other sides, the high-water mark is the monument between the land of the city and that of the state. The sea is a fixed boundary.

As stated before, the government of the United States is in duty bound to carry into effect the stipulations contained in the treaty of Guadalupe Hidalgo; but the power to do so must be exercised in the manner provided by congress, and it would seem that when congress vested in the federal courts the power to determine the rights of Mexican claimants, and provided (section 7) that in making the survey the surveyor general should "follow the decree of confirmation as closely as practicable, whenever such decree designates the specific boundaries," and that "it shall be the duty of the commissioner of the general land-office to require a substantial compliance with the directions of this section before approving any survey and plat forwarded to him," that the officers of the land department are as to such lands merely auxiliary to the court, with special and limited jurisdiction to carry out its decrees. Such seem to have been the views of this court as expressed in *More v. Massini*, 37 Cal. 432, where the patent granted certain lands described by metes and bounds, (following the survey,) but the court said: "The land *confirmed* is bounded on the south by the seashore, and the land included in the survey will also be held to be bounded on the south by the seashore, unless the calls imperatively demand other boundaries. When the decree of confirmation fixes the exterior bounds of a *rancho*, whether it is one granted with specific boundaries, or one of a specific quantity within a larger area, the presumption is that the lines of the survey coincide with, or at least do not extend beyond, the exterior limits or bounds of the decree; for the survey is not an independent act, but is an act performed under the decree, and preparatory to its being carried into effect by a patent. * * * It appears by the plat that, following the courses and distances of the survey, portions of the sea will be included in the lines of the *rancho*. *This is inconsistent with the calls of the decree of confirmation, which confirms a tract bounded by the seashore.*"

In that case the patent did not show upon its face that any land below high-water mark was included in the tract granted, but the fact was shown at the trial by witnesses,—surveyors. It is true the patent recited the description of the tract as confirmed by the decree, but the land described in the patent was the tract as surveyed, giving the metes and bounds. The recital in the patent referred to in the complaint herein is sufficient, we think, to connect the decree with the patent as part of the chain of title. Recitals of this character show, and are intended to show, why the patent was issued. They preserve—like recitals in deeds between individuals—the connection in the chain of title; are binding upon the grantee; and the muniments of title referred to become links on which the strength of the title may be tested. Where the deed recites the record of the authority upon which it is made, the record referred to becomes a part of the deed, and the grantee takes with notice of its limitations. *Cleveland v. Hallett*, 6 Cush. 404; *Devlin*, Deeds, §§ 1000, 1003.

Upon the allegations of the complaint, and the authority of *More v. Masini*, *supra*, we think that the plaintiff would be entitled to read the decree in connection with the patent, and if the facts stated be found to be true, would be entitled to a decree quieting title to the lands in controversy. In case of a conflict, courses and distances must yield to monuments. Where water-courses, or mountains, or any other natural objects, are called for in patents, distances must be lengthened or shortened, and courses varied so as to conform to those objects. Mistakes in distances and courses are more probable and more frequent than mistakes as to trees, rivers, mountains, and other objects capable of being clearly and accurately fixed. *McIver v. Walker*, 9 Cranch, 177.

Judgment reversed, with directions to overrule the demurrer, and allow the defendant to answer.

We concur: SEARLS, C. J.; THORNTON, J.; MCKINSTRY, J.; SHARPSTEIN, J.; MCFARLAND, J.; TEMPLE, J.

(74 Cal. 183)

CARIT v. WILLIAMS and others. (No. 9,747.)

(Supreme Court of California. November 30, 1887.)

1. INSOLVENCY—DISCHARGE—DEBT REDUCED TO JUDGMENT—REVIEW OF CAUSE OF ACTION.

Defendant applied to the court to have an execution against him stayed, and a judgment satisfied, by reason of a certificate of discharge in insolvency proceedings. *Held*, that the court had the right to go behind the judgment, and examine the pleadings; and where they showed the original claim was created by fraud, and not barred by the discharge, it was not so merged in the judgment as to create a new debt subject to be discharged by the insolvency certificate.

2. SAME—DENIALS IN ANSWER—PRESUMPTIONS OF AVERMENTS OF COMPLAINT.

Defendant moved to have an execution set aside, and the issuance of any further execution stayed, and the judgment satisfied on account of his discharge under the insolvency act. In the suit in which judgment had been entered and execution issued, the complaint could not be found, but the answer was, and it showed that the only material denials were as to the commission by defendant of acts of fraud. *Held*, that it will be presumed that the judgment was founded upon allegations in the complaint to which the answer was responsive, and that the debt arose through the fraud of defendant, and therefore not barred by the discharge.

Commissioners' decision. Department 1.

Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Cook & Cook, for appellants. *D. H. Whittemore*, for respondent.

FOOTE, C. This is an appeal from an order denying the motion of the defendant Andrew Charles to set aside a certain *alias* execution, to stay the issuance of any future execution, and to have the judgment marked "Satisfied." The grounds upon which the appellant based his contention that the motion should be granted were that he had been discharged as an insolvent from any and all obligation either to pay or have satisfied in any manner out of his property the judgment upon which the *alias* execution issued. It appears from the record in the original suit that the second amended complaint filed in the action was not to be found when the court below considered the appellant's motion, and that it was upon the issues made up by that pleading, and the answer filed thereto by the appellant, that the cause was submitted to a jury, who returned a general verdict for the plaintiff for a large sum of money.

The appellant contends that even if, in a matter of the kind in hand, the court could look behind the judgment, to the record in the action where it was rendered, to ascertain if the debt claimed to have been discharged by the certificate of the court presiding in the insolvency proceedings was created by

the appellant's fraudulent acts, yet that, as the *complaint* was not to be found, it was not permissible for the court to determine that the original debt was founded in the fraud and deceit practiced by the appellant. In this we think he is mistaken. If the complaint is not to be found, but the answer to that complaint is, and it shows, as in this case, that the only material denials upon the part of the appellant are as to the commission by him of acts of fraud, it will be presumed that the judgment was founded upon allegations in the complaint to which the answer was responsive, and that, therefrom, the debt must have arisen through the fraud of the appellant. The latter should certainly be held to the statements of his answer; and as that is devoted to a denial of specific acts of fraud, and there is nothing else to show what the allegations of the complaint were, it will be presumed that there were none other than those to which the answer was responsive, unless admitted by the answer to be true.

But the appellant contends that the court below had no right to look at anything in the record of the action in which the judgment was recovered, except that judgment; that the original debt was merged in the judgment; that the latter had been obtained before the certificate of discharge was granted; and that the court, upon the hearing of his motion to stay the *alias* execution, etc., was bound to treat that judgment as covered by and included in the certificate. But such does not seem to have been the views in similar cases of learned judges other than the one who determined this contention against the appellant.

This court has, it seems to us, clearly intimated what the law is, as to such a matter, although the precise question here involved was not in issue, in *Imlay v. Carpenter*, 14 Cal. 177; saying, after citing numerous decisions of other courts: "The judgment is but the original debt in a new form. * * * The opposing decisions are from Massachusetts and Maine, and proceed upon the technical doctrine, so pointedly repudiated in *Dresser v. Brooks*, that the original debt is merged and lost in the judgment, and that the judgment is a debt newly created and conclusive in its nature. * * * The force of the reasoning and the weight of authority are against this view." And in that case (*Imlay v. Carpenter, supra*) this court appears to have agreed to the right of the trial court to go behind the judgment, and look into the pleadings in the original action, with a view to grant a motion to set aside an execution.

In *Dresser v. Brooks*, 3 Barb. 448, it is said: "These cases have arisen under our insolvent laws, and the courts have uniformly held that, in an action upon a judgment to which a discharge under the insolvent law was pleaded, they would look behind the judgment to the debt on which it was founded, in order to determine whether that was of such a character, had its origin at such a time and place, and between such parties, as to be within the provisions of the act."

Section 33 of the last United States bankrupt act is very similar in its provisions to section 52 of the insolvent act of this state, as bearing upon the right of discharge from a debt created by fraud; and in *Re Patterson*, 2 Ben. 156, Judge BLATCHFORD very clearly, and as we think conclusively, disposes of the point we are now considering. He says: "The only other question is whether the debt is once excepted by section 33 of the act from the operation of a discharge. That section provides that 'no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act.' It is claimed by the bankrupt that, the debt in this case being in the shape of a judgment, this court cannot, in applying section 33, go behind the judgment, to see whether the claim on which the judgment was recovered was created by fraud; that the judgment, which is now the only debt, was created by the claim, and not by the fraud; and that although the judgment was cre-

ated by the claim, and the claim by the fraud, yet the judgment was not created by the fraud. This view is unsound. Wherever the debt, no matter whether it be in the shape of a judgment, or in any other form, was created by fraud, had its root and origin in fraud, there it is not to be disregarded. To hold that the recovery of a judgment in an action where the *gravamen* of the complaint is fraud, condones that very fraud by so merging the original claim that the judgment cannot be said to be a debt created by the fraud set out in the complaint as the ground for recovering the judgment, would fritter away entirely the good sense and plain intention of the thirty-third section. The case of *Bangs v. Watson*, 9 Gray, 211, cited to sustain this view, does not, in my judgment, support it, and I have been referred to no case which leads to any such conclusions."

It would therefore appear that the court below had a right to go behind the judgment, and inspect the pleadings in the original action; that it was justified from an inspection of the defendant's answer in concluding that the only claims made by the second amended complaint against the defendant, which were not admitted by the answer, were founded upon his alleged fraudulent acts; and that the jury in rendering its verdict did so upon the issues thus submitted to them; and that the original claim, created by fraud, was not so merged in the judgment as to make it a new debt, and subject to be discharged by the court granting the certificate of discharge in insolvency.

It follows that the order appealed from should be affirmed.

We concur: BELCHER, C. C.; HAYNE, O.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

(74 Cal. 199)

In re Estate of SANDERSON, Deceased. (No. 9,653.)

(*Supreme Court of California.* November 30, 1887.)

1. EXECUTORS AND ADMINISTRATORS—LIABILITY TO ACCOUNT—LACHES.

An executor failed to account for a long period, and pleaded the statute of limitations and laches to a demand for an accounting. *Held*, that his obligation to account was continuous, and the right to demand one could be asserted as long as the duty remained unperformed.

2. SAME—ACCOUNTING AND SETTLEMENT—EXCHANGING CURRENCY FOR GOLD.

An executor exchanged \$500 in currency, the property of the estate, for \$370 in gold, and paid a coin debt of the estate, getting current value for the greenbacks. *Held*, that he was only liable to account for the \$370.

3. SAME—EXCEPTIONS TO ACCOUNT—SUBMISSION TO JURY.

Code Civil Proc. Cal. §§ 1713-1716, provides that, except when otherwise enacted, the provisions of part 2 of the Code, relating to ordinary actions, shall constitute the rule of proceeding in probate matters, and that issues of fact joined in such proceedings must be tried as provided for the trial of contested wills by section 1312. Sections 1635-1638 provide that any person interested in an estate may file exceptions to the account in writing, and a method of settling the account. *Held*, that exceptions to an account are aids to the court in his duty of scrutinizing it, but are not issues of fact to be submitted to a jury on demand of a party in interest.

4. SAME—LIABILITIES—FAILURE TO COLLECT NOTE—PRESUMPTION.

Code Civil Proc. Cal. § 1631, provides that an executor may be examined upon oath on rendering his account. Section 1613 provides that he shall be charged with the estate coming into his hands at the value in the inventory of appraisement. Section 1615 provides that he shall not be responsible for debts uncollected if it appear to be without his fault. Section 1635 provides that any person interested may contest the account. An executor charged himself with balance of a certain note and mortgage in his account, and credited himself with the same amount uncollected. *Held*, that the presumption was that he could have collected the note, in absence of showing by him that it was not collected without any fault by him, and the power of the court to examine the executor on his account was not limited by the fact that no specific objections had been filed.

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5. SAME—RELEASE BY HEIRS OF CO-EXECUTOR.

An executor of an estate had at the death of his decedent a note and mortgage in his hands belonging to him, which he turned over to his co-executor, who collected part of the debt. He called the attention of his executor to the fact that the note was about outlawed, and he replied that he knew all about it, and would look after it. The statute of limitations ran against the note. The heirs agreed with the executor not to call him to account, and that an order settling his account might be filed with the probate court. Code Civil Proc. Cal. § 1613, provides that each executor shall be liable for all the estate coming into his hands. *Held*, that as the executor was not liable for the balance of the note uncollected by his co-executor, and could not be called upon by him for contribution for any sum he might have to pay for his failure to collect, the agreement of the heirs not to sue the executor could not therefore operate to discharge the co-executor.

6. SAME—INTEREST ON BALANCES—ANNUAL RESTS.

When there has been great delay in settling an estate, the court is justified in charging legal interest on balances, with annual rests.

7. SAME—ORDER SETTLING ACCOUNT—APPEAL.

An order was entered by the court that the account of an executor "be, and the same is hereby, allowed and approved, except as to the matters following," etc. *Held*, that it is an order settling an account, and is appealable.

8. SAME—APPEAL—REVIEW—DEFECTS WAIVED.

An executor asked for a reversal of judgment in a contest of his account because there were no findings by the probate court. There was nothing in the transcript to show that findings were not waived. The bill of exceptions recites that, when the "statement on motion for new trial was made," the court struck out an allegation that on October 3, 1883, counsel was asked to waive findings, and refused. The order settling the account was of October 11th. *Held* that, for aught that appears, findings may have been waived before or after October 3, 1883, and the matter struck out had no place in the statement.

9. APPEAL—REVIEW—CREDIBILITY OF WITNESSES.

Where there is a conflict of testimony, the court below is the judge of the credibility of the witnesses.

In bank. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

T. Z. Blakeman, for appellant. *Cope & Boyd*, for respondent.

MCKINSTRY, J. 1. It is contended by appellant, L. A. Sanderson, executor, that a new trial of the contest of his account should be directed, because the court below failed to find upon the issues made by the contest. But the transcript contains no bill of exceptions which shows that findings were not waived, *if findings were proper*. There is a bill of exceptions which recites that, when the "statement on motion for a new trial" was settled, the judge struck out from the proposed statement an allegation, "On October 3, 1883, counsel for contestants requested counsel for the executor to waive findings of fact, which counsel for the executor declined to do," and that "the said matter so struck out recited facts." The trial of the contest took place April 12th, and the order settling the account was made and entered October 11, 1883. For aught that appears, findings may have been waived at the close of the testimony, or before or after October 3, 1883, and prior to the entry of the decree. The bill of exceptions fails to show distinctly that findings were not waived. Moreover the matter struck out has no proper place in the statement.

2. Appellant claims that, by failing to contest his verified account upon the specific ground that the balance of the "Braly note" remained uncollected by reason of the neglect of the executor, the contestants admitted that it remained uncollected without any fault on his part. Section 1631, Code Civil Proc., provides that, on rendering his account, the executor may be examined on oath touching any property or effects of the decedent. The power of the court so to examine him, and to base the terms of its decree settling the account upon such examination, is not limited by the circumstance that no person interested in the estate has filed specific exceptions to which the examina-

tion is appropriate. To hold that the executor should be entitled to the benefit of every credit to himself in his account, which is not specifically objected to by a party in interest, would be to deprive the court of its wholesome supervision over the accounts of executors and administrators, to encourage negligence, and open the way for fraud. It seems to have been held in *Trotter's Case*, 40 Miss. 711, that the probate courts of that state "cannot command the conscience of an administrator so as to compel him to conform his returns under oath to the views of the court." But, as we have seen, section 1631 of our Code (Code Civil Proc.) provides in terms that the executor or administrators may "be examined." And in addition to what is said in *Estate of Moore*, 13 Pac. Rep. 880, and in *Estate of Herteman*, 15 Pac. Rep. 121, the power of the court to go behind an account, and its duty to require a full and fair account, was recognized in *Hirschfeld v. Cross*, 67 Cal. 662, 8 Pac. Rep. 507, and other decisions. In the case last mentioned this court said: "The probate court is the guardian of the estates of deceased persons, and has control of the person appointed by it to administer the estate, subject to review as provided by law."

Even if it should be conceded that an account presented by an executor establishes its own correctness *prima facie*, the account should at least show on its face that a failure to collect a debt due to decedent was not the result of the negligence of the executor. Every executor is chargeable with the whole of the estate of the decedent which may come into his possession, at the value of the appraisement contained in the inventory. Code Civil Proc. 1613. No executor is accountable for any debts due decedent "if it appears that they remain uncollected without his fault." *Id.* 1615. But, if it do not so appear to the court, the executor must be held answerable for the amount of a debt due the decedent as appraised in the inventory. In the account herein presented, all that appears is that the executor is debited with a balance of the Braly note uncollected, and that the executor is credited with the same balance; that is, that a portion of the Braly note was not collected. That fact, if taken as true, is not a statement that it remained uncollected "without fault" on the part of the executor. There is no presumption here as to the executor having done his duty. The presumption is he could have collected the note in the absence of showing, by his own averment, at least, that a portion was not collected without any fault in him.

The Code of Civil Procedure provides that, at the hearing for settlement, "any person interested in the estate may appear and file his exceptions in writing to the account, and may contest the same." Section 1635. An exception may be taken to an account for that credits appear therein to which, as matter of law, the executor is not entitled; as if an executor shall attempt to set off, as against money or property of the estate which has passed into his hands, individual expenditures of his own, from which the estate could receive no benefit, and for which it was in no way responsible. Here the contestant of the account of the executor objected that it appeared therefrom he had failed to charge himself therein with the whole of the principal and interest of the M. A. Braly note and mortgage. The exception called the attention of the court to the fact that, by his account, the executor sought to relieve himself of responsibility as to part of the Braly note, without any showing, even by entry in the credits, that he had not been guilty of negligence. Moreover, the account is expressly excepted to "because it is not made to appear therein that the Braly note remained uncollected without the fault of said executor."

3. But appellant contends that the contestant of an account is *plaintiff*; that the exceptions in writing must be as fully and accurately drawn as a complaint in an ordinary civil action; that the account as presented must be taken and settled as correct in all respects, except as to the specific exceptions taken to it; that at the trial of the contest no evidence is admissible, except such as

supports, not only the attack upon the particular items referred to in the specifications, but the specific averments set forth in the specifications as grounds of objection to the particular items. And appellant claims that, under the allegations in the exceptions as to the Braly note, the court below should have allowed no testimony to prove that the executor had been guilty of negligence in failing to collect that note. In New York the practice obtains of permitting objections to an account to be stated in the most general language, although the surrogate may require them to be made more specific. Under a general objection to any and all of the items, it was there held that the surrogate could inquire into and scrutinize the account, and was not bound by the executor's oath thereto, or by the vouchers produced by him; and in examining it he could allow, for his information, any person to point out errors and defects therein. *Red. L. & P. Surrogates' Courts*, (2d Ed.) 672; *Peck v. Sherwood*, 56 N. Y. 615; *Buchan v. Rintoul*, 70 N. Y. 1.

Appellant relies, in support of his contention, on sections 1713-1716, Code Civil Proc. By sections 1713 and 1714, the provisions of part 2 of the Code—relating to proceedings in ordinary actions—do *not* constitute the rules of practice in probate proceedings when "it is otherwise provided;" and the provisions of part 2—relating to new trials and appeals—are *not* applicable when "inconsistent" with the provisions of the title in which the sections are found. A mode and manner of settling accounts of executors and administrators is specially provided, which, if followed, is inconsistent with the provisions relating to new trials. An *appeal* from an order settling an account is expressly allowed within 60 days. Code Civil Proc. 963, 1715. The article and chapter referred to in section 1716 relate to contests of the probate of wills. Code Civil Proc. 1312. The suggestion of appellant is that the "exceptions" permitted by section 1635 constitute a complaint which may be demurred to on any of the grounds mentioned in section 631; and which, if sufficient in form, must be answered by the executor; that the issues made by such complaint and answer must, on the demand of either party, be tried by a jury; that judgment must be entered against the party to whom the special verdict is adverse, together with *costs* in favor of the prevailing party. That the procedure thus marked out is singularly inappropriate as a mode for settling an account, which it is the duty of the court of its own motion carefully to scrutinize, appears on saying it.

It may aid in ascertaining whether the legislature has required the procedure insisted upon, to look for a moment at the history of the laws with reference to the joinder of issues of fact in probate, and their trial. April 23, 1855, the twentieth section of the act of May 1, 1851, "to regulate the settlement of estates of deceased," etc., was amended so as to provide: "If any person appears and contests a will, he shall file a statement in writing of the grounds of his opposition. When issues shall be joined in the probate court respecting the competency of the deceased to make a last will and testament, or respecting the execution by the deceased of such last will and testament under restraint or undue influence, or fraudulent representations, or for any other cause affecting the validity of such will, such issue or issues shall, at the request of either of the parties interested, be certified immediately to the district court of the proper county for trial by jury. * * * Upon the determination of such issue or issues of fact, the jury trying the same shall render a special verdict thereon, and the finding of the jury shall be certified by the district court to the probate court, whereupon the probate court shall proceed to admit such will to probate or not, according to the facts found and the law." St. 1855, p. 132. Compare section 1312, Code Civil Proc. The original act of 1850 (St. 1850, p. 402, § 295) gave an *appeal* to the district court from certain orders of the probate court, including "all settlements of executors or administrators," and provided that, on filing the appeal papers, the district court should be possessed of the cause, to re-examine the account anew. And the

act of 1851 (pages 486, 487, §§ 294, 298) attempted to give like appeals, and provided that the district court should try the matter anew. Neither act purported to declare that, on such appeal, questions of fact arising upon a settlement of accounts should be tried by jury in the district court. May 20, 1861, (St. 1861, p. 628,) section 20 of the probate act of 1851 was again amended by providing that the issues of fact arising on the contest of a will, which might previously have been sent to the district court, should be tried in the probate court, and, if so requested by a party in interest, by jury. Such is substantially the provision of the Code of Civil Procedure.

Thus it appears that, prior to the Codes, there was no express provision of law requiring, nor any which could be construed to require by implication, that any issues of fact arising in the probate court should be tried by jury, except such as might arise upon the contest of the probate of wills. Are sections 1716 and 1717 to be read as commanding the proceedings set forth in section 1312, Code Civil Proc., and those which immediately follow, to be resorted to whenever an account is contested?

In *Re Estate of Moore, supra*, the question was fully considered and discussed by Justice TEMPLE, and the question above stated was answered in the negative. The court there held that sections 1716 and 1717 "should not be construed as granting an absolute right to a jury trial in cases in which, according to the course of the common law, a jury trial was denied as inappropriate, and especially upon the settlement of the accounts of administrators and executors, where so much is left to the mere discretion of the judge, and in the face of the language of the Code, in many sections, implying that the settlement shall be by the court. Sections 1636-1638, Code Civil Proc." See, also, the remarks of MCFARLAND, J., in *Estate of Hertman, supra*.

There may be a manifest propriety in requiring, at the request of a party, issues of fact such as ordinarily arise in the contest of the probate of a will, (was the testator of sound mind? was he subjected to undue influence?) to be tried by a jury. But the proceeding in probate for the settlement of an account is *sui generis*, bearing but a distant and incomplete analogy to the procedure for an accounting in equity. The executor or administrator derives his power to act as such from the will, or order of the court, but in his conduct of the affairs of the estate he is subjected largely to the discretion and control of the court. The court is bound to protect the estate, and, as far as may be, the rights of all concerned. Publication is had that all interested may have an opportunity, by written exceptions, to call the attention of the court to alleged errors or defects; but, in the absence of exceptions, the court may and should inquire into any matter which may seem to the court objectionable, and pass judgment thereon; and, in the presence of specific objections, the court is not limited to the specific objections. A special verdict must pass on all the issues by presenting the conclusions of fact bearing on all. Code Civil Proc. 624. Section 1314, relating to contests of wills, provides that the jury must return a special verdict "upon the issues submitted to them by the court," upon which the judgment of the court must be rendered. For many years it has been the practice in this state, when a special verdict is desired, to cause to be prepared and submitted to the jury special issues,—usually in the form of questions,—and it would seem that this practice is recognized by the legislature by the words, "the issues submitted to them by the court." In cases of contests of a will the issues must be such as that the determination of them will leave to the court no office except to enter a judgment admitting the will to probate or rejecting it. Section 1314.

But if, as claimed by appellant, when an account is contested, the trial and evidence must be confined to the particular items excepted to, and to the grounds of exceptions thereto, no judgment settling the account can be based on a special verdict of a jury *alone*, unless all of the items of the account are excepted to. This strengthens the presumption that the statute does not re-

quire that a contest of an account must be submitted to a jury on the demand of a party in interest. Even if it should be conceded that there are any issues of fact, other than those arising on the contest of wills, which, on demand, must be submitted to a jury, in conformity to the requirements of the Code as to such contests, they must at least be like—of the same kind as—those joined in contests of wills, and like those which by the former statutes were directed to be sent to the district court for trial. It would seem that they must be such the verdict whereon would be determinative of an order or judgment to be entered by the court, and not merely determinative of subordinate facts which may be considered by the court in connection with other facts in making its order of judgment.

We are clearly of opinion that exceptions to an account do not create "issues of fact joined," such as must be submitted to a jury on demand of a party in interest. The language of section 1635 does not of itself require the elaborate procedure provided for in sections 1312-1314. No time is given the executor to prepare to meet or to answer the exceptions; although, doubtless, in proper cases, the court may grant him time to secure further evidence in support of his account as rendered. On the day appointed, or on any subsequent day to which the hearing may be postponed, any party in interest may "contest the account." True, his exceptions must be in writing, but this may well be that the point of his objections shall be made clearly to appear to the court. It is proper, and we believe it has been the practice, to extend to contestants the widest latitude in amending and supplementing their exceptions. What, then, is the purpose of section 1635? To us it appears the object is that all interested may inspect, and, if it is desired, object, to the account. But it is the duty of the court carefully to scrutinize the account, and to reject all claims of the executor illegal in themselves or unjust in fact. The court might perhaps overlook particular objections which were not called to its attention; and the exceptions are permitted in aid of the court when performing its duty of making the account correct. It was not intended to deprive the court of its power to supervise in every particular the accounts of executors and administrators, a power conferred for the protection of all interested, including infants, and oftentimes adults ignorant of their rights. The only point decided in *Boughton v. Flint*, 74 N. Y. 485, was that an auditor, to whom objections to an account were referred by the surrogate, must confine the inquiry before him within the limits of the reference.

4. It is said by appellant that the evidence would not support a finding of such negligence on his part, with respect to the Braly note, as should render him liable for the balance thereof uncollected. But even if the testimony of the appellant tends to prove an excuse for his neglect, for the reason that he was not specifically advised by the attorney, Fabens, of the necessity of commencing an action to foreclose the mortgage, the testimony of Weeks was to the effect that the attention of appellant was called to the fact that the Braly note would "outlaw" in a few weeks, and that appellant did know of the consequences of the running of the statutory limitation. It was for the court below to determine the credibility of the several witnesses.

5. It is insisted, however, that, even if the appellant was guilty of negligence, his co-executor, Weeks, was also liable for negligence in the same matter; that their liability was joint, and, the devisees having released Weeks from all liability as executor unconditionally, appellant was thereby discharged from liability. Appellant urges that any negligence on the part of the executors constituted a tort, and as there can be but one satisfaction of a tort, the release of one of them released both. But, for a neglect of their duty as trustees, they were liable as for breach of the contract obligations they took upon themselves as executors. Appellant claims that if the executors were joint debtors, the release of one released the other. The obligations of co-executors arise from their contract, and are several. Although one may in some cases

make himself liable by placing the other in a position to do wrong, or by aiding him in his acts or misfeasances, the liability is still the several liability of each. And this is so, even if it be conceded the devisees or legatees may under some circumstances claim both to be liable. Whether the executor Weeks was guilty of negligence in not taking more active measures to enforce the collection of the Braly note and mortgage, which was in the possession of the appellant, was to be determined by the evidence below, and in reviewing the evidence we must assume the testimony of Weeks to be true.

At common law, executors were generally liable for their own acts, and not for the acts of their co-executors. Each executor had an independent right over the personal property of his testator; he might sell it, and receive the purchase money, and give receipts in his own name. There were, indeed, cases in which both of the executors were made severally—perhaps jointly and severally—liable. "If an executor does any act to transfer the property into the exclusive control of the co-executor, and thus enables his co-executor to misapply the same, he will be liable; as if he joins in drawing or indorsing a bill or note, or delivers or assigns securities to his co-executor to enable him to receive the money alone, or if he gives him a power of attorney, or does any other act that enables his co-executor to misapply the money; and so it was held that if by agreement between the executors, one to receive and intermeddle with such a part of the estate, and the other with such a part, each of them will be chargeable with the whole, because the receipts of each are pursuant to the agreement made betwixt both." Probably the case *would not now be followed*, but it illustrates the principle." Perry, Trusts, §§ 421, 422, and cases cited in notes. And so if an executor stands by and sees a breach of trust committed, or about to be committed, by a co-executor, and does nothing to protect the estate, or to call the defaulting executor to account, he is liable. But a neglect to collect a debt which might, with proper exertion, be collected, is a *devastavit*, (Bouv. Dict.,) and a *devastavit* by one of two executors shall not charge his companion, provided he has not intentionally or otherwise contributed to it; for the testator's having misplaced his confidence in one shall not operate to the prejudice of the other. *Rowland v. Milforth*, Cro Eliz. 319; *Williams, Ex'rs*, bottom p. 1820. In the American note to the same page are collected many decisions in this country to the effect that where one executor merely permits his co-executor to take possession of assets without going further, and *concurring in a misapplication of them*, he does not render himself responsible for the receipts of his co-executor.

The extent of the liability of one executor for the acts of his co-executor will depend very much upon the circumstances of each case. *Fonte v. Morton*, 36 Miss. 350; *Noland v. Calvit*, 12 Smedes & M. 273; *Clark v. Blount*, 2 Dev. Eq. 51. In the case before us, the note and mortgage were in the exclusive possession of the appellant, and we cannot say the co-executor failed in reasonable diligence when he relied upon the positive statements of appellant that he knew all about the matter, and that there was plenty of time to attend to the collection of the Braly note. Such was the effect of his declarations. It has sometimes been broadly stated that, if an executor turn over assets which he has received to his co-executor, he becomes responsible for the due application and administration of those assets by his co-executor. The rule, as settled by authority, however, and as laid down by *Williams on Executors*, (bottom p. 1823,) is: "If an executor is merely passive by not obstructing his co-executor from getting the assets into his possession, the former is not responsible. If, however, the one in any way contribute to enable the other to obtain possession, he is answerable, notwithstanding his motive be innocent, *unless he can assign a sufficient excuse*." In a note, many authorities are referred to in support of the text. In all the cases there seems to have been some circumstance to put the executor, when he trans-

ferred the actual possession to his co-executor, on his guard against possible misconduct or irresponsibility on the part of the co-executor, or an entire absence of any explanation to show that in delivering the asset to his companion he acted with the prudent care of a reasonable person.

The English case—*Langford v. Gascoyne*, 11 Ves. 333—goes further, perhaps, than any other cited by appellant. A bill for an accounting was filed by a widow against the three executors of the estate of her deceased husband. The master, in his report, charged all three of the defendants with a certain sum, which (upon advice of a witness) the plaintiff, in the presence of all the executors, had delivered into the hands of one of them, Spurrel, the witness not having a good opinion of the circumstances of Gascoyne, another of the executors. Spurrel immediately gave the money over to Gascoyne, who took it away. The witness, before the master, also testified: "*Gascoyne was reputed not to be in good circumstances.*" The court, with hesitation, held that Spurrel, as well as Gascoyne, was properly charged with the amount, but that the master erred in charging the third executor with it.

In *Edmonds v. Crenshaw*, 14 Pet. 166, the testator by his will directed his property, real and personal, to be sold by his executors, and the proceeds to be by them invested in certain stocks for the benefit of persons named in the will. The property *was sold*, and the account of sales settled with the ordinary by the executors. One of the executors became insolvent. The beneficiaries named in the will filed a bill in the circuit court of the United States to compel a performance of the direction of the will. The solvent executor stated in his answer that the moneys were not invested while he remained in South Carolina, where testator died, because the sums collected were small; and that he removed to Alabama, having first delivered over to his co-executor all the assets of the estate which had ever come into his hands, and taken the receipt of his co-executor for the same, which he filed with the ordinary. The parties went to a hearing on bill and answer. The executor had proceeds of the sale of the property in his hands, which it was his duty to see were invested as directed by the will. The supreme court held that the executor could not discharge himself by paying over the assets to his co-executor, but must show that he made the investment required by the will, or applied the funds in some other manner in conformity with the trust.

In *Clarke v. Clarke*, 8 Paige, 152, an executor paid over all the moneys in his hands belonging to the estate to the executrix, testator's widow. The executor contended he was not liable because by the terms of the will the widow was entitled to the use of all the property during her widowhood. The court held the widow was not entitled under the will to the possession of the estate, and that the executor, who had suffered her to use the proceeds of the property for her own purposes, and to sell the last piece of real estate, when the proceeds were more than sufficient to pay all the testator owed, was liable.

In *Mesick v. Mesick* an executor had assets in his possession, for which he had given a receipt *undertaking to collect* the same, and apply *the proceeds* in the manner designated by the testator. He afterwards voluntarily delivered the assets to his co-executor, without any "good reason." The court held that while, ordinarily, an executor is not liable for *money received* by his co-executor, yet when, having it in his actual possession, he hands it over to his co-executor, he will only be exempted from liability on showing *good reason* for having done so. 7 Barb. 120.

Johnson v. Corbett, 11 Paige, 266, holds that where an administrator suffers or permits his co-administrator to misapply the funds of the estate, when he has the power to prevent it, he is liable, in equity, for such misapplication, if the amount misapplied cannot be collected from the co-administrator. This last decision would seem to imply that his liability was in its nature that of a *surety*.

Chancellor KENT has said, speaking of the liability of co-executors: "The defendant P. is not responsible for the *devastavit* of his co-executor C., any further than he is shown to have been knowing or assenting to it at the time. * * * Merely permitting a co-executor to possess assets, without going further and concurring in the application of them, does not render an executor liable for the receipts of the other. * * * Each executor is liable for his own acts, unless he hands over *moneys collected or received* to his co-executor, or joins in the direction or misapplication of the assets." *Sutherland v. Brush*, 7 Johns. Ch. 22.

As we have seen, the liability of an executor for acts or omissions of his co-executor depends upon the circumstances of each case. Some of the cases relied upon as authority for holding Weeks liable, are cases in which the loss to the estate was caused by malfeasance, or affirmative misapplication of the assets by one executor which the other could have prevented. Some were cases in which assets were delivered to a co-executor who was insolvent, or whose probable insolvency was known to the executor delivering them. In some, money collected or received by an executor, and for which it was his duty to account, was turned over to a co-executor. In others, the executor surrendering the money or assets was charged by the will with some special duty in respect to them; as that they should be invested in a particular manner under his direction. In all there was a failure to make it appear that there was good reason for passing the actual possession to the co-executor.

In the case at bar, the Braly note and mortgage were in the possession of the appellant from the time of making up the inventory of the estate until the debt was barred by the statute of limitations; with the exception of a brief period near the commencement of the administration, when they were in the hands of counsel, having been placed in his hands by appellant. Prior to the death of the testator, they were in the possession of Weeks as his attorney in fact. Precisely how or when they passed into the possession of appellant does not appear, although this occurred shortly after the death of decedent. The appellant was, and continued to be, amply able to respond for all the assets that passed into his hands. The asset was not collected by Weeks, and the money paid over to appellant. And the testimony of appellant supplies a sufficient reason why the note and mortgage were placed in his actual custody: "The note was, with all the balance of the papers, placed in my safe. Captain Weeks had no safe, and I kept the accounts and papers." We think that under the circumstances, neither upon principle, nor on the weight of authority, did the executor Weeks become liable for the balance of the Braly note, in part collected by appellant, merely from the fact that he was in possession of it (the note) at the time of the testator's death, and delivered it or permitted it to be delivered to appellant.

But is this the case of the "release" of one of two joint debtors? Even at law it is necessary that a technical release under seal be given to one of several debtors jointly bound, in order that the others may avail themselves of it as a discharge. *Armstrong v. Hayward*, 6 Cal. 183; *Prince v. Lynch*, 38 Cal. 531. The provisions of our Code with reference to the effect of a release of one of several joint obligors have no application here, as the liability of Weeks, if it accrued at all, accrued prior to the adoption of the Codes. At common law a release of one of several obligors, whether bound jointly, or jointly and severally, discharges the others, and may be pleaded in bar. But when two are bound jointly and severally, and the obligee covenants with one *not to sue him*, it does not amount to a release, but is a covenant only, and the obligee may still sue the other obligor. *Rowley v. Stoddard*, 7 Johns. 209. Courts endeavor to carry out the intention of the parties when the instrument appears to have been intended to be a covenant not to sue, and not a release. 2 Chit. Cont. 1155. Here the instrument signed and not sealed by the devisees amounts to a promise not to call the executor Weeks to any account-

ing, and a consent that an order settling his account might be entered in the probate court without notice to them. The language of the writing clearly indicates it was intended as a contract not to seek legal redress as against Weeks. If the consideration for the promise of the devisees appeared to be the payment in whole or in part of the debt due from the Braly estate, the appellant would be entitled to a credit for the sum so paid. This because it *was* paid; but it remained for appellant to show the fact.

When the executors give a joint and several bond, the effect is to make them jointly and severally liable, *on such bond*, for the misconduct of each. Williams, Ex'rs, 1820, note *y*. Here the will provided that the executors should not give bond, and so far as appears none was given. By our statute, when two or more persons are appointed executors or administrators, the superior court must require a separate bond from each of them. Code Civil Proc. 1391. Each is chargeable in his account with the whole of the estate which may come into his hands. Id. 1613. When an executor is guilty of neglect with reference to assets in the possession of his co-executor, he is not made liable upon the theory that the assets are in the possession of both, which, in fact, they are not, but upon his neglect in delivering them to his co-executor without good cause, or in not seeing to it that they were taken out of the possession of the co-executor, or were not by him misapplied or lost.

Even if it should be conceded that Weeks could, at the option of the devisees, be charged with the part of the Braly note uncollected, by reason of his neglect in not taking measures to cause it to be collected, it would not follow that the appellant, who had the note in his possession, could assert the agreement styled a "release" as a release to him. Co-executors are not liable to each other, but each is liable to the *cestuis que trust* to the full extent of the fund he receives. *Edmonds v. Crenshaw*, *supra*. As between the executors herein, the primary and principal obligation was on appellant to account for the note and mortgage which was in his possession. We know of no principle by which Weeks could be held to contribute towards any sum appellant might have to pay as a consequence of his failure to collect the Braly note. The appellant, therefore, could have lost no right to contribution by the arrangement between Weeks and the devisees.

6. On the twenty-sixth of February, 1869, the appellant exchanged \$500 in currency—the property of the estate—for \$370 in gold. The court below directed that the appellant to charge himself with the former instead of the latter sum. There is no dispute but that the \$370 were paid to satisfy a coin debt due from the estate, or that the \$500 "currency" were then worth \$370 in gold. The transaction is treated by counsel as a "sale," but we think that is hardly the term to apply to the exchange of one currency for another. We take notice that coin was always treated as the standard of value in this state, and was so recognized by our legislation. If the executor had paid the gold debt with \$500 in greenbacks, the transaction would not have been refused the approval of the probate court for that reason alone. If, indeed, he had gold at his disposal, he should have paid the debt in gold; but, if he had not, any sale of property he might have made would have produced either "currency" or a proportional less amount in gold. It is suggested he should at once have proceeded to collect the Braly note. But, although the appellant was properly held liable for the Braly note, the question whether he used a reasonable discretion in changing the paper currency into gold is to be determined by the conditions existing when it was done. The Braly note bore interest at the rate of 1 per cent. a month, and had several months yet to run. The appellant may reasonably have believed it was for the interest of the estate to dispose of the greenbacks rather than to bring the foreclosure suit, which might be pending a considerable period of time before decree. The court erred in compelling him to account for more than the \$370.

7. Considering the great delay of appellant in accounting, we cannot say

the superior court was not justified in charging the appellant with legal interest upon balances, with annual rests.

8. It is claimed by appellant that the right of respondents to demand an accounting was barred by the statute of limitations, and that by their laches they had lost their right to call the executor to an account. From the expiration of the time mentioned in the notice to creditors, it was the duty of the executor to account. His obligation to account was continuous, and he cannot claim that his failure to do so, at any moment of time, set the statute in motion, or cast upon the respondents the duty to demand an accounting; since their right to demand it ran with his duty, and could be asserted so long as his duty remained unperformed. There is no express provision of our law with respect to the limitations of actions which applies to the case, and we discover in the record no such laches as a court of equity will sometimes consider sufficient reason for dismissing an appeal to its jurisdiction. It cannot be claimed that the devisees and legatees consented that the executor should be relieved of his duty to account as such, and that the estate should remain open and unsettled. If any unfavorable consequences may be supposed to have been suffered by appellant by reason of the insolvency of his co-executor, he could have avoided them by more prompt action on his part; but such insolvency could not relieve him from the burden of accounting for the property of the estate in his possession. He did not and could not "repudiate his trust" entirely by his mere failure to account. He failed to perform a specific duty which still continued imposed upon him until his accounts were settled.

9. It is claimed by *respondent* that the order entitled, in the transcript, "Order Settling and Correcting Account," is not appealable, because *not* an order settling an account. But, while informal, we think the order that the account "be, and the same is hereby, allowed and approved, except as to the matters following," etc., is an order settling the account. It directs the executor to charge himself in the account with certain sums, and approves of the account as rendered in other respects. There remained only the clerical duty of making the account conform to the order. *Estate of Miner*, 46 Cal. 566.

The order appealed from is modified by striking therefrom the words, "The said executor is directed to charge himself in said account with the sum of \$500, as of the twenty-sixth of February, 1869, instead of the sum of \$370, 'amt. rec'd, sale of \$500 currency found on R. A. Sanderson's body, at 74 cents,'" and the order appealed from is in all other respects affirmed.

We concur: SEARLS, C. J.; TEMPLE, J.; MCFARLAND, J.; PATERSON, J.; THORNTON, J.; SHARPSTEIN, J.

(2 Cal. Unrep. 319)

MALONEY and another v. HEFER. (No. 9,866.)

(*Supreme Court of California*. November 30, 1887.)

HOMESTEAD—HOW LOST—TEMPORARY ABSENCE—FILING DECLARATION.

A married woman owned two houses and a lot, and, while residing in one of the houses, prepared a declaration of homestead, and went into another county to visit for four months. Her husband, during her absence, occupied lodgings in a house, not on the property. While she was away, the declaration of homestead was filed. Defendant obtained judgment against the plaintiffs, and levied on a portion of the lot, and sold it. *Held*, in an action by the husband and wife to quiet their title to the lot, that, as the claimants were not residing on the lot when the declaration was filed, it was not valid.

Commissioners' decision. Department 1.

Appeal from superior court, San Francisco county; JOHN F. FINN, Judge.
E. J. & J. H. Moore, (*Nathaniel Bennett*, of counsel,) for appellants.
N. B. Mulville, for respondent.

BELCHER, C. C. The plaintiffs were husband and wife, and brought this action to quiet their title to a lot of land in the city of San Francisco. The lot fronts on Perry street, having a width of 25 feet and a depth of 80 feet, and is claimed by the plaintiffs as their homestead.

In January and February, 1883, there were two houses on the lot, one on the front and the other on the rear part of it, and the value of the whole property was between \$2,500 and \$3,000. The front house had a basement, and above it two flats or stories, which were leased to and occupied by tenants. The rear house was a small one and was reached by a narrow passage-way along the side of the front house from Perry street. Between the street and the front house was a yard sixteen and one-half feet long and five feet wide, and between the two houses was a yard which was divided by a board fence from five to seven feet high. Mrs. Maloney owned the whole lot as her separate property, and had resided with her husband in the rear house for more than 10 years. On the twenty-fifth day of January, 1883, while so residing on a part of the premises, she executed and acknowledged, in proper form, a declaration of homestead on the whole lot, and on the eighth day of February following filed it for record. After executing the declaration, and on the same day, she temporarily went away to visit friends in another county, and was gone about four months. During her absence her husband occupied other lodgings in the city, and the house, with the exception of one bed-room, which with its furniture was reserved, was occupied by a tenant. On or about the first day of March, 1883, the defendant obtained a judgment against the plaintiffs, and subsequently, under an execution issued thereon, sold, bid in, and in due time obtained a sheriff's deed for a part of the lot described as 22 feet wide on Perry street, and extending back 55 feet.

At the trial it was claimed by the plaintiffs that the quality of a homestead was impressed upon the whole lot, and so no part of it was subject to sale under execution. The court thought otherwise, and adjudged that the defendant had acquired a good title to that part of the lot on which the front house stood, and the yards which were attached to it in front and rear. The plaintiffs moved for a new trial, and the case comes here on appeal from the judgment and an order denying their motion.

It has frequently been decided by this court that to constitute a valid homestead the claimant must *actually reside* on the premises when the declaration is filed. *Babcock v. Gibbs*, 52 Cal. 629; *Dorn v. Howe*, Id. 630; *Aucker v. McCoy*, 56 Cal. 524; *Pfister v. Dascey*, 68 Cal. 572, 10 Pac. Rep. 117. Here the homestead claimants were not actually residing on the premises when the declaration was filed. Nearly two weeks before it was filed they went away and ceased to occupy any part of the premises. It is true, they went away temporarily, and were gone only about four months; but during that time they certainly did not actually reside on any part of the lot filed upon.

It follows that the judgment and order should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(74 Cal. 191)

KAMM v. BANK OF CALIFORNIA. (No. 9,412.)

(Supreme Court of California. November 30, 1887.)

1. ABATEMENT—ANOTHER ACTION PENDING—PLEADINGS AS EVIDENCE.

Plaintiff sent to a banking firm \$75,000 to be invested in loans and commercial paper. The money, with the knowledge and consent of the plaintiff, was taken charge of by R., one of the firm, and by him invested; it being secretly understood between him and plaintiff that a new bank was to be started, in which R. was to be interested, and these notes and securities were to be used to pay the subscription of plaintiff to its stock. Fifty thousand dollars was subscribed by R. for the plaintiff and paid, when the bank, the defendant, went into business. R. in all these matters had controlled the money and investments, and most of the time had them in his own name. Four thousand dollars of the balance was paid to plaintiff, and he sued the new bank to recover the \$21,000, alleging that it received it as his agent. Defendant claimed that the money had been sent to R., as the agent of the plaintiff, and that he was liable therefor, and offered to show on the trial that the plaintiff had presented the identical claim against the estate of R., now deceased; that it was rejected, and suit was brought against the executor of R., which was then pending and being prosecuted, and that the claims of the plaintiff in that suit were the same as the facts set up as a defense by the defendant in this suit, and denied herein by the plaintiff; that the complaint was verified by plaintiff's attorney, who was authorized to prosecute the suit. *Held*, that the complaint in that action was admissible in evidence to show the fact of suit brought and the nature of the action.

2. PLEADING—AMENDMENT—PENDING MOTION FOR NONSUIT.

Upon the close of plaintiff's testimony, defendant moved for a nonsuit. Pending the motion, the court allowed the complaint to be amended, so as to conform more nearly to the proofs. *Held*, that it was in the furtherance of justice, and a proper exercise of the discretion of the court.

3. LIMITATION OF ACTIONS—PLEADING THE STATUTE—DEFECT NOT APPARENT—DEMUR-
RER.

A pleading contained a cause of action which was not on its face amenable to the charge of being barred by the statute of limitations. *Held*, that a demurrer to it was properly overruled.¹

Department 2. Appeal from superior court of the city and county of San Francisco; M. A. EDWARDS, Judge.

F. G. Newlands and *S. M. Wilson*, for appellant. *McAllister & Bergin* and *Mastick, Belcher & Mastick*, for respondent.

SEARLS, C. J. This is an action to recover from the defendant, the Bank of California, (a corporation,) the sum of \$20,810, interest, and costs of suit. The cause was tried by the court, a jury having been waived, written findings filed, and judgment entered thereon in favor of plaintiff for the sum of \$32,051.60, and costs. Defendant appeals from the judgment and from an order denying a new trial.

The action was commenced on the twenty-third day of September, 1876, and was tried upon the issues made by the fourth amended complaint, filed April 27, 1883, and the answer thereto, up to and pending the trial, when the complaint was again amended. Jacob Kamm, the plaintiff, during all the times hereinafter mentioned, was a resident of Portland, Oregon. "The Bank of California" was organized as a corporation on the fourth of July, 1864, on which day its directors held their first meeting, and on the fifth of July, 1864, the bank was opened for business. Before that time there existed the banking firm of Donohoe, Ralston & Co., composed of Joseph A. Donohoe, William C. Ralston, Eugene Kelly, and Ralph S. Fretz. With that firm the plaintiff did business, such as depositing moneys, drawing checks upon it, and

¹ Where a pleading does not show on its face that the cause of action sued on is barred by the statute of limitations, the defense of the statute must be specially pleaded. *Chellis v. Coble*, (Kan.) *ante*, 505. Concerning the necessity and manner of pleading the statute, see *Merriam v. Miller*, (Neb.) 34 N. W. Rep. 625, and note; *Hayt v. Hunt*, (Colo.) 15 Pac. Rep. 410; *Piper v. Hoard*, (N. Y.) 13 N. E. Rep. 632; *Cameron v. Cameron*, (Ala.) 3 South. Rep. 148.

other banking business. That firm dissolved about the latter part of June, 1864, by dividing into two parts, one of which was Donohoe & Kelly, and the other Fretz & Ralston. The latter under that firm name did business for the short interval between the dissolution of the firm of Donohoe, Ralston & Co., and the fifth of July, 1864, when the Bank of California commenced business.

While the firm of Donohoe, Ralston & Co. was doing business, and in the early part of the year 1864, a project was formed by William C. Ralston, the plaintiff, Jacob Kamm, R. S. Fretz, and a number of others to form, incorporate, and inaugurate a new bank, to which Ralston and Fretz were to carry as much of the business of Donohoe, Ralston & Co. as they could. Mr. Ralston was very active in procuring associates and in obtaining possession and control of a large amount of notes, bills, and commercial paper, in which the funds of the new associates were from time to time invested for the purpose of using them ultimately in payment of subscriptions to the stock of the new bank when formed, and as a nucleus upon which to start business. This matter was kept secret from Donohoe and Kelly, who were not taken into the new project, and much of the business that would have naturally flowed into the current affairs of Donohoe, Ralston & Co. was diverted by Ralston from its natural channel, and kept in such condition and control by him as would enable him to throw it at once into the new bank when it should be organized. In this Mr. Kamm was co-operating with Mr. Ralston, as will be seen by the correspondence between the parties; Kamm living at the time in Portland, Oregon, and only coming to San Francisco from time to time.

Kamm, it would seem, had concluded to take stock in the new bank to the extent of about \$75,000, and, following out the plan adopted by Ralston, was to forward that amount to Ralston, to be invested in commercial paper; so that, when he should be called upon to pay up his subscription to the new bank, he would be enabled to pay in the commercial paper instead of cash, and that commercial paper would then become the property of the bank. Thus its funds to that extent would, on its opening for business, be already invested, filling the important part of a beginning and nucleus, as already stated, for its general banking business.

Kamm already had a general deposit account with Donohoe, Ralston & Co., and was remitting and drawing. For the purposes of the new project, he commenced to remit on the eleventh of April, 1864, and continued up to the twenty-fifth of May, 1864, at which time he had remitted \$69,500. By adding to this the sum of \$5,500, drawn from his general deposit account with Donohoe, Ralston & Co., he made up the aggregate amount of \$75,000 named in the complaint. Though these amounts came nominally to Donohoe, Ralston & Co., in the beginning, for the ostensible purpose of investments, they were immediately taken charge of by Ralston, with the express knowledge and consent of Kamm and Donohoe, Ralston & Co., and invested on loans and in commercial paper, with the secret intent of Kamm and Ralston to transfer such investments and commercial paper to the new bank when formed, in payment of Kamm's subscription. In all of these matters Ralston managed and controlled the funds and investments, and most of the time had them in his own name, and secretly gave information to and corresponded with Kamm, constantly imposing on the latter the most profound secrecy. In this manner the \$75,000 in cash and checks came to the possession and control of Ralston, and was by him invested, and the investments, from time to time, changed.

When the Bank of California went into business, or shortly after, \$50,000 of the amount, it is admitted, went to pay up his subscription to the stock, which had been subscribed for him by Ralston at his (Kamm's) special direction. Of the remaining \$25,000 Kamm admits payments to him of \$4,190, but still claims as unpaid to him the sum of \$20,810. This amount, with interest, he demands from defendant, upon the theory that it was his agent for these investments, and as such agent received the \$75,000 in commercial

paper and securities, and had failed to account to him for so much thereof as is involved in this action.

The important question of fact presented for determination at the trial was whether the Bank of California received the money and securities involved in the action as the agent of plaintiff, or whether Ralston retained custody thereof as such agent, and became liable therefor. The testimony was voluminous and conflicting, and while the court below found in favor of the plaintiff, grave doubts were expressed concerning the propriety of the conclusion reached.

We have stated these facts to the better understanding of a question raised at the trial, upon certain testimony offered by the defendant and excluded by the court, the exclusion of which is assigned as error, viz.: Defendant proved that in September, 1876, plaintiff executed a power of attorney to Joseph M. French, whereby the latter was authorized and empowered for and on behalf of the former to collect and receive all claims and demands due him, the said plaintiff, to take and prosecute all legal proceedings necessary and proper to collect the same, etc. Defendant then offered to prove that the identical claim involved in this action was presented, duly verified, by J. M. French, on behalf of plaintiff, to the executors of W. C. Ralston, (who departed this life on the twenty-seventh day of August, 1875,) on the twenty-fifth day of October, 1876, as a claim in favor of plaintiff and against the estate of Ralston, that said claim was rejected by the executors of Ralston, deceased, and that thereafter, and on the twenty-fifth day of January, 1877, an action was instituted in the district court of the Fourth judicial district of the state of California, in and for the city and county of San Francisco, in the name of and for the plaintiff, against the executors aforesaid, to recover the sum of money claimed in this action, which suit against said executors was then "pending and being prosecuted against the estate of Mr. Ralston, with the knowledge and consent of Mr. Kamm, the plaintiff here." The testimony was excluded, an exception taken to the ruling, and the action of the court is assigned as error.

The complaint in the action against the Ralston estate was a part of the proffered evidence, and is signed by the same attorneys as appear for plaintiff in this case. It appears from the complaint in this cause, supported by evidence, that plaintiff remitted certain moneys, which the Bank of California agreed to invest, and did invest, for him, and had collected and appropriated to its own use \$20,810, parcel thereof; that the bank was the contracting party with plaintiff, and responsible to him for the money.

In the other action pending he set up that this money was remitted to and deposited with William C. Ralston, and that Ralston had undertaken to invest for him that money; that Ralston received it, and that Ralston agreed to invest it, and Ralston agreed to keep it invested; and that Ralston reported to him, from time to time, of and concerning this money which was invested; and that he had made a request and demand on Ralston to pay him that money, and that Ralston had refused to pay it to him prior to the time of his death, and that it remained unpaid to him at the time of Ralston's death. In that suit Kamm avers the facts to be just as defendant in this action claims them to be. True, plaintiff did not verify the complaint in that cause, but it was verified by his attorney, and we find nothing to indicate that the act was unauthorized; but, on the contrary, proof was offered that the action was being prosecuted with the knowledge and consent of the plaintiff.

Where a suit is brought in the name of and for the benefit of a party by his attorney in fact, thereunto duly authorized, and is being prosecuted with his knowledge and consent, he must be presumed to know these facts, and to have assented thereto, and, so far as the same is evidence for or against him, to be bound thereby.

Greenleaf, in treating of the subject of admissions, says: "So, the allegations in the declaration or pleadings in a suit at law have been held receiv-

able in evidence against the party in a subsequent suit between him and a stranger, as his solemn admission of the truth of the facts recited, or of his understanding of the meaning of an instrument, though the judgment could not be made available as an estoppel, unless between the same parties, or others in privity with them." 1 Greenl. Ev. § 195; *Parsons v. Copeland*, 33 Me. 379.

In *McBermott v. Mitchell*, 47 Cal. 249, it was held that a joint answer by two defendants, signed by their attorneys and verified by only one of them, was not admissible in evidence, for the purpose of proving the allegations therein contained, in an action brought against the defendant who did not sign or verify such answer.

To hold a party bound by all the allegations in a pleading which he has not signed, and with which he may not be acquainted, would in many cases work a great hardship. When, however, an action is brought by or for a party, and is being prosecuted with his knowledge or consent, the complaint therein is evidence against him of the fact of suit brought, and of the nature of the action. These are special facts dependent upon the general tenor and effect of the pleading, and are independent of many of the formal allegations therein. To this extent and for this purpose we think the complaint in *Kamm v. Ralston* was admissible. It may well be that the proffered testimony would carry but little weight with a jury or the court acting as such. We can well see how a party, being in doubt as to which of two parties is legally liable to him, may bring separate suits against each, but these and other like considerations go to the weight of the testimony when introduced, and not to its admissibility. We are of opinion the testimony ought to have been admitted, and that its exclusion was error.

Upon the close of plaintiff's testimony, defendant moved for a nonsuit, pending which motion the court permitted plaintiff to amend his complaint so as to more nearly conform to the proofs. This action was in the furtherance of justice, and a proper exercise of the discretionary power of the court.

The demurrer to the fourth amended complaint was properly overruled. The pleading contained a cause of action, and was not on its face amenable to the charge of being barred by the statute of limitations. We find no error in the action of the court in refusing to strike out portions of the complaint as amended pending the trial. It is apparent that, through all the numerous amended complaints, plaintiff was pressing, by somewhat varied statements, the same cause of action set out in his original complaint. We are therefore of opinion the plea of the statute of limitations was not well taken.

As a new trial must be had, it can serve no useful purpose for us to enter upon the difficult task of discussing the findings of the court below, or the sufficiency of the evidence to support them.

The judgment and order appealed from are reversed, and a new trial ordered.

We concur: MCKINSTRY, J.; TEMPLE, J.; MCFARLAND, J.; PATERSON, J.

(72 Cal. 591)

KEARNEY and others v. KEARNEY. (No. 11,547.)

(Supreme Court of California. June 27, 1887.)

HOMESTEAD—ALLOTMENT—NOTICE TO HEIRS—VALUE.

Code Civil Proc. Cal. § 1465, provides that the probate court, in the course of administration, must set apart a homestead to the widow, if none has been selected, in the manner prescribed in article 2 of the same chapter, which provides for homesteads not exceeding \$5,000 in value. A probate court, after appointing an administrator, set apart a homestead to a widow, on her own motion and without notice to the heirs, on proof that it was worth less than \$5,000. In a suit to set the decree aside, it appeared that the property was worth \$10,000, though no fraud was suggested in making proof of the value of the property before the probate court. *Held*, that the court had jurisdiction of the matter, and the decree setting apart the homestead was valid.

In bank. Appeal from superior court, San Joaquin county; J. G. SWINERTON, Judge.

L. W. Elliott and John C. Byers, for appellant. *Stanton L. Carter and Carter, Smith & Keniston*, for respondents.

SEARLS, C. J. This is an equitable action brought by the plaintiffs, as heirs at law of J. W. Kearney, deceased, against the defendant, the widow of decedent, to set aside a certain decree of the superior court in probate, whereby a homestead was set apart to defendant. The cause was tried by the court, findings in writing filed, upon which judgment in favor of defendant was entered. Plaintiffs appeal from the judgment, and the cause comes up on the judgment-roll.

The *gravamen* of the charge is fraud in procuring the decree whereby the homestead was carved out of decedent's estate, and that no notice was given of the application or hearing in the proceeding for such decree. The defendant was appointed administratrix of the estate of her deceased husband. There were no children, and the heirs at law other than the widow are two brothers and a sister. The property in question, upon which deceased and defendant had their residence prior to the death of the former, consisted of 320 acres of land, and was appraised at \$4,200. Subsequent thereto, and on the eighteenth of March, 1878, defendant applied to the probate court by petition to have the same set apart to her as a homestead; and on a hearing before the court, but without notice to the other heirs, the property was found to be of less value than \$5,000, and was, by a decree duly entered, set apart to defendant, the widow, as a homestead.

In this action the court finds that the homestead, when set apart, was of the value of \$10,000, but that defendant in good faith believed the same was of no greater value than \$5,000, and the findings negative any fraudulent intent on the part of defendant. Subsequently to the order setting apart the homestead, the usual proceedings for a distribution of the residue of the estate were had, of which due notice was given, and in which proceedings it affirmatively appeared that the homestead had been set apart, etc. The residue of such estate was, by decree of April 7, 1879, duly distributed. On the twenty-second of February, 1883, the plaintiffs moved the superior court, as the successor of the former probate court, to set aside the decree of homestead upon the same grounds substantially as urged here; which motion, after a hearing, was denied by the court, whereupon this action was instituted. The property in question was community property of defendant and her deceased husband, upon which they had resided for many years prior to the death of the latter, and they had no homestead under any statute.

The first contention of appellants is that the decree setting apart the homestead is void for want of jurisdiction in the court to hear and determine the same without notice. Probate proceedings, and the judgments rendered therein, are in the nature of proceedings *in rem*. In other words, such judgments are

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founded in proceedings, not against persons as such, but against or upon the thing or subject-matter itself, whose *status* or condition is to be determined, and the judgment when rendered is a solemn declaration of the *status* of the thing, and *ipso facto* renders it what it declares it to be. *Woodruff v. Taylor*, 20 Vt. 65. The probate of a will establishes its *status*, and such *status* adheres to the will, and concludes the whole world, subject only to be avoided by such direct proceedings to that end as may be provided by some affirmative law. 2 Smith, Lead. Cas. (6th Amer. Ed.) 669, and cases cited; *Deslande v. Darrington's Heirs*, 29 Ala. 95; *Woodruff v. Taylor, supra*; *State v. McGlynn*, 20 Cal. 234. Decrees of sale of the real estate of lunatics and deceased persons stand upon the same footing. *Latham v. Wiswall*, 2 Ired. Eq. 294; *Wyman v. Campbell*, 6 Port. (Ala.) 219.

A prominent distinction between proceedings *in personam* and proceedings *in rem*, consists in the different methods by which jurisdiction is obtained by the court. In the former, jurisdiction of the parties is obtained by personal service, or its equivalent, while in the latter, or at least in such cases coming under that head as relate to *things* exclusively, jurisdiction is acquired by taking possession of the *thing*, or by some act tantamount thereto, and a judgment *in rem* in such a case binds the "*res*, in the absence of any personal notice to the parties." *The Globe*, 2 Blatchf. 427. The parties in interest in such cases are deemed parties to the suit without personal notice. *Bauduc's Syndics v. Nicholson*, 4 La. 81; *Thomas v. Southard*, 2 Dana, 475.

In this class of cases, two questions only need be answered in the affirmative to uphold a judgment: (1) Did the court have the authority to determine the subject-matter of the controversy? (2) Did the court have jurisdiction over the *thing* proceeded against as a defendant? Freem. Judgm. § 611.

The first question is answered in the affirmative in this case by our statute, which authorizes the court to act in cases like the one at bar. Code Civil Proc. § 1465. This section provides that "upon the return of the inventory, or at any subsequent time during the administration, the court may, on its own motion or on petition therefor, set apart * * * the homestead selected, designated, and recorded. * * * If none has been selected, * * * the court must select, designate, and set apart * * * a homestead for the use of the surviving husband or wife and the minor children * * * in the manner provided in article 2 of this chapter, out of the common property," etc. The answer to the second question is that the proceeding to set aside the homestead is in the nature of a proceeding *in rem*, and that, to obtain jurisdiction over the *thing* for the purpose of decreeing its *status*, only such notice is required as is provided by positive law. We have said that in a proceeding *in rem* against *things* no notice is required. This must, of course, be taken with the proviso that the statute has not provided for notice. It is a familiar principle of law in such cases that the local law as to notice governs, and whatever provision it makes, whether for personal or constructive notice, must be obeyed. In the language of *Monroe v. Douglas*, 4 Sandf. Ch. 182: "But such party cannot be permitted to show that he never had any notice of the suit, otherwise than by showing that the notice prescribed by the local law was not given, thereby proving the judgment to be void by that law. Actual notice in suits *in rem* is not required to be given to absentees in any system of municipal law with which I am acquainted."

The inquiry in such cases is not, was the defendant therein served with process, or did he appeal in the action? but the question is, did the court proceed according to its own municipal laws in pronouncing the judgment or decree? The record shows that the court in this case acquired jurisdiction of the subject-matter of the estate in the usual manner, and, having such jurisdiction and authority to set apart a homestead, and the statute not requiring notice thereof to be given, we are of opinion the decree of the court

in that behalf was not void for want of notice to the heirs. It follows that the proceedings by which the homestead was set aside are to be treated as though the plaintiffs were personally present thereat. Evidence was there introduced as to the value of the land, and it is not suggested that any fraud or device was resorted to by the defendant, whereby plaintiffs, had they in fact been present, would have been prevented from making proofs in reference to such value.

If the defendant believed, as the court found she did, that the value of the land did not exceed \$5,000, there was no fraud or imposition practiced by her upon the court in bringing witnesses to establish such fact. Appellants also contend that the statute relating to single persons permits only \$1,000 worth of land to be taken for a homestead. The section referred to provides for a homestead of not exceeding \$5,000 in value by any head of a family, and not exceeding \$1,000 in value by any other person. As before stated herein, the homestead is to be set apart in the manner provided in article 2, c. 5, tit. 11, Code Civil Proc.

Referring to article 2, we find it provides for a homestead not exceeding in value \$5,000. It is true, the article as it now stands only treats of homesteads perfected before the death of the husband or wife. Section 1485 of that article, which provided the manner of setting apart a homestead of the value of \$5,000 where none before existed, has been repealed; but as the probate act provided for a homestead of not exceeding \$5,000, where the declaration is made during the life-time of decedent whether there are or are not minor children, and as it provides a means whereby the court shall set aside a homestead in cases where none has before been designated, we are of opinion that the court being called upon to do what the parties might have done, while both were living, may properly set aside for the survivor and minor children if any, or for the minor child or children if neither husband nor wife is living, a homestead of any value not exceeding \$5,000. This question was before this court in *Estate of Burns*, 54 Cal. 223, where it was held that a homestead not exceeding \$5,000 in value could be set apart without notice. The judgment is affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

TEMPLE, J. I concur on the authority of *Mawson v. Mawson*, 50 Cal. 539, and under some feeling of compulsion, in view of the consequences of a different ruling. In *Mawson v. Mawson*, it was intimated that the method originally provided for setting apart a homestead in article 2, c. 5, Code Civil Proc., had been repealed, and there was therefore no mode prescribed, and the court would proceed under section 187, Code Civil Proc. Section 1465 still prescribes, however, that when no homestead has been selected in the lifetime of the deceased husband or wife, the court may proceed to set apart one as provided in article 2. That article formerly contained other sections specifically directing the mode of setting apart a homestead in such cases. They have been separated, but there still remains a procedure in article 2 for setting apart a homestead where one had been selected, but is found to exceed \$5,000 in value. This procedure *mutatis mutandis* could be made applicable. In view of the very grave questions which have been raised in regard to the validity of these homesteads which have been set apart without notice, I suggest that probate judges adopt as a suitable mode of proceeding the mode still found in article 2, so far as applicable. That is the admeasurement and appraisal of the homestead, the report, the setting of a day for hearing, and the notice as there prescribed.

SEARLS, C. J. I concur in the suggestions of Justice TEMPLE as to a proper course to be pursued in the cases indicated.

(2 Cal. Unrep. 811)

In re Petition of MARSHALL.

(Supreme Court of California. November 8, 1887.)

PLEADING—NEW PARTIES BY AMENDMENT—CERTIORARI.

In a suit to condemn land the plaintiff obtained, in March, 1887, leave to amend complaint and summons filed December, 1886, by inserting the name of the petitioner herein as defendant, and, in April, 1887, having consolidated with other railroad companies, obtained an order to substitute the consolidated company as plaintiff. Petitioner applied for a writ of *certiorari*. *Held*, that it must be denied.

In bank. *Certiorari* to superior court of San Diego county; J. D. WORKS, Judge.

J. H. Marshall petitioned for a writ of *certiorari* to the superior court of San Diego county. His name appeared in the body of a complaint in a condemnation suit, but not in the summons nor as defendant in the complaint filed December, 1886. Plaintiff, in the condemnation proceedings in March, 1887, obtained leave to amend the summons *nunc pro tunc* by inserting petitioner's name as defendant, and later the complaint was so amended, and in August, 1887, the complaint was amended by substituting a company as plaintiff.

J. G. Deakin, (*Myrick & Deering*, of counsel,) for petitioner. *Lewis Chase*, *contra*.

BY THE COURT. In the above-entitled cause the application for a writ of review is denied.

(74 Cal. 222)

SANTA CRUZ WATER CO. v. KRON and others. (No. 12,025.)

(Supreme Court of California. December 1, 1887.)

MUNICIPAL CORPORATIONS—BONDS—ELECTION—TIME OF TAKING EFFECT OF ACT.

Under California act of March 9, 1885, entitled "An act to authorize corporations of the fifth class containing more than three thousand and less than ten thousand inhabitants to obtain public water works," an election was held in the city of Santa Cruz on March 30, 1885, and bonds were issued to pay for the works. *Held* that, by virtue of Pol. Code Cal. § 323, which enacts that an act shall take effect 60 days after its passage unless otherwise prescribed therein, the election was void, and a writ of *mandamus* to compel payment of interest on the bonds would not be granted. *McFarland*, J., dissenting.

In bank.

Application by the petitioners, the Santa Cruz Water Company, for a writ of mandate, commanding defendants Kron, Swanton, Jeter, and Squirm, constituting the common council of the city of Santa Cruz, to allow payment of interest on certain bonds issued in payment of city water-works.

Pringle & Hayne, for petitioners. *J. M. Lesser* and *Charles B. Younger*, for defendants.

PER CURIAM. This is an application for a writ of mandate, commanding the defendants Kron, Swanton, Jeter, and Squirm, constituting the common council of the city of Santa Cruz, to audit and allow a demand for interest on certain bonds of the city aforesaid, issued to purchase and pay for water-works, and to command the mayor, Effey, who, as well as the city, is made a defendant, to draw his warrant on the city treasurer therefor. The bonds in question were issued pursuant to authority conferred by an election held, or purporting to be held, under an act of the legislature approved March 9, 1885, entitled "An act to authorize corporations of the fifth class, containing more than three thousand and less than ten thousand inhabitants, to obtain public water-works." St. 1885, p. 42. "Every statute, unless a different time is prescribed therein, takes effect on the sixtieth day after its passage." Pol. Code, § 323. The act of March 9th did not in terms prescribe when it

should take effect, and hence did not become a law until the sixtieth day thereafter, viz., May 8, 1885. The election was held March 30, 1885. Conceding the act of March 9, 1885, to be applicable to Santa Cruz, the election authorizing the bonds to issue was null and void, because held before the law took effect. *Andrews v. Railroad Co.*, 16 Mo. App. 305; *McDougal v. Johnson*, 6 Cal. 674.

It follows that the petition for a writ of mandate must be denied and the proceedings dismissed. Ordered accordingly.

(74 Cal. 250)

LOUGHBOROUGH, Adm'r, etc., v. MCNEVIN and others. (No. 9,520.)

(*Supreme Court of California.* December 1, 1887.)

1. PLEDGE—LIEN—EXTINGUISHMENT—TENDER.

The lien of a pledgee is extinguished when a tender of the amount due on the debt is made according to law, and is refused by the pledgee.

2. SAME—REFUSAL TO DELIVER—CONVERSION.

A refusal by a pledgee to deliver up the pledge to an assignee of the pledge, upon a sufficient tender being made by the assignee of the amount due him, is conversion, and the fact that the property pledged had been attached by a third person, with whom the assignee had no privity, is no justification.

3. SAME.

In an action of trover to enforce the redemption of a pledge, the pledgee will be held responsible for any depreciation in value of the pledge, after the tender of the amount due, and refusal by the pledgee.

4. SAME—INTERVENING CLAIMANT.

One to whom a pledge has been assigned pending litigation concerning it, may file a complaint in intervention, under section 386, Code Civil Proc. Cal., which provides for order of substitution.

5. TENDER—SUFFICIENCY.

Where one who held certain shares of stock as security for money loaned, demanded payment of the debtor, which was refused, and afterwards an assignee of the stock tendered to the pledgee the whole amount due him, with interest, held a sufficient tender, under section 1492, Civil Code Cal., which provides that where delay in the performance of an obligation is capable of exact and entire compensation, and time has not been declared to be the essence of the contract, an offer of performance, accompanied by an offer of such compensation, may be made at any time after the obligation is due.

6. SAME.

A tender to a pledgee of the amount secured by the pledge is not vitiated by a condition that the pledge be delivered to the one tendering payment.

7. SAME.

A tender of the amount due a pledgee by an assignee of the pledge is sufficient without bringing the money into court.

In bank. Appeal from superior court, city and county of San Francisco.

THORNTON, J. The judgment and order appealed from are affirmed for the reasons given in the decision by department 2, filed June 27, 1887, (14 Pac. Rep. 369.)

We concur: SEARLS, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; TEMPLE, J.; PATERSON, J.

(74 Cal. 269)

DOMINGUEZ v. MASCOTT. (No. 12,210.)

(*Supreme Court of California.* December 2, 1887.)

1. NEW TRIAL—APPLICATION—TIME TO SERVE NOTICE.

Section 659, Code Civil Proc. Cal., provides that "the party intending to move for a new trial * * * must, * * * after notice of the decision of the court, * * * serve upon the adverse party a notice of his intention," etc. Held, that such a notice, given before the findings were signed and filed, was ineffectual; there being no decision, and no party aggrieved, within the meaning of section 657, which provides that "the former verdict or other decision may be vacated, and a new trial granted, on the application of the party aggrieved," etc.

2. SAME—APPEAL—RECORD.

Under section 681, Code Civil Proc. Cal., a notice of motion for a new trial is no part of the record on appeal, but must be made to appear by a statement on bill of exceptions, and, when the motion for a new trial is denied, the fact that a statement or affidavits were filed does not warrant the presumption that such notice was either given or waived.

Commissioners' decision. In bank.

Appeal from superior court, Los Angeles county.

Horace Bell and C. H. Connell, for appellant. *Robert Hardie and W. I. Foley*, for respondent.

HAYNE, C. The notice of motion for a new trial was given before the findings were signed, and was therefore premature and ineffectual. Under the present system the findings constitute "the decision." Until the findings are signed and filed there is no decision, and nobody is "aggrieved," within the meaning of section 657, Code Civil Proc. That a premature notice of motion is ineffectual has frequently been decided. *Mahoney v. Caperton*, 15 Cal. 313; *Bates v. Gage*, 49 Cal. 126; *Hinds v. Gage*, 56 Cal. 487; *Spottiswood v. Weir*, 66 Cal. 529, 6 Pac. Rep. 381.

It is true that the notice of motion is not a part of the record on appeal. *Girdner v. Beswick*, 69 Cal. 112, 10 Pac. Rep. 278; *Hook v. Hall*, 68 Cal. 23, 8 Pac. Rep. 596. But if, for that reason, the notice printed in the transcript cannot be looked at to see when it was given, then the record does not show that a notice was given or waived, and this of itself was good ground for denying the motion. *Wright v. Snowball*, 45 Cal. 654; *Calderwood v. Books*, 28 Cal. 154. Formerly the notice was part of the record on appeal. But by careless legislation it is no longer so; and, this being the case, it must, as stated in *Girdner v. Beswick*, above cited, "be made to appear as part of the record, by a statement or bill of exceptions," or in some appropriate mode. If it had appeared that the respondent had proposed amendments to the proposed statement without reserving proper objection, the notice of motion would have been waived. But the record does not show this, or anything from which it can be inferred that there was a waiver. It cannot be presumed from the naked fact that a statement or affidavits were filed that a notice of motion was given or waived, where the motion is denied.

The question as to the insufficiency of the evidence cannot be considered on appeal from the judgment, because that appeal was taken more than 60 days after the decision.

We therefore advise that the judgment and order denying a new trial be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

(74 Cal. 261)

PACIFIC COAST RY. CO. v. PORTER and Wife. (No. 12,122.)

(Supreme Court of California. December 2, 1887.)

1. EMINENT DOMAIN—COMPENSATION—BENEFITS ACCRUING TO RESIDUE OF LAND.

Const. Cal. art. 1, § 14, provides that no right of way shall be appropriated to the use of any corporation not municipal, until compensation is made, irrespective of any benefits from the proposed improvements. Held, that the benefits supposed to result to the rest of a piece of land by the taking of part of it for the right of way for a railroad, cannot be considered in a suit to determine the compensation to be paid the owner.

2. SAME—PROCEDURE—VERDICT.

Code Civil Proc. Cal. § 1249, provides that compensation and damages on condemnation proceedings shall be assessed as of the date of the issuing of the sum-

mons. Section 1243 provides that the proceedings "must be commenced by filing a complaint and issuing a summons thereon." The verdict of a jury in a condemnation suit assessed the damages as to "the present value of the strip of land." *Held*, that the verdict was to be construed with reference to the issues in the pleadings, which related to the time of the beginning of the proceeding in this case identical with the summons.

Commissioners' decision. In bank.

Appeal from superior court, San Luis Obispo county; JAMES G. MAGUIRE, Judge.

The Pacific Coast Railway Company, plaintiff, sued Uriah and Fanny R. Porter, defendants, to condemn a right of way. Judgment for defendants, and plaintiff appealed.

R. B. Treat, for appellant. C. W. Goodchild and W. H. Spencer, for respondents.

HAYNE, C. This was a proceeding to condemn a strip of the defendants' land for the purposes of the plaintiff's road. The cause was tried by a jury, who rendered a verdict, and judgment was entered thereon and on the additional findings of the court condemning the said land, and decreeing that the plaintiff pay to the defendants Uriah and Fanny Porter: (1) The sum of \$75, adjudged to be the value of the land taken; (2) the sum of \$800, as damages to the remainder of the land; and (3) the sum of \$275, cost of fencing and cattle-guards, which, however, the plaintiff was given the option to build at its own expense. The plaintiff appeals from that part of the judgment directing payment to the said defendants.

1. It is argued for the appellant that evidence should have been admitted of the benefits accruing to the remaining land, and that such benefits should have been deducted from the amount of damage assessed. But the constitution expressly provides that "no right of way shall be appropriated to the use of any corporation *other than municipal* until full compensation therefor be first made in money or ascertained and paid into court for the owner *irrespective of any benefit* from any improvement proposed by such corporation." Article 1, § 14.

Under this provision the benefits supposed to result to the remainder of the land cannot be considered. An exception to this rule is provided when the corporation for whose use property is taken is a "municipal corporation." The cases of *Butte Co. v. Boydston*, 64 Cal. 110, and *Tehama Co. v. Bryan*, 68 Cal. 57, 8 Pac. Rep. 673, fall within this exception. For, as is well said by respondent's counsel, the word "municipal," as used in the provision, refers to such corporations as are for public government, and therefore includes counties. Unless the cases mentioned proceed upon this ground, we do not see how they can be sustained.

2. It is claimed that under section 1249, Code Civil Proc., the compensation and damages should have been assessed at the date of the issuing of the summons; and that the verdict of the jury was as to "the present value of the strip of land," etc. This seems to verge close to those criticisms upon the form of the verdict which are to be made in time to admit of correction. *Algier v. The Maria*, 14 Cal. 170, 171. But without reference to this rule it seems to us that the verdict did relate to the time of the issuance of the summons. The verdict is to be construed with reference to the issues made by the pleadings; and the issues made by the pleadings ordinarily relate to the time of the commencement of the action or proceeding, which in this kind of case is identical with the issuance of the summons. Section 1243 of the Code provides that the proceedings "must be commenced by filing a complaint and issuing a summons thereon." Under this language, the proceedings were not commenced until the summons was issued. Compare *Flandreau v. White*, 18 Cal. 639; *Green v. Water Co.*, 10 Cal. 374. In the case before us the complaint was filed and the summons issued on the same day.

We therefore advise that the part of the judgment appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion that part of the judgment appealed from is affirmed.

(74 Cal. 263)

ROACH and Wife v. RIVERSIDE WATER CO. (No. 12,079.)

(Supreme Court of California. December 2, 1887.)

1. EMINENT DOMAIN—PROCEDURE—NOTICE OF *LIS PENDENS*—PURCHASER—CLAIMANT OF HOMESTEAD.

Code Civil Proc. Cal. § 409, provides that from the time of the filing a *lis pendens* "a purchaser or incumbrancer" of the property shall be affected with constructive notice. Section 1256 provides this shall apply to condemnation proceedings. In November, 1885, defendant filed notice of *lis pendens* at the beginning of a condemnation of a right of way. March, 1886, the wife of the owner of the property, living with him, filed a declaration of homestead. April, 1886, judgment was rendered in the condemnation proceedings, and the damages paid into court for the owner of the property. *Held*, that the word "purchaser" in section 409 included those who had acquired a homestead interest in the property.

Commissioners' decision. Appeal from superior court, San Bernardino county; J. A. GIBSON, Judge.

William Roach and Rufina Roach, plaintiffs, sued the Riverside Water Company, defendant, in an action of ejectment. Judgment for defendants. Plaintiffs appealed.

H. C. Rolfe, for plaintiffs. Curtis, Otis & Conner, for defendants.

HAYNE, C. Ejectment. On November 9, 1885, the plaintiff William Roach was the owner of the land in controversy. On that day the defendant herein commenced proceedings against him to condemn a right of way over the land for a public purpose, and on November 23, 1885, duly filed a notice of *lis pendens*. On March 22, 1886, the plaintiff Rufina Roach, who was the wife of William Roach, and who resided on the premises with him, filed a declaration of homestead thereon. On April 1, 1886, judgment of condemnation was rendered in pursuance of a stipulation, which was as follows: "It is hereby stipulated by the respective parties that plaintiff have judgment for the right of way over the land of defendant, as claimed in the complaint, and that defendant and his wife will execute a deed of said right of way, in addition thereto, to plaintiff, upon plaintiff's paying to defendant \$925." The plaintiff in said proceedings (defendant herein) paid said sum into court subject to the order of the plaintiff. It has not been withdrawn, but remains in the hands of the clerk for Roach, whose property it is. The plaintiff Rufina Roach was not a party to the condemnation proceedings, and it is argued that she was not a purchaser or incumbrancer within the meaning of section 409, Code Civil Proc., which provides, with reference to notices of *lis pendens*, that "from the time of filing such record only, shall a purchaser or incumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action." This provision applies to condemnation proceedings. Code Civil Proc. § 1256. And we think the word "purchaser" must receive a liberal construction, and be held to include those who have acquired a homestead interest in the property. Any other rule would enable parties to commit frauds. We therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

(74 Cal. 273)

ROYLANCE and others v. SAN LUIS HOTEL Co. and others.¹ (No. 12,000.)

(Supreme Court of California. December 2, 1887.)

1. APPEAL—REQUISITES—NOTICE—SERVICE.

Plaintiffs recovered a judgment against certain of the defendants, and it was adjudged that "they take nothing against the defendant * * * company, and that their complaint, in so far as it seeks to foreclose a lien, is hereby dismissed," etc., and "that the defendant * * * company, do * * * recover from * * * plaintiff its costs," etc. Plaintiffs then served upon that defendant the following notice: "Plaintiffs * * * appeal from the judgment * * * dismissing said action as to the defendant * * * company and for recovery by said * * * defendant from plaintiffs * * * costs of * * * action. The plaintiffs appeal from the whole of said judgment, and from every part thereof." Held to include only an appeal from that part of the judgment dismissing the complaint, and for the recovery of costs against the plaintiffs, and the appeal should not be dismissed for failure to serve notice of appeal upon the other defendants.

2. MECHANIC'S LIEN—PROCEEDINGS TO PERFECT FILING CLAIM BEFORE COMPLETION OF BUILDING.

Section 1187, Code Civil Proc. Cal., regulating mechanics' liens, provides that "every original contractor, within sixty days after the completion of his contract, and every person save the original contractor, * * * must, within thirty days after the completion of any building, * * * file for record * * * a statement," etc. Held, that a claim of lien filed before the completion of the building was premature, and could not be enforced.

In bank. Appeal from superior court, San Luis Obispo county; D. S. GREGORY, Judge.

This action is to foreclose a mechanic's lien. Appellants, plaintiffs, were material-men, and furnished material to be used in the construction of the hotel of the defendant, the San Luis Hotel Company. These materials were furnished directly to the defendants, who were doing work in the hotel for the original contractors. The complaint showed that the claim of lien was filed before the completion of the building. The following is the judgment of the court below: "This cause coming on regularly to be tried, * * * the court having heard and considered the allegations and evidence of the respective parties, did * * * make and file its findings of fact and conclusions of law herein, and ordered judgment to be entered herein, that the plaintiffs take nothing herein against the defendant San Luis Hotel Company, and that the plaintiffs' complaint, in so far as it seeks to foreclose a lien, be dismissed, and that the said hotel company, defendant, have judgment against the plaintiffs for costs, and that the plaintiffs do have and recover from John D. Armstrong and William Armstrong, partners as Armstrong Bros., the sum of," etc. Wherefore * * * it is ordered, adjudged, and decreed that the plaintiffs take nothing against the defendant, the San Luis Hotel Company, and that the plaintiffs' complaint herein, in so far as it seeks to foreclose a lien, be, and the same is hereby, dismissed out of this court; and it is further ordered and adjudged that the defendant, the San Luis Hotel Co., do have and recover of and from the plaintiff its costs and disbursements herein, now taxed at \$20.25."

The following is the notice of appeal: "You will please take notice that the plaintiffs Joseph Roylance, Robert Dalziel, and Frederick Delger, partners under the firm name and style of San Francisco Brass-Works, hereby appeal * * * from the judgment * * * filed and entered in the said superior court on the twenty-first day of January, 1886, * * * dismissing said action as to the defendant San Luis Hotel Company, and for recovery by said last-named defendant from the plaintiffs of twenty dollars and twenty-five cents (\$20.25) costs of said action. The plaintiffs appeal from the whole of said judgment and from every part thereof."

Wm. R. Davis and Wm. Shipsey, (Wm. Lair Hill, of counsel,) for appellants. McD. R. Venable and C. W. Goodchild, (Metcalfe & Metcalfe and F. B. Ogden, of counsel,) for respondents.

¹For a corrected report of this case, see 20 Pac. Rep. 572.

PER CURIAM. As it appears to us, the notice of appeal in this action was intended to embrace only that part of the judgment of the court below which affected the plaintiffs in adjudging that "they take nothing against the defendant, the San Luis Hotel Company, and that their complaint, in so far as it seeks to foreclose a lien, be, and the same is hereby, dismissed out of this court," and "that the defendant, the San Luis Hotel Company, do have and recover from the plaintiff its costs and disbursements, now, taxed at \$20.25." It was not intended to include in the notice any appeal from that portion of the judgment where the plaintiff recovered a personal judgment against Armstrong Bros. for a sum of money. Taking all the terms of the notice of appeal together, it seems to us that the words "said judgment," where they occur in the last clause of the notice, refer not to the whole judgment as rendered by the court, but to that part of it which is set out in the language of the notice preceding the last clause thereof, which language, fairly interpreted, includes only that part of the judgment which affects the hotel company and the plaintiff, but does not include that portion which affects the rights of Armstrong Bros. Therefore the appeal, as taken, should be entertained notwithstanding that the counsel for Armstrong Bros. were not served with notice of the appeal.

But the complaint does not show that the plaintiffs are entitled to enforce any mechanic's lien upon the building of the hotel company; for as alleged in the complaint, the claim of lien was filed on the thirteenth of October, 1884, and the building was not completed until after that date. Hence, from that pleading itself, it appears that the plaintiffs prematurely filed their claim of lien, and according to their allegations could not enforce it. In *Perry v. Brainard*, 8 Pac. Rep. 882, it was said: "The court below found that the lien which was sought to be enforced by the action was filed prior to the completion of the building, and was therefore prematurely filed. The statute reads: 'Every original contractor, within sixty days after the completion of his contract, and every person save the original contractor, claiming the benefit of this chapter, must, within thirty days after the completion of any building, improvement, or structure, or after the completion of the alteration or repair thereof, or the performance of any labor in a mining claim, file for record,' etc. Code Civil Proc. § 1187. It will be seen that the time prescribed by the statute for the filing of the plaintiff's claim was 'within thirty days after the completion of the building.' Under a similar statute, the supreme court of Kansas lately held in two cases—*Davis v. Bullard*, 4 Pac. Rep. 75, and *Seaton v. Chamberlain*, Id. 89—that a claim so filed was premature, and a lien based thereon could not be enforced. The reasoning of that court commends itself to our judgment."

(15 Or. 456)

HAMLIN v. KASSAFER and others.

(*Supreme Court of Oregon.* November 28, 1887.)

JUSTICE OF THE PEACE—HOLDING OVER TERM—VALIDITY OF ACTS—COLLATERAL ATTACK.

Where one had been elected justice of the peace, and had discharged the duties of that office, but at the next election was defeated, and on the expiration of his term refused to surrender the office, its docket, and the books and papers thereunto belonging to his successor, who had received the certificate of election, and who had duly qualified thereunder, *held*, that the incumbent so holding over under claim or color of right was an officer *de facto*, and his official acts were valid as to the public and third persons, and could not be collaterally impeached.

Appeal from circuit court, Jackson county; L. A. WEBSTER, Judge.

This action was brought by James Hamlin, plaintiff, against the defendants, Frank Kassafer, a constable, and others, to recover personal property alleged to have been wrongfully taken in execution under a judgment recovered before one exercising and performing the functions of a justice of the

peace. Judgment was rendered for the defendants in the court below, whereupon plaintiff brought this appeal.

W. R. Andrews, for appellant. H. K. Hanna, for respondents.

LORD, C. J. This action was brought by the plaintiff against the defendants to recover certain personal property alleged to have been wrongfully taken. The defendants admitted the taking, but justified in substance to this effect: That on the twenty-eighth day of September, 1887, the defendant Carlton recovered a judgment in a justice's court before one E. D. Foudroy, against the plaintiff, Hamlin, for the sum of \$80 and costs; that execution was issued thereon, and placed in the hands of the defendant Kassaffer as constable, and that the property aforesaid was seized and taken into custody under the same, etc. The plaintiff denied the recovery of the judgment in the said justice's court, or in any court, etc. Upon issue being thus joined, the issue raised was as to the validity of said judgment.

The evidence as disclosed by the bill of exceptions is, in substance, that one E. D. Foudroy had been elected justice of the peace for the precinct of Jacksonville at the general election in 1884, and had entered upon the discharge of the duties of his office; that, at the general election in 1886, Foudroy was again a candidate for that office, but was defeated by one G. A. Hubbel, who received the certificate of election, and duly qualified, and that he demanded of the said Foudroy the possession of said office, its docket, and books thereunto belonging, but that Foudroy refused to surrender the same, and continued to exercise and perform the functions of the said office; that thereafter, and at the time of the rendition of the said judgment by the said Foudroy, he was in possession of said office in which he had held court as a justice of the peace, and of the docket and books, and also a sign at the door notifying the public he was such officer; that the defendant Hubbel, when said judgment was rendered, was in possession of the town hall, and had acted as, and performed the duties and functions of, a justice of the peace, and that these matters were open and notorious; but the evidence indicates that these acts were performed in his official character as a city recorder, by virtue of which he was *ex officio* justice of the peace; that the defendant Carlton, at the time of the recovery of said judgment, was a resident of Medford, and had no knowledge of any dispute as to who was justice of the peace. Upon this state of facts, the court gave several instructions, which were excepted to, and refused to give another, which constitutes the main source of grievance, and from which it is evident that the plaintiff sought to have the court instruct the jury that the defendant Foudroy was a mere usurper when the judgment was rendered by him.

It is admitted, therefore, that this record presents only one question,—was Foudroy a *de facto* officer? Upon this point there would seem to be a little room for controversy; for conceding, as was argued, that Hubbel, by reason of official duties performed at the town hall, was reputed to be a justice of the peace, it by no means follows that their acts operated to displace Foudroy, and induct *him* into the possession of the disputed office. To render the judgment void, Foudroy must have presumed to act without any just pretense or color of title. As this is the contention of counsel for the plaintiff, it may not be amiss to note, preliminarily, some distinctions as to officers which will render the law applicable to the facts in hand more evident.

An office has been defined to be a right to exercise a public function or employment, and to take the fees and emoluments belonging to it; and Chief Justice MARSHALL says: "He who performs the duties of that office is an officer." From the inherent nature of an office, no less than from reasons of public policy, there cannot be two persons in the possession of an office at the same time. It becomes important, then, to observe the distinction between an officer *de jure* and an officer *de facto*. Lord ELLENBOROUGH said: "One

who has the reputation of being the officer he assumed to be, and yet is not a good officer in point of law," is an officer *de facto*. *King v. Bedford Level*, 6 East, 356. To constitute a person an officer *de facto*, he must be in the actual possession of the office, and in the exercise of its functions, and in the discharge of its duties. When this is the fact, necessarily there can be no other incumbent of the office. An officer *de jure* is one who has the lawful right to the office, but who has either been ousted from, or never actually taken possession of, the office. When the officer *de jure* is also the officer *de facto*, the lawful title and possession is united; then no other person can be an officer *de facto* for that office. "Two persons cannot be officers *de facto* for the same office at the same time." *McCahon v. Commissioners*, 8 Kan. 442; *Boardman v. Halliday*, 10 Paige, 232; *Morgan v. Quackenbush*, 22 Barb. 80. "An officer *de facto*," said STORRS, J., "is one who exercises the duties of an office, under color of an appointment or election to that office. He differs, on the one hand, from a mere usurper of an office, who undertakes to act as an officer without any color of right; and on the other hand, from an officer *de jure*, who is, in all respects, legally appointed and qualified to exercise the office. It is not, in all cases, easy to determine what ought to be considered as constituting a colorable right to an office, so as to determine whether one is a mere usurper." *Plymouth v. Painter*, 17 Conn. 588. The distinction, then, which the law recognizes, is that an officer *de jure* is one who has the lawful right or title, without the possession, of the office; while an officer *de facto* has the possession, and performs the duties, under the color of right, without being actually qualified in law so to act, both being distinguished from the mere usurper, who has neither lawful title nor color of right. The mere claim to be a public officer is not enough to constitute one an officer *de facto*. There must be some color to the claim of right to the office, or, without such color, a performance of official duties, with the acquiescence of the public, for such a length of time as to raise a presumption of colorable right. *Brown v. Lunt*, 37 Me. 428; *Burk v. Elliott*, 4 Ired. 355; *Conover v. Deolin*, 15 How. Pr. 477; *Ex parte Strang*, 21 Ohio St. 610. Said SUTHERLAND, J.: "There must be some color of election or appointment, or an exercise of the office, and an acquiescence for a length of time, which would afford a strong presumption of at least a colorable election or appointment." *Wilcox v. Smith*, 5 Wend. 233. See, also, *State v. Carroll*, 38 Conn. 449. It may be said, then, that the color of right which constitutes one an officer *de facto* may consist in an election or appointment, or in holding over after the expiration of one's term, or acquiescence by the public in the acts of such officer for such a length of time as to raise the presumption of colorable right by election or appointment. From considerations of public policy, the law recognizes the official acts of such officers as lawful to a certain extent. It will not allow them to be questioned collaterally, and they are valid as to the public, and as to third persons who have an interest in the thing done. *People v. Stevens*, 5 Hill, 630; *Burton v. Patton*, 2 Jones, (N. C.) 124; *People v. Sassovich*, 29 Cal. 480. Within the scope of his authority, the acts of an officer *de jure* are valid for all purposes. Not so with an officer *de facto*; his acts are only recognized in the law to be valid and effectual so far as they affect the public and third persons. As to these, his acts are as valid as if he were an officer *de jure*. The reason of the rule is apparent. It would be unjust and unreasonable to require every individual doing business with such officer to investigate and determine at his peril the title of such office. "Third persons, from the nature of the case, cannot always investigate the right of one assuming to hold an important office, even so far as to say that he has color of title to it by virtue of some appointment or election. If they see him publicly exercising its authority, if they ascertained that this is generally acquiesced in, they are entitled to treat him as such officer, and, if they employ him as such, should not be subjected to the danger of having his acts collat-

erally called into question." DEVENS, J., in *Petersilea v. Stone*, 119 Mass. 467. Besides, it is against the policy of the law to allow a suit between private individuals to determine the title to an office. Such judgment could only bind the parties, and would be of no effect as against the public.

Upon the facts of the case in hand, Foudroy was not an intruder, and did not usurp the office. He may have been holding over without legal authority. His term had expired, but he had not been ousted, but remained in the possession of the office, and continued to exercise the functions and discharge its duties. A mere usurper is one who acts without color of title, and whose acts are utterly void. *Hooper v. Goodwin*, 48 Me. 80; *Tucker v. Aiken*, 7 N. H. 113. Said CHRISTIAN, J.: "A mere usurper is one who intrudes himself into an office which is vacant, and ousts the incumbent, without any color of title whatever; and his acts are void in every respect." *McCraw v. Williams*, 33 Grat. 513. Certainly, upon no view of the facts can Foudroy be regarded as an intruder or usurper within this purview of the law. From the fact that there was evidence tending to show that, at the town hall, Hubbel had discharged duties belonging to the office of a justice of the peace, and was reputed by some persons to be such officer, the counsel for the plaintiff assumes as a consequence that Foudroy had been dislodged or ousted, and that these acts, without, in fact, being in possession of the office, its books or docket, operated in some way, I suppose, to give him constructive possession, and to constitute him an officer, not only *de jure*, but *de facto*, and to make the acts of Foudroy those of an intruder or usurper.

Laying aside the fact that the witness who testified as to such acts of Hubbel in the town hall, also stated on cross-examination that Hubbel was at the time city recorder, by virtue of which he was *ex officio* justice of the peace, and that he did not know whether such acts were performed as an *ex officio* justice of the peace or not, it is plain law that no such consequences resulted. Foudroy being in possession of the office with the legal *indicia* of title, he was a *de facto* officer, and until the question of title was settled by a proper proceeding he may discharge the duties of the office. "Until then," that is, ousted by *quo warranto*, says Mr. Blackwell, "he holds the office by the sufferance of the state, and the silence of the government is construed by the courts as a ratification of his acts, which is equivalent to a precedent authority. When the government acquiesces in the acts of such an officer, third persons ought not to be permitted to question them." Blackw. Tax Titles, 117. In *Leach v. Cassidy*, 23 Ind. 449, the court say: "The law has provided abundant means by which an officer *de jure* may become such *de facto*, against another who wrongfully holds possession; but the public are interested that, while such litigation is pending to settle the right, the function of the office shall continue to be exercised, in order that public business may be done. To this end it is a rule of plain common sense, as well as law, that an officer *de facto* shall act until he be ousted." Again, in the same court, in *State v. Jones*, 19 Ind. 358, PERKINS, J., said: "But if, when such person attempt to take possession of the office, he is resisted by the previous incumbent, he will be compelled to try the right in some mode prescribed by law. If such elected or appointed person finds the office in fact vacant, and can take possession uncontested by the former incumbent, he may do so," etc. To the same effect in *Conover v. Devlin*, 5 Abb. Pr. 171, it is said: "The public interest—the interest of all persons having business with the office in controversy—imperatively requires that, until the question of title can be decided, there should be some one person recognized as in peaceable possession *de facto* of the office, and, of course, of the muniments necessary to discharge its duties." In *State v. Durkee*, 12 Kan. 314, the court say: "The interest of the public requires that somebody should exercise the duties and functions of the various offices pending a litigation concerning them, and no one has a better right to do so than the various officers *de facto* who claimed to be officers *de jure*." "It

would be strange doctrine," said VALENTINE, J., "to announce that whenever an officer steps out of the place where he usually does his business, then any person who chooses to claim the office may at once step in and become immediately an officer *de facto*. Such a short road to obtain a contested office has never yet been opened. This is not the legal way to obtain the possession of a contested office. The only legal remedy in such case for the party out of the office to obtain the possession of the same is by a civil action in the nature of a *quo warranto*." *Brady v. Theriff*, 17 Kan. 471. The evidence is that Hubbel, who was elected and qualified, demanded the office, but that Foudroy, who was in possession, refused to deliver it up, or the books, papers, and docket, but remained in the possession of the same, exercising its functions and discharging its duties, when the judgment claimed to be void was rendered.

How, then, could Hubbel be in possession of such office? If he could not acquire possession, and make himself an officer *de facto*, by slipping in when Foudroy was out of the place where he kept his office, according to the authority last cited, how could the acts supposed to have been performed as a justice of the peace in the town hall operate to give such possession, or constitute him an officer *de facto*? However much he may have been entitled to obtain the office, nothing but actual incumbency could make him the justice of the peace of the precinct to which he was elected. Note the analogy of the facts in *Morton v. Lee*, 28 Kan. 287, to the case in hand. For brevity, they are taken from the syllabus. Where a person is duly appointed by the governor of the state as a justice of the peace, and thereafter qualifies and enters upon the discharge of the duties of the office, and is placed in full possession of the books, papers, and docket pertaining to the office, and, after the expiration of his term under his appointment, continues to hold over, and refuses, upon demand of his successor in office, to deliver up the books, papers, and docket of the office, and has full charge and control of the same, and continues to discharge the duties of the office, and is generally recognized by a large portion of the people where he holds his office as such officer, held, that he is a justice of the peace *de facto*, and his acts as justice of the peace, though not those of a lawful officer, are valid, so far as they involve the interest of the public and third persons. In *Carl v. Rhner*, 27 Minn. 293, 7 N. W. Rep. 139, Smith, who had been elected judge, qualified, and thus, under a statute, became *de jure* a judge in the place of his predecessor, N., whose term then expired. Thereafter, upon the same day, before S. began to perform the duties of the office, N. directed judgment in an action he had tried. Held that his acts in doing so were those of an officer *de facto*, and were valid.

From these citations it must be manifest that where one is holding over after the expiration of his term under claim or color of right, his official acts are those of a *de facto* officer, and are valid as to the public and third persons, and cannot be collaterally assailed. And it must be considered as equally well settled that while he is in possession of such office, when an adverse claim is made, he may continue to exercise the office until the question is settled. As Foudroy was never ousted, or in any manner abandoned the office, but continued in possession thereof, with all its legal *indicia*, exercising its functions and discharging its duties, he was a *de facto* officer, and as such, when the judgment was rendered, it cannot be collaterally assailed.

The judgment of the court below must therefore be affirmed.

(20 Nev. 75)

STATE *ex rel.* PATTERSON and others v. DONOVAN. (No. 1,274.)

(Supreme Court of Nevada. November 22, 1887.)

GAMING—ACT IN RESTRAINT—CONSTITUTIONAL LAW—LOCAL AND SPECIAL LAWS.

The Nevada "Act to restrict gaming," approved March 8, 1879, providing, in section 7, that certain games shall not be carried on in any room of the first floor or story of any building, nor a license issued therefor in any county where more than 1,500 votes were cast at the general election last preceding the application, is not in violation of Const. Nev. art. 4, § 20, prohibiting local and special legislation, although at the time the application was made there was only one county in the state to which the law could apply.

Application for *mandamus*.

W E F Deal and M. N. Stone, for relators. F. M. Huffaker, Dist. Atty., for respondent.

HAWLEY, J. This is an application for a writ of *mandamus*, to compel respondent, the sheriff of Storey county, to issue a license to relators to carry on a game of faro in a back room on the first floor of the International Hotel building in Virginia City. It is alleged in relators' petition, and admitted by respondent, "that Storey county is the only county in the state that cast fifteen hundred votes, or over, at the last general election." This proceeding was instituted for the purpose of testing the validity of section 7 of "An act to restrict gaming," approved March 8, 1879, which reads as follows:

"Sec. 7. None of the above-mentioned games shall be carried on, nor shall any license issue to carry on the same, in any room of the first floor or story of any building; and when any building has two first floors or stories, the other being or fronting on another street, then, and in such case, no license shall issue to carry on any of said games in any room on or in either of said first floors or stories of such building: provided, that in any county in which, at the general election next preceding the time of application, were polled less than fifteen hundred votes, or in any county created after said general election, the licensee shall be entitled to carry on his game in any back room of the first or ground floor of any building; and if any person carrying on any of said games shall knowingly permit to enter or remain in any licensed room, any person under the age of twenty-one years, he shall be deemed guilty of a misdemeanor, and shall be punished by the same penalties for violation of its provisions as are prescribed in section 1 of this act." St. 1879, p 116; Gen. St. 1263.

Section 1, to which section 7 refers, reads as follows: "Each and every person who shall deal, play, carry on, open, or cause to be opened, or who shall conduct, either as owner or employe, whether for hire or not, except under a license as hereinafter provided, any game of faro, * * * shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars, or by imprisonment in the county jail not less than three months, nor more than one year, or by both such fine and imprisonment."

Relators claim that the clause in section 7 which requires the withholding of a license to carry on the game in any room on the first floor or story of any building in counties polling 1,500 votes and over is local and special legislation, and is in conflict with the provision in section 20, art. 4, of the constitution, which prohibits the legislature from passing any local or special laws "for the punishment of crimes and misdemeanors," and that it also conflicts with section 21 of said article of the constitution.

The question as to what is and what is not local or special legislation has been so frequently and thoroughly discussed by this court as to render it unnecessary to again reiterate the general principles relating thereto. The facts presented in this case simply call in question the power of the legislature to

make the classification specified in section 7. The general power to make a classification of counties, based upon a voting population, is expressly recognized in *Youngs v. Hall*, 9 Nev. 226; *State v. Woodbury*, 17 Nev. 355; and *State v. Boyd*, 19 Nev. —, 5 Pac. Rep. 735. The right of the legislature to exercise this power is subject to many limitations and restrictions, several of which are stated in the *Boyd Case*. All acts or parts of acts attempting to create a classification of counties or cities by a voting population, which are confined in their operation to the existing state of facts at the time of their passage, or to any fixed date prior thereto, or which by any device or subterfuge excludes the other counties or cities from ever coming within their provisions, or based upon any classification which, in relation to the subject embraced in the act, are purely illusory, or founded upon unreasonable, odious, or absurd distinctions, have always been held unconstitutional and void. The legislature has no power or authority to pass such acts. *State v. Boyd*, 19 Nev. —, 5 Pac. Rep. 735, and authorities there cited; *State v. Hermann*, 75 Mo. 340; *State v. Mitchell*, 31 Ohio St. 607; *Woodard v. Brien*, 14 Lea, 520; *Heightstown v. Glenn*, 47 N. J. Law, 106; *Devine v. Commissioners*, 84 Ill. 592; *Davis v. Clark*, 106 Pa. St. 384; *Morrison v. Backert*, 112 Pa. St. 322, 5 Atl. Rep. 739.

Does the classification as made in section 7 of the act under consideration come within any of the limitations above stated? Section 7 is based upon a voting population "at the general election next preceding the time of application" for a license. It is not limited to such counties only as may have been within the classification at the date of its enactment. It is not restricted in its operation to any particular county or counties. It is general in its terms and applies uniformly to all the counties in the state, and its operation and effect is to be determined by the increase or decrease of the voting population in the respective counties. At the time the act was passed there were four counties in the state that at the last general election had cast over 1,500 votes. The mere fact that at the present time there is but one county that at the last general election polled over 1,500 votes is immaterial. The validity of the act is not dependent upon the number of counties coming within the designated class. The principle which determines its constitutional validity is decided by ascertaining the effect of the law. If in its operation and effect it is so framed as to apply in the future to all counties coming within the class mentioned, it is neither local nor special, within the meaning of the constitutional prohibition against the passage of local or special laws. The classification in section 7 is not in any respect illusory or unreasonable in its character. The legislature in passing the act intended "to protect the keepers of public gaming houses from criminal prosecution when a proper license is procured." *Scott v. Courtney*, 7 Nev. 421. The acts constituting the offense of misdemeanor and the penalties and punishments imposed by the act apply alike to all persons engaged in carrying on the games, whether conducted in the back rooms of the first floors or in rooms in the second stories, and are not in any manner governed or controlled by the classification of votes in section 7. The keepers of the games in whatever place they are allowed to be conducted and carried on, are subject to all the penalties and punishments imposed by the act, regardless of the question whether the county in which the games are carried on polled more or less than 1,500 votes. There is, in this respect, no distinction or discrimination.

The legislature, in granting the privileges and giving the protection mentioned in the act, deemed it prudent and wise to impose certain restrictions, not only upon the keepers of the games, but upon the officers who were authorized to issue the license. The only restriction which has any reference to the classification in section 7, relates to the *place* where the games are to be carried on. In making this restriction the legislature decided that it was not advisable to allow any of the games to be carried on in the front room of

the first floor of any building, where the games would be exposed to the public gaze of all the passers-by; that, if such games were to be carried on under the protection of the law, they should be conducted not in the open public places, but might be carried on in the counties where the voting population was less than 1,500 votes in the back rooms on the first floor, and in more populous counties the place should be still more secluded; and no license should issue to carry on any of said games in any room on the first floor of any building. In the interest of public morals, as a matter of public policy, and a protection to the youth and unwary, it must be admitted not only that the legislature had the power, but that it was its duty, to designate the places where the games could be carried on without being exposed to public view. Whether they pursued the wisest course to accomplish this purpose was a question exclusively within the wisdom and discretion of the legislature. As no absurd or unreasonable distinctions were made, either with reference to the subject of the act or in the classification of votes, and as the classification and the object to be accomplished by it were real and substantial in their character, and the provisions of the section general in their terms, and uniform in their operation and effect, it follows that the entire section (7) is constitutional and must be upheld. The views we have expressed, and the conclusions we have reached, are sustained by abundant, and almost universal, authority. *State v. Woodbury*, 17 Nev. 355-358, and authorities there cited; *Kilgore v. Magee*, 85 Pa. St. 411; *Darrow v. People*, 8 Colo. 418, 8 Pac. Rep. 661; *State v. Graham*, 16 Neb. 77, 19 N. W. Rep. 470; *Marmet v. State*, (Ohio,) 12 N. E. Rep. 466; *Rutherford v. Heddens*, 82 Mo. 392; *Ewing v. Hoblitzelle*, 85 Mo. 75; *In re Church*, 92 N. Y. 4; *Mason v. Spencer*, 35 Kan. 519, 11 Pac. Rep. 402; *Thomason v. Ashworth*, (Cal.) 14 Pac. Rep. 618; *Pritchell v. Stanislaus Co.*, Id. 795.

Mandamus denied.

(10 Colo. 429)

LITTLE BOBTAIL GOLD MIN. CO. v. LIGHTBOURNE and others.

(Supreme Court of Colorado. November 18, 1887.)

CORPORATIONS—ACTIONS AGAINST—SERVICE OF PROCESS—STATUTES—REPEAL BY IMPLICATION.

Section 30 of the Colorado act of March 14, 1877, providing for the formation of corporations, which provided for service of summons in suits against them, was repealed by implication by the act of March 17, 1877, providing "a system of procedure in civil cases in courts of justice;" section 37 establishing a new method of service.

Commissioners' decision. Error to county court, Gilpin county.

James E. Lightbourne and L. S. Newell, partners as the Gilpin Coal, Feed & Lumber Company, plaintiffs, sued the Little Bobtail Gold Mining Company, defendant. Judgment for plaintiff. Defendant appealed.

Tilford & Gilmore, for plaintiff in error.

STALLCUP, C. The plaintiff in error was a corporation, and was defendant below. A question as to the validity of the service of the summons upon it is presented for consideration here. The service of summons, as shown by the return thereon, was made on J. H. Bowan, general manager and agent of the defendant. The question presented is disclosed by the following assignment of error: "It did not appear from the return of the sheriff on the summons that the service of the summons was made in the county where the principal office of the corporation is kept, or its principal business carried on, by delivering a copy to the president thereof, or, in the case of his absence from such county, that the service was made on either the vice-president, secretary, treasurer, cashier, general manager, general superintendent, or stockholder of such corporation, and no excuse is shown why service was not so made as aforesaid."

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An act of our legislature, entitled "An act to provide for the formation of corporations," was approved March 14, 1877; section 30 of which act provided as follows: "In suits against any corporation, summons shall be served in that county where the principal office of the corporation is kept, or its principal business carried on, by delivering a copy to the president thereof, if he may be found in said county; but, if he is absent therefrom, then the summons shall be served in like manner in such county on either the vice-president, secretary, treasurer, cashier, general agent, general superintendent, or stockholder of said corporation within such time and under such rules as are provided by law for the service of such process in suits against real persons; and if no such person can be found in the county where the principal office of the corporation is kept, or in the county where its principal business is carried on, to serve such process upon, a summons may issue from either one of such counties, directed to the sheriff of any county in this state where any such person may be found, and served with process." An act of the same legislature, entitled "An act to provide a system of procedure in civil actions in courts of justice in the state of Colorado;" was approved March 17, 1877; section 37 of which act provides as follows: "If the suit be brought against a corporation, service shall be made by delivering a copy of the summons to the president or other head of the corporation, or to the secretary, cashier, treasurer, or general agent thereof; but, if no such officer of the corporation can be found in the county, service may be had on any stockholder of such corporation. If the suit be against a foreign corporation, or a non-resident joint-stock company or association, doing business within the state, service shall be made by delivering a copy of the writ to an agent, cashier, or secretary thereof; in the absence of such agent, cashier, treasurer, or secretary, to any stockholder."

It is apparent that plaintiff in error relies upon the provisions of the former act. But the service was made under the provisions of the latter act, and was in accord therewith. The provisions of the former act in this regard were repealed by the provisions of the latter act. This presents an instance of undoubted repeal by implication, as the title to, and the language employed in, the latter act, upon this subject, are as comprehensive, direct, and effective in entirely extinguishing the provisions of the former act upon the same subject as any direct expression to that effect would be. The judgment should be affirmed.

We concur: MACON, C.; RISING, C.

BY THE COURT. For the reasons assigned in the foregoing opinion the judgment of the county court is affirmed.

(10 Colo. 440)

STEWART v. STEVENS.

(Supreme Court of Colorado. November 18, 1887.)

1. WATERS AND WATER-COURSES—GRANT OF RIGHT TO DIG A DITCH—WHO ENTITLED TO BENEFIT OF CONTRACT.

A contract was made between several parties, among them plaintiff and defendant, by which they agreed to form a company and dig a ditch across specified lands, to be dug and sustained by the parties to the contract in proportion to the lands benefited. The company was afterwards dissolved before the ditch was dug. *Held*, that this agreement did not give an individual member of the company, after the dissolution of the latter, a right to dig a ditch across another individual member's land.

2. SAME—LANDS NOT DESCRIBED IN CONTRACT.

If it be conceded that such agreement gave such right as to lands described, it could not give the right as to lands owned by a member, but not described.

3. SAME—GRANT OF RIGHT BY ORAL DECLARATION.

A conversation, by which defendant claimed that plaintiff gave him permission to go on and construct a ditch across plaintiff's land, if conceded to have occurred, is not a legal grant of right of way, and is not binding upon plaintiff as an estoppel.

4. SAME—ESTOPPEL—IN PAIS—SILENCE.

The silence of a party who sees a work advancing towards his land, which the builder evidently intends to construct across the land, is no ground of estoppel, as the party is not bound to complain until his rights are encroached upon.

Commissioners' decision. Appeal from district court, Douglass county.
J. W. Horner, for appellant. C. C. Holbrook, for appellee.

MACON, C. This suit was instituted by appellant, Izett Stewart, against appellee, Lewis G. Stevens, to restrain him from building a ditch upon and through certain lands of the former. A preliminary injunction was issued against appellee, but upon the final hearing it was dissolved and the suit dismissed. Complainant claimed title dating back to 1871, to the south half of the S. W. $\frac{1}{4}$ of section 23, township 8, range 68, in Douglass county, Colorado, and title from 1875 to the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, and the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, and the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, in the same section, township, and range, the latter acquired from one John Jones; and that, without right or consent of plaintiff, defendant threatened and was about to enter upon said premises, and dig and excavate a large ditch; with other averments showing irreparable injury; and praying an injunction to restrain the alleged wrong. The preliminary injunction was allowed May 10, 1880. On August 10, 1880, defendant answered; admitting his purpose to enter upon the lands of plaintiff for the purpose of building the ditch thereupon, but alleged the grant of right of way from the plaintiff by deed dated April 12, 1872, which deed is in the words and figures following:

"Article of agreement, made and entered into this 12th day of April, A. D. 1872, between John Thomas, Albion Smith, Izett Stewart, John Lindsay, and Lewis G. Stevens, all residing at West Plumb Creek, in the county of Douglass, and the territory of Colorado. Whereas, we, the said John Thomas, Albion Smith, Izett Stewart, John Lindsay, and Lewis G. Stevens, do hereby mutually and severally agree to construct a ditch not less than two feet or more than four feet in width, to run through the several lands and farms as herein mentioned: John Thomas, S. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, Sec. 26, T. 8 S., R. 68 W; Albion Smith, N. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, said Sec. 26; Izett Stewart, S. $\frac{1}{2}$ of S. W. $\frac{1}{4}$, Sec. 23, said T. 8; John Lindsay, N. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ and S. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, and S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$, said Sec. 23; Lewis Stevens, S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, Sec. 14, said T. 8. We also jointly and severally agree to bear our proportion of outlay and labor necessary for the completion and repairs of the said ditch, the same to be proportioned and regulated according to quantity of water required, and do hereby agree upon; namely: John Thomas' supply of water to be sufficient to irrigate ten acres of pasture land or equal thereto; Albion Smith's, ten acres; Izett Stewart's, twenty acres; John Lindsay's, sixty acres; Lewis G. Stevens', two hundred acres,—whenever a sufficient supply of water can be obtained; but whenever a deficiency of water, each one herein named, his heirs, executors, or successors, shall be entitled to his or their adequate proportion. The said ditch to be commenced on Upton J. Smith's land, S. W. $\frac{1}{4}$ of Sec. 26, T. 8 S., of R. 68 W., and to be continued to Lewis G. Stevens' land, S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of Sec. 14, said T. 8; management to be regulated by shares; ten acres to be considered one share. In testimony whereof, the parties hereto this and one other instrument of the same tenor and date, interchangeably set their hands and seals, this 12th day of April, 1872.

[Signed]	"JOHN THOMAS.	[Seal.]	JOHN LINDSAY.	[Seal.]
	"ALBION SMITH.	[Seal.]	LEWIS G. STEVENS.	[Seal.]
	"IZETT STEWART.	[Seal.]		

—And by virtue of an oral agreement and understanding between the parties to said deed, prior to the execution of the same: the allegation as to which is as follows: "That it was understood and agreed by and between such plaintiff and defendant and said other named persons that each and all of said persons, including said plaintiff, were to grant unto each other a right of way for said ditch through their respective lands, and that said plaintiff was to grant to said defendant a right of way for said ditch through his, said plaintiff's, land. That thereupon, in furtherance of said agreement, and in consideration of the benefit to be derived by each of said parties from the use of said ditch, a certain writing was made, executed, acknowledged, and delivered by and between the parties aforesaid, and recorded in the office of the clerk and recorder of Douglass county aforesaid." Plaintiff's title to the land described in his complaint is not denied, but it is averred in the answer that defendant does not intend to enter upon any of the land of plaintiff except that included in his grant of the right of way, as found in the deed and oral agreement. Plaintiff filed his replication, and denied the oral agreement charged, and that the land through which defendant proposed to run the ditch in part was the same land described in the deed. The final hearing of the case came on in December, 1883, when the court dissolved the injunction, and dismissed the plaintiff's bill; from which decree plaintiff appealed to this court, and assigns 10 errors in the ruling of the court.

In our view of the case, it is not necessary or material to examine any of the assignments except the third and fourth. The third is that "the court erred in holding that the paper marked 'Exhibit E' entitled the defendant to build the ditch therein mentioned, through land owned by the plaintiff and that acquired by the plaintiff after the execution of said paper marked 'Exhibit E,' and never owned by any of the parties to said agreement until acquired by the plaintiff." It is obvious that, if it be conceded that the written agreement of April 12, 1872, amounts to a grant of the right of way for the ditch over and into lands therein described, it cannot be so extended as to embrace other lands not described therein, and to which the parties thereto had then no title. And by the testimony of the appellee himself, it is seen that the surveyed route of the ditch which he proposes to follow, if permitted to go on with the enterprise, passes over and through the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, and the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, of section 23, being a distance, as described by him, of at least three-quarters of a mile, none of which land was the property of appellant in 1872, nor of any one of the parties to this agreement, but was, so far as the record discloses, the property of one John Jones, appellant's grantor. It is true, the written agreement describes the N. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of said section, which includes the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of said section, as the property of John Lindsay; but there is no evidence to support such claim, and as the burden of showing that such land was the property of said Lindsay on April 12, 1872, was upon the appellee, we must hold that, in the absence of such proof, the land was not Lindsay's when he signed said agreement. Hence the dissolution of the injunction, so far as it applied to these tracts of land last described, should not have been ordered, unless there was some other ground therefor *de hors* this agreement.

It is insisted by appellee that inasmuch as appellant remained silent from 1872 to 1880, while appellee continued the work on the ditch from 1873 to and including 1875, and bought and procured some lumber and timber for the ditch after 1875, he is estopped to dispute appellee's right of way through the land not described in the deed, as well as that described therein. The cases cited in support of this contention by appellee are not in point; the facts in this case failing to bring it within any of the rules enforced in those cases. In the first place, the deed which created the company, if it created any obligation upon the parties thereto, was an obligation to the company as a company,

and not to the members thereof as individuals. The enterprise was to be a joint enterprise, and not an individual one. It is not necessary to say what would have been the effect of the company's prosecuting the work and meeting with opposition on the part of appellant; because it is shown by both appellee and Hill, his witness, that every member of the company except appellee abandoned the enterprise after 1872, and declined to proceed further in it. From that time to 1880 appellee proceeded with the ditch alone, and while he says he was working for all, he fails to show that he had any authority to do so. He could not have bound the company for anything done by him without its authority, express or implied. He shows no express authority, and the idea of an implied one is clearly negated by the fact of abandonment of the work by all the other members as early as 1873. If, then, the company did not wish to go further in the work, and declined so to do, no promise by or conduct of appellant towards the company in 1872 would bind him after the abandonment of the work, and the dissolution of the company. If he was not bound to the company after that time, it is clear he could not be to appellee, because the latter did not succeed to any rights of the company by assignment, succession, or otherwise. In his prosecution of the work, then, appellee was acting solely on his own behalf, and in doing so the silence of appellant can give him no right whatever. A land-owner may be aware that a railroad company has surveyed the route for a railroad over his land, and has expended large sums of money in grading up to his line, intending to enter his premises and build its road; but he may with impunity remain silent until the attempt is made to enter upon his land, and prevent such attempt by injunction. It would be an anomalous defense on the part of the railroad company that, by his silence, while he saw its survey across his land, and the great expenditures made in grading to his line, he should be estopped to assert his right to protect himself against invasion. The case of appellee on the facts is not stronger. The case of *Youker v. Nicholls*, 1 Colo. 551, is not in point, for the reason that since that case was decided we have formed a constitution which prohibits the taking of private property for private use, without compensation; and the legislature has provided the proceedings by which, upon the payment of just compensation, private property may be subjected to private use. *Tripp v. Overocker*, 7 Colo. 72.

The record plainly discloses the further fact that appellee could not have been ignorant of the abandonment of the enterprise by appellant long prior to 1880. In his testimony he says, "That part of the ditch which had been built on the land claimed as Lindsay's, which was the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 23, had been filled up by appellant before the year 1878;" which conduct was more clearly a dissent from and an objection to the further prosecution of the ditch enterprise than could have been made by oral declaration. Besides, appellant swears that he knew of no work done by appellee after 1872, and he is not contradicted on this point. Without knowledge on his part, silence would have no effect to estop him. *Bigelow, Estop.* 437.

Appellee relies further upon the alleged conversation between himself and appellant in March, 1880, in which the latter said he believed the water would not run through the ditch; that he would do no more work upon it until he was satisfied to the contrary, but that he would not oppose appellee's working on it, and to go ahead with it; relying upon which statement, appellee avers he proceeded with the work on the ditch, and performed 154 days' labor thereon. This conversation is denied specifically by appellant; but, if it be admitted in its full meaning, it does not imply even a legal grant of right of way across appellant's land without compensation. Grants of estate and easements of land are by the statute of frauds to be evidenced by properly executed and authenticated written instruments, and, except in cases of fraud on the part of the land-owner, are not to be otherwise created. To allow loose and indefinite conversations, such as are relied on, to stand in lieu of the deed of

conveyance, is a virtual repeal of the statute of frauds, which we are not inclined to favor. It is quite easy to find the meaning in the language imputed to appellant, entirely consistent with his intention to exact compensation for the injury to his premises, which would result from the construction of the ditch.

Estoppels *in pais* are the creations of courts of equity, invented to prevent irreparable injury to a party who has been led into a course of conduct in reliance upon the representations of another, which it is inequitable to allow that other to retract; but these rules of equity are not resorted to if other rules of law can be invoked for the relief of the sufferer. Without intending to decide the question here, it is very doubtful if a right will ever be enforced against a party upon the ground of equitable estoppel, where the party claiming the benefit of it can enforce such right under a statutory power independent of estoppel. Here appellee could have condemned the land required for his ditch, and have secured the title thereto by payment of the compensation assessed by the appraisers. It is said in *East v. Dolihite*, 72 N. C. 567, that "the damage to support an estoppel against the owner of an estate, and convert him into a trustee, must be something more substantial than what would technically amount to a consideration in a contract. It must be a substantial one, and of such a character that the person sustaining it cannot be put back in his former condition, and cannot be adequately compensated by pecuniary damages."

Upon the facts of the case, it seems that this litigation is waged for no other purpose on the part of appellant than to compel appellee to pay for the right of way; and on the part of appellee to avoid such payment. If, however, it were conceded that appellant intended to be understood as promising to dedicate the right of way to appellee from this conversation of March, 1880, according to the authority of *Brightman v. Hicks*, 108 Mass. 248, an estoppel would not arise upon it. In that case GRAY, J., says: "A promise upon which the statute of frauds declares that no action shall be maintained, cannot be made effectual by estoppel merely because it has been acted upon by the promise and not performed by the promisor." We find no element of estoppel in the facts of the case.

The fourth assignment of error goes to the legal effect of the deed as a grant of right of way over the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$, section 23, township 8, range 68. This instrument is claimed by appellee to be a deed granting the right of way over and through the lands described therein, and upon that construction claimed the right he was attempting to exercise. This instrument contains no words of grant. It purports to be an agreement for a partnership for a single enterprise, in which the relative rights and duties of each partner are specified and protected, and nothing more. The fact that the lands through which the ditch was to be built are described therein is nothing more than a loose and indefinite designation of the route to be pursued, limited only by the boundaries of the several tracts of land mentioned. We find nothing in the so-called deed to warrant the conclusion that any party thereto designed to grant, free of cost, to the company the right of way over his land, and therefore cannot accept the view entertained and pressed by appellee. But if it showed a complete and perfect conveyance of the right of way over the lands described, as we have stated above, the company took the grant *in solido*, and not the individual members, and appellee has not shown himself entitled to these rights. The company dissolved in 1873, and positively refused to prosecute the enterprise further, and each of them made other ditches through which to flow water upon their lands. Upon this dissolution, without transferring its property or franchises to any other person, its rights, whatever they might have been under this deed, were extinguished. It necessarily follows that the court erred in dissolving the injunction, and that the decree should be reversed, and the cause remanded, with direction

to reinstate injunction; but appellee may proceed under the condemnation statutes.

We concur: STALLCUP, C.; RISING, C.

BY THE COURT. For the reasons assigned in the foregoing opinion the judgment of the district court is reversed, and the cause remanded, with directions to the said district court to reinstate the injunction. The appellee may proceed under the condemnation statute, if he be so advised.

(10 Colo. 184)

TOWN OF ASPEN v. RUCKER. County Judge, and others.

(Supreme Court of Colorado. June 15, 1887.)¹

1. PUBLIC LANDS—TOWN-SITES—POWERS OF STATE LEGISLATURE.

Act of congress of March 2, 1867, authorizing the entry of town-sites, provides that the title to the property conveyed by government patent is to be held in trust for the several use and benefit of the occupants of the town-site. Laws Colo. 1881, p. 239, § 4, provides that, in case any lots in a town-site remain unclaimed and unconveyed at the end of 90 days, such lots shall revert to and become the property of the town. Section 27 provides that, on failure of persons or associations entitled to lots to pay certain fees within a specified time, they shall be deemed to have relinquished all right and title therein, and the corporate authorities shall be deemed seized of the title in fee-simple, discharged of the trust. A town alleged that no valid claim to certain lots had been filed within the prescribed time, and asked for a decree establishing the title to the lots in it. *Held*, that the act of congress required the whole town-site to be held in trust until finally disposed of as trust property, and that neither the legislature nor the court could change the character of the estate derived from the government from one in trust to one in fee-simple, except, *first*, by conveyances to beneficiaries who have complied with the law, and, *second*, by *bona fide* sales made by the trustee under such regulations as the legislature may prescribe.

2. SAME—INJUNCTION TO PREVENT CONVEYANCE TO PERSONS NOT BENEFICIARIES.

A town alleged in a bill that the defendant land company presented its statement to the trustee claiming to be entitled to lots and blocks of land described in the bill as being a portion of the town-site; that it never was an occupant or in possession of the same; and that the county judge, who held the lots in trust, would execute a deed to defendant unless restrained by injunction. To this bill the defendant demurred. *Held*, that upon the complaint, admitted to be true by the demurrer, defendant was not a beneficiary of the trust, and the injunction should be granted.

ELBERT, J., dissenting.

Appeal from district court, Garfield county.

This chancery proceeding was instituted by the town of Aspen, in Pitkin county, against the above-named defendants, who are residents of the same county. The purposes of the bill are—*First*, to obtain an injunction to restrain said county judge from conveying a portion of the town-site of the town of Aspen to the defendant, the Aspen Town & Land Company; and, *second*, for a decree adjudging the complainant to be the owner of the real estate claimed by the said corporation defendant.

The facts upon which the prayers for relief are based are as follows: That the town-site of the town of Aspen was entered in the United States land-office by J. W. Deane, then county judge of said Pitkin county, on the second day of June, 1881, in trust for the several use and benefit of the occupants thereof; that public notices of the entry were given and published by said county judge, as required by law; and that, within the time prescribed by law for the presentation of claims for lots and parcels of ground within said town-site, the said town and land company, defendant, presented to said county judge a statement of particular parcels of land situate therein, in which it claimed an interest. It further alleges that no other applications have been received by

¹ Withheld upon petition for rehearing. Petition denied November 25, 1887.

the county judge or his successors in office for deeds to the parcels of land described in the bill, and claimed by said town and land company. Another allegation is that the last-mentioned defendant has demanded a deed of the lots, blocks, and parcels of land so claimed by it from the defendant Rucker, as county judge and successor in trust to the patentee of said town-site, and that, unless restrained by injunction, he will execute and deliver deeds therefor to said town and land company. It alleges that said town and land company is not entitled to a deed for any portion of said lands for the following among other reasons, to-wit: "That the said the Aspen Town and Land Company was not on the second day of June, A. D. 1881, nor on the twenty-ninth day of July, A. D. 1881, when it delivered its statement of claim into the office of the said J. W. Deane, county judge, as hereinbefore set forth, the occupant of, or in the possession of, or entitled to the occupancy or possession of, said above-described real estate, or any lot, block, share, or parcel thereof, but filed said statement for the purpose of speculation only. * * * That said corporation was organized, as plaintiff is informed and verily believes, for the sole purpose of attempting to obtain title to said town-site of Aspen, and speculate in town lots in said town-site; and plaintiff is advised that such object is not authorized by law." The alleged ownership of the complainant is based upon the allegations that no valid claims have been presented for the lands in controversy, and that more than three months have elapsed since the time for filing statements of claims expired. Upon these statements of fact, and the preceding statement, that the town and land company was not qualified to claim title, the complainant avers that the real estate described in the bill now belongs to it as the town of Aspen.

A temporary injunction was ordered to issue as prayed for in the bill, upon the filing thereof. The defendants demurred to the bill, alleging ambiguity and informality, and that it did not state facts sufficient to constitute a cause of action. The district court sustained the demurrer, and dismissed the bill.

A. Helms, L. S. Dixon, and C. J. Hughes, for appellant. Taylor & Ashton and J. M. Downing, for appellees.

BECK, C. J. In so far as the bill alleges the ownership of the lots and blocks in controversy to be in the town of Aspen as a corporation, and seeks to have the title so adjudged by a judicial decree, its demands are not warranted either by the law or the facts of the case. It is true the legislative act of March 1, 1881, (Laws 1881, p. 239, § 4,) contains a provision which would appear to sustain the claim here made, but the adjudications of this and other courts are to the effect that the act of congress approved March 2, 1867, under which the entry in this case was made, will not bear such an interpretation.

The last clause of section 4 of the legislative act provides: "In case any lots in such town remain unclaimed and unconveyed at the end of said ninety days, all such lots shall revert to and become the property of such town." Section 27 also provides, on failure of persons or associations of persons entitled to lots and parcels of land to pay certain fees and charges within the time therein prescribed, that they shall be deemed to have relinquished all right, title, interest, or estate therein, and the corporate authorities shall thereafter be deemed to be seized of the title thereto in fee-simple absolute, discharged of the trust. The language of the act of congress, authorizing the entry, however, and the language of the grant as well, is to the effect that the title to the property conveyed by the government patent is to be held in trust for the several use and benefit of the occupants of the town-site.

The mistake of the complainant in this case seems to have been, either in overestimating the power of the state legislature, or in misconstruing the provisions of the act of March 1, 1881. This body is authorized to make all needful rules and regulations for the execution of the trust, and the appropriation

of the proceeds of sale of the trust-estate. This includes power to direct sales of the entire trust-estate, saving and accepting the lands used for streets, alleys, parks, and other public purposes. The trustee is required to execute deeds to the occupants of the town-site of the lots or parcels of land to which they are entitled, upon their compliance with the local rules and regulations. But only residents and actual occupants and their assigns are entitled to demand deeds from the trustee by virtue of the act of congress. Purchasers of vacant or forfeited lots and parcels in the town-site, at sales regularly made pursuant to statute, are likewise entitled to conveyances from the trustee or person invested with the title thereto. The courts also have powers in the premises, which may, in proper cases, be called into exercise. They have jurisdiction to determine controversies between adverse claimants, and to enforce the rights of legal claimants. But neither the legislature nor the courts are authorized to change the character of the estate granted by the government, from an estate in trust to one in fee-simple, save in the manner above mentioned; that is to say: *First*, by conveyances to beneficiaries, who have complied with the law; *second*, by *bona fide* sales made by the trustee under such regulations as the legislature may prescribe.

The construction given by the courts of this state to the acts of congress is that the entire town-site is required to be held in trust until finally disposed of as trust property. It is held in *City of Denver v. Kent*, 1 Colo. 936, that those portions to which no valid claims exist in favor of individual occupants are to be held in trust for the occupants collectively, as a community. It was again held in *Georgetown v. Glaze*, 3 Colo. 234, and also in similar terms in *Smith v. Pipe*, Id. 187, to have been the purpose of the acts of congress to vest the estate and trust powers, not in the corporation itself, but in the trustee or trustees, in his or their official or politic capacity, and to limit it to the successor in trust, until the trust should be finally exhausted. The court further held that an entry in the name of the corporate officials of a town could not, by construction of law, inure to vest the estate in the corporation, and that no such intent was manifest in the act. The foregoing views and decisions are sustained by *Lechler v. Chapin*, 12 Nev. 65; *Town Co. v. Maris*, 11 Kan. 128; and many other cases therein cited.

The complainant in the present case, the town of Aspen, misconstrued the act of congress when it declared, in the complaint filed therein, that "*the real estate herein described belongs to it as the town of Aspen.*" Upon consideration of the pleadings, therefore, consisting of the bill and the demurrer thereto, (and there is nothing more before us in this case, save the order for the temporary writ of injunction, and the subsequent judgment of the court dissolving the judgment and dismissing the bill,) we are of opinion that this branch of the bill, as framed, presents no ground for equitable relief.

We will now inquire whether the complainant was entitled to injunctive relief upon the facts and circumstances stated in the bill. The allegations of the bill, that the defendant, the Aspen Town & Land Company, presented its statement to the trustee, claiming to be entitled to lots, blocks, and parcels of land described in the bill, and that it is not, and never was, an occupant or in possession of any portion thereof, and that said defendant, the county judge of Peitkin county, who holds the title to such lots and parcels of land in trust, will execute a deed therefor to said claimant, unless restrained by injunction, is conclusive of this question. These are material allegations of fact, and they are admitted to be true by the demurrer of the defendants. Upon the pleadings, therefore, the town and land company is clearly not a beneficiary of the trust. It acquired no right to a conveyance by the statement presented to, nor the demand for a deed made upon, the trustee. *Sherry v. Sampson*, 11 Kan. 615; *Lechler v. Chapin*, 12 Nev. 65-72; *Carson v. Smith*, 12 Minn. 560, (Gil. 458;); *Leech v. Rauch*, 3 Minn. 448, (Gil. 332;); *In re Selby*, 6 Mich. 193; *Town Co. v. Maris*, 11 Kan. 148. As held in *Bingham v.*

City of Walla Walla, 13 Pac. Rep. 408, it was the duty of the court to control the action of the trustee, during the pendency of the trust, against acts prejudicial to the rights of the *cestui que trust*. If the corporation may maintain its bill to correct an abuse of the trust which affects the common interest of all the beneficiaries, as held in *Georgetown v. Glaze* and *City of Denver v. Kent*, *supra*, it may with equal propriety maintain a bill to prevent such an abuse, when the same is imminent.

It follows that the district court erred in sustaining the demurrer to the whole bill of complaint, and in dismissing the bill. For the reasons assigned, the judgment is reversed and the cause remanded.

ELBERT, J., dissenting.

(10 Colo. 191)

MAYOR, ETC., OF THE TOWN OF ASPEN v. ASPEN TOWN & LAND CO.¹

(Supreme Court of Colorado. June 15, 1887.)

1. PUBLIC LANDS—TOWN-SITE—COLLATERAL ATTACK OF PATENT—MANDAMUS.

A land patent recited that a county judge had made a town-site cash entry for certain land, in trust for the inhabitants of a town; that it appearing that the town had been incorporated, and that the corporate authorities were the successors in trust of the county judge, the secretary of the interior had directed that a patent should be issued on the entry to the corporate authorities of the town, but further recited that the United States had given and granted the land in question to the county judge, his successor and assigns, in trust. Petitioner asked for a writ of *mandamus* to compel the corporate authorities of the town to convey certain lots in the town-site. Held, that the patent could not be collaterally attacked, nor any error in its issuance questioned in this action, but its validity must be assumed; that the legal title to the land was in the county judge and his successors in office, and, as the corporate authorities had no vested title to the town-site, the court had no jurisdiction to award the writ to compel a conveyance by them.

2. SAME—MANDAMUS TO CORPORATE AUTHORITIES TO COMPEL CONVEYANCE—PLEADING.

Plaintiff corporation, in a petition for a peremptory writ of *mandamus*, to compel the making of a deed to certain town-site lots, alleged the filing of a claim to the lots within the provisions of Laws Colo. 1881, p. 237, § 4, relating to the acquisition of town-site lots, but neither in this claim nor in the petition averred that it was an occupant of the land or a resident of the town. Respondents, in their answer, alleged affirmatively that it was composed of persons neither residing in nor occupying lots in the town, and that it was trying to obtain the title for speculative purposes. Plaintiff neither traversed the allegations by reply, nor refuted them by proof. Held that, as plaintiff failed to disclose any right to the conveyance, the court erred in awarding the writ of *mandamus*.

ELBERT, J., dissenting.

Appeal from district court, Garfield county.

The case presented by this record is a proceeding by *mandamus* on part of the Aspen Town & Land Company against the mayor and board of trustees of the town of Aspen, to compel said corporate authorities to issue a deed to the plaintiff for a considerable portion of the lots and blocks comprising the town-site of said town, the same being located in the county of Pitkin. The plaintiff's petition in this case sets out the history of the entry of said town-site by J. W. Deane, county judge of said Pitkin county, the organization of the plaintiff as a corporation, with power to take, enter, hold, sell, and convey real estate prior to said entry, and alleging compliance on its part with the provisions of the legislative act of March 1, 1881, relating to the presentation of its claims to said county judge, for the lots and blocks described in the petition. It states "that the specified right, interest, and estate which * * * petitioner claimed in the parts and parcels of land described in the statement in writing, and hereinafter particularly set forth and described, was the right to occupy and possess such parcels, parts, and tracts of land, and to be enti-

¹ Withheld upon petition for rehearing. Petition denied November 25, 1887.

tled to receive a deed from such county judge, conveying to it the legal title to such parcels or parts of land, and the right to, and to be the owner of, the title in fee thereto." The effect of the order of the secretary of the interior is averred to be that the trust created by the original entry by Deane became and is now vested in the mayor and corporate authorities, and that, under the state statute, the plaintiff, on payment of costs and charges required by law, became entitled to a deed of conveyance of the lands claimed, there being no contesting claimant. It is alleged that Deane's term of office as county judge has long since expired; that he was succeeded in said office by J. W. King, and he by Thomas A. Rucker, who, at the time of filing the petition, was the present judge of said county court, and that, though often requested, none of said county judges have ever conveyed to plaintiff said lots and blocks, or any part thereof. A demand on the corporate authorities of the town of Aspen for a deed thereto is alleged to have been made by plaintiff on the fourteenth day of November, 1884, which was also refused. Upon filing this petition, an alternative writ of *mandamus* was ordered to the city authorities, respondents, commanding them to convey by good and sufficient deed or deeds of conveyance the lands described, in accordance with the prayer of the petition, or to show cause, within a given number of days, why they had not done so. The respondents made return to said writ by answer under oath, as required by statute, denying most of the material averments of the petition, including the allegation that the petitioner had no plain, speedy, or adequate remedy in the ordinary course of law. They likewise made the following, among other, allegations of fact, to-wit: "And respondents further allege that the petitioner is not now and never was an occupant of the lots and parcels of lots described in the petition herein. And for further return to plaintiff's petition, respondents allege and aver that plaintiff is endeavoring to secure and acquire the title and possession of said lots, blocks and parcels of land for speculative purposes, and never has occupied, or intended to occupy, possess, enjoy, and improve said parcels of land mentioned in the petition herein as town lots, and that petitioner herein is a pretended and fictitious organization or corporation composed of persons or individuals not inhabitants of the town of Aspen, nor residing therein, or owning or occupying any lot or lots in said town."

The cause was heard by the court, without a jury, upon the petition and answer, and on the following agreed statement of facts:

That on the twenty-third day of March, 1880, DAVID SMITH, the then county judge of Gunnison county, in which county the land was, made application to the land-office to enter the town-site of Aspen, in trust for the occupants thereof. A protest was filed against said entry, for the reason that the land was mineral land, and not subject to entry as a town-site. A hearing was had, and on October 22, 1880, the register and receiver decided that the application and entry should be allowed. April 11, 1881, the decision was affirmed, and on the second of June, 1881, the entry of the land was allowed to be made. Pending these proceedings, by an act of the legislature, the county of Pitkin was created out of a portion of Gunnison county, which includes the town-site of Aspen, and J. W. Deane was appointed and qualified as county judge of the new county, and the town of Aspen became incorporated. J. W. Deane, as such county judge, on the second day of June, A. D. 1881, made the entry of the town-site as theretofore applied for, in trust for the inhabitants of the town, and received a certificate of entry therefor. On the ninth of June, 1881, the town authorities protested this entry, and prayed the commissioner of the land-office to cancel the same, and allow the town authorities to make the entry of said town-site. On the nineteenth of July, 1881, the commissioner made an order suspending the entry until further proceedings on said protest were determined. On the fifth of May, 1884, the commissioner held said entry for cancellation. On the eighteenth of July, A.

D. 1884, the honorable secretary of the interior decided that, by the incorporation of the town of Aspen before the entry was made, the town authorities were the successors in trust of the town-site, and modified the order of the commissioner, holding the entry for cancellation, and ordered a patent to issue on the entry to the town authorities. Afterwards, on the third of March, A. D. 1885, a patent was issued on the entry made by J. W. Deane, as county and probate judge, reciting, among other things, the decision and order of the secretary of the interior, which reads as follows: "Now know ye, the United States of America, in consideration," etc., "have given and granted, and by these presents do give and grant, unto the said J. W. Deane, county and probate judge aforesaid, and to his successors and assigns, in trust as aforesaid, the said tract above described, [describing the Aspen town-site] to have and to hold the same, together with all rights, * * * unto the said J. W. Deane, county and probate judge as aforesaid, and to his successors and assigns as aforesaid."

Immediately after making the entry of June 2, A. D. 1881, J. W. Deane, as trustee, published notice of such entry, as required by section 3 of the state statute, and the petitioner, the Aspen Town & Land Company, on the ninth day of July, A. D. 1881, signed a statement of its claim to the lots mentioned in the complaint, and delivered it into the office of the county judge, as required by section 4 of the state statute. That soon after the order of the honorable secretary of the interior, of the eighteenth of July, 1884, the town of Aspen, by reason of becoming incorporated at the time aforesaid, published a notice under the state statute, and the intervenor,¹ not having made any filing under the notice published by J. W. Deane as county judge, or within 90 days thereafter, of her claim to the lots described in her petition in intervention, filed a statement with the corporate authorities in pursuance of the notice published by them. At the expiration of the 90 days from the first publication made by J. W. Deane, as trustee as aforesaid, the defendant, the Aspen Town & Land Company, demanded a statement of the expenses and costs due upon the lots theretofore filed upon by it, and tendered to the then acting trustee the amount so due, and demanded deeds for said lots, and that, before the commencement of the action by it against the corporate authorities, further demanded said deeds to be executed to them, by the corporate authorities, which demand was refused. That the only statement filed by the defendant's company were those filed on the ninth day of July, A. D. 1881, in the office of J. W. Deane, the then acting trustee. That the Aspen Town & Land Company was a corporation, duly organized and existing under the laws of the state of Colorado, and has been such corporation at all of the times mentioned in the complaint filed herein. That the Aspen Town & Land Company was the only person, company, or association of persons which filed on the lots described in the complaint herein, in the office of J. W. Deane, as county and probate judge, and that no filings were tendered by any one else covering said lots or parcels of ground or any part thereof. That on, to-wit, the third day of March, A. D. 1885, and in pursuance of the entry made by J. W. Deane, as county and probate judge as aforesaid, a patent was issued for the said town-site of Aspen, which said patent, excepting the description by metes and bonds, is as follows, to-wit:

"The United States of America to All Whom These Presents Come, Greeting: Whereas, on the twenty-third day of March, eighteen hundred and eighty, an application was made to the register of the United States land-office at Leadville, Colorado, by the citizens of the town of Aspen, in the county of Gunnison and state of Colorado, to enter the lands hereinafter described, as the town-site of Aspen, under the act of congress, approved March 2, 1867, entitled 'An act for the relief of the inhabitants of cities and towns upon pub-

¹There was no intervenor in this case.

lic lands,' accompanied by a plat of survey of said town-site, executed by B. Clark Wheeler, United States deputy-surveyor, and tender of payment by a deposit of the purchase price of the land with the receiver of said land-office; and whereas, by the act of the legislature of Colorado, approved February 23, 1881, the county of Pitkin, embracing a portion of said county of Gunnison, including said town-site of Aspen, was created out of said county of Gunnison; and, whereas, it appearing that the town of Aspen had been duly incorporated under the laws of Colorado, and therefore that the corporate authorities of said town are the legal successors of the town-site trust applied for and hereinbefore set forth as found by the decision of the Hon. Henry M. Teller, secretary of the interior, dated July 18, A. D. 1884; and, whereas, J. W. Deane, county and probate judge of said Pitkin county, made town-site cash entry under date of June 2, A. D. 1881, for the land thereinbefore applied for, in trust for the inhabitants for said town of Aspen, as appears by the certificate of said receiver of said land-office, numbered 647, and bearing the said date of June 2, 1881; and, whereas, the honorable secretary of the interior, by his decision aforesaid, has directed that a patent be issued in the name of the corporate authorities of said town of Aspen, upon the entry made by the said J. W. Deane, county and probate judge of said county of Pitkin, in trust as aforesaid, for the following described tract of unsurveyed land, to-wit [Here follow field-notes:] Now, know ye, that the United States of America, in consideration of the premises, and in conformity with the general acts of congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said J. W. Deane, county and probate judge as aforesaid, and to his successors and assigns in trust, as aforesaid, the said tract above described, to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatever nature thereunto belonging, and the said J. W. Deane, county and probate judge as aforesaid, in trust as aforesaid, and to his successors and assigns in trust as aforesaid: provided, that no title shall be hereby conveyed of any mine of gold, cinnabar, or copper, or to any valid mining claim or possession held under existing laws: and provided, further, that the grant hereby made is held and declared to be subject to all conditions, limitations, and restrictions contained in section two thousand three hundred and eighty-six of the Revised Statutes of the United States, so far as the same are applicable thereto.

"In testimony whereof, I, Chester A. Arthur, president of the United States of America, have caused these letters to be made patent, and the seal of the general land-office to be hereunto affixed.

"Given under my hand at the city of Washington, the third day of March, one thousand eight hundred and eighty-five, and of the independence of the United States, the one hundred and ninth.

"By the President:

CHESTER A. ARTHUR. [Seal.]

"By M. McKEAN, Secretary.

"S. W. CLARK, Recorder of the General Land-Office."

The court decided the petitioner to be entitled to all the lots and lands claimed by it and described in its petition, and gave judgment that peremptory writ of *mandamus* issue to the corporate authorities of said town, commanding them to immediately issue deeds to the petitioner therefor.

The errors relied on are as follows: *First*. That the court erred in awarding a peremptory writ of *mandamus* against defendants and respondents. *Second*. The court erred in deciding that petitioner was entitled to the property claimed by it in its petition. *Third*. The court erred in entertaining the application for a peremptory writ of *mandamus*, because the remedy of petitioner, if any, is by proceedings in a court of equity. *Fourth*. That the court erred in deciding that the petitioner was entitled to any lots, or parts of lots, in the town-site of Aspen, because it appears that the petitioner was not a *bona fide* occupant of the same, or any of them.

A. Heims, L. S. Dixon, and C. J. Hughes, for appellant. Taylor & Ashton and J. M. Downing, for appellee.

BECK, C. J. It is assigned for error that the court erred in entertaining the application for a temporary writ of *mandamus*, because the remedy of petitioner, if any, was by a proceeding in equity. In support of the remedy selected by the plaintiff, we are referred to section 333, p. 102, of the Civil Code, which provides that "the writ of *mandamus* may be issued * * * to any inferior tribunal, corporation, board, officer, or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." Also to the following quotation from High, Extr. Rem. § 80, (and to many other authorities of similar import,) viz.: "Whenever a specific duty is required by law of a particular officer, unattended with the exercise of any degree of official judgment or element of discretion, and on the performance of which individual rights depend, *mandamus* is the appropriate remedy for the failure or refusal to perform the duty." Another statement of the rule, not inconsistent with the foregoing, but more pertinent to this case and supported by authorities cited, was laid down by this court in *People v. Spruance*, 8 Colo. 319, 6 Pac. Rep. 831, as follows: "The writ of *mandamus* is said to be a high prerogative writ, which should never issue unless the party applying for it shall show a clear legal right to have the thing sought by it done in the manner and by the person sought to be coerced. It must not only be in the power of such person, but it must be his duty to perform the act sought to be done."

1. Leaving out of view, for the present, the validity of the plaintiff's claim, did the law cast any duty upon the corporate authorities of the town of Aspen, or were they invested with power to convey to claimants title to the lots, blocks, and parcels of land comprising said town-site? If not, the remedy by *mandamus* is not available, and it is immaterial whether a remedy in equity existed or not.

It would certainly appear, from the facts and circumstances attending the entry of this town-site, and the issue of the patent therefor, as the same are set forth in the agreed statement of facts, and appear in the patent itself, that the patent might have issued direct to the corporate authorities, instead of the county judge. Such would seem to have been the view and direction of the honorable secretary of the interior at the time the entry was held for cancellation. Whether his order was misinterpreted, or whether by inadvertence the patent was issued to the county judge instead of the corporate authorities, we have no means of ascertaining, but the title to the town-site was clearly conveyed to J. W. Deane, in his official capacity as county judge, in trust, as required by the acts of congress. The conveyance was likewise pursuant to the entry made by him in the United States land-office, which is stated in the patent to have been made "*in trust for the inhabitants of said town of Aspen.*" The granting clause of the patent is in the usual form, conveying the title to said county judge, "*and to his successors and assigns, in trust.*" This language has always been held, so far as we are advised, to be equivalent to a grant to the officer named, in his official capacity, and to his successors in office, in trust for the use and benefit of the *cestui qui trust*. The title of the property in question never having vested in the corporate authorities of said town, it follows that it was not in their power, and consequently not their duty, to execute the deed demanded by the plaintiff and required by the judgment of the court below. If this proposition be correct, the district court was without jurisdiction to award the peremptory writ.

The patent must be construed according to the acts of congress authorizing its issuance; and while the recitals therein set forth may indicate the views of the government officers respecting the rights of parties, the form and manner of executing the patent must be in conformity to the laws of congress.

McGarrahan v. Mining Co., 96 U. S. 316. The congressional act of March 2, 1867, has, in numerous cases, been held to be substantially similar to the original act of May 23, 1844. It differs as to who may be trustee of a town-site in this: that it permits the corporate authorities of an incorporated town to enter the town-site, and, if not incorporated, the judge of the county court, "in trust for the several use and benefit of the occupants thereof," while the former act permitted the entry to be made by the county judge in all cases, but in the same manner and for the same purposes. The forms of the patents under both acts are substantially the same, limiting the trust-estate to the officer making the entry, (designating him by his official title,) "and to his successors and assigns, in trust."

The proper construction of the words "limiting the trust" was considered in *Smith v. Pipe*, 3 Colo. 187, 196. Justice WELLS, who delivered the opinion in the case, says: "It cannot be doubted that the purpose of the statute is to confer the estate upon the county judge, or the corporate authorities in their official and politic capacity, and to limit it to the successors in office until the trust should be finally exhausted." This opinion further holds that the power to take the grant as trustee is vested in the officer, and not in the individual, and that it is unnecessary in the patent to designate the incumbent by his proper name.

The trust in the present case having vested in the county judge, by the issue of the patent to that officer, and the grant being limited therein in the usual manner, "and to his successors and assigns in trust," it follows that the successors mentioned are the successors in office, notwithstanding the previous recitations in the patent, for the act of congress does not authorize any other successors. In holding that the legal title to the town-site vested, under the grant, in the county judge and his successors in office, in trust for the occupants thereof, it does not necessarily follow that the trust must continue to be executed by the said successors until the trust-estate is extinguished. This grant was made under peculiar circumstances, and possibly the language employed in the granting clause of the patent does not express the will of the grantor on this point. If it should be made to appear, in a proper proceeding, with proper parties thereto, that the officers of the government having jurisdiction to decide what local official or officials should be clothed with power to execute this trust, intended by their official action therein that the corporate authorities of the town of Aspen should execute the trust, that intent may still be rendered and made effective as to the unexecuted portion of the trust. *Silver v. Ladd*, 7 Wall. 219; *Johnson v. Tousley*, 13 Wall. 72.

The patent cannot be collaterally attacked, and its validity must be assumed in the present action. For the purposes of this case, it must be treated as issued to the proper party, and its legal effect determined accordingly. Since the county judge is the patentee, and, as above shown, the statute, as construed by this court, names his successors in office as the successors in trust, the patent cannot be regarded in this case as changing the latter succession to the town authorities.

2. The remaining errors assigned question the right of the plaintiff to a conveyance of any portion of the large body of lots and blocks claimed by it. The plaintiff's petition contains no allegation that the right of the plaintiff to a conveyance of any portion of these lands has ever been adjudged in its favor. The contrary inference may be drawn from the averments of the petitioner, that the settlement of the plaintiff's claim was made to County Judge Deane, and, although often requested, neither he nor his successors in office, King and Rucker, have ever conveyed to plaintiff the said lots, blocks, pieces, and parcels of land, or any part thereof. It is not averred in the petition that any statement of the plaintiff's claim was presented to the corporate authorities for adjudication. There is no averment in the petition, nor any mention or admission in the agreed statement of facts on which the case was tried, that

the plaintiff was in any manner an occupant of any portion of the lands so claimed; nor is there any statement therein that the plaintiff is, or ever has been, a resident of said town of Aspen. On the contrary, it is affirmatively alleged in the answer of the respondents, that the plaintiff never has occupied any portion of the lands claimed in the petition, that the plaintiff corporation is composed of persons not inhabitants of said town of Aspen, nor residing therein, or owning or occupying any lot or lots in said town, and that it is endeavoring to acquire the title and possession of said lots for speculative purposes. These averments are neither traversed by a reply, nor refuted by proof.

The pleadings and the proofs, on this point, therefore, present the same question passed upon at the present term in the case of *Town of Aspen v. Rucker, ante*, 791. It was there adjudged, upon the admissions of the pleadings, to the effect that the Aspen Town & Land Company never was an occupant, or in possession of any portion of the town-site of Aspen; that it was not a beneficiary of the trust, and acquired no right to a conveyance by its statement of claim and demand for conveyance. The decisions of the courts upon this point are clear and decisive that no claimant of lots comprising a portion of a town-site is a beneficiary of the trust, or entitled to a conveyance, without proof of actual occupation, either by the claimant or his grantors, whether such claimant be an individual or a town company. *Cook v. Rice*, 2 Colo. 131-136; *Clayton v. Spencer*, 2 Colo. 378-380; *Town Co. v. Maris*, 11 Kan. 128; *Sherry v. Sampson*, 11 Kan. 611, 615; *Clark v. Titus*, 11 Pac. Rep. 312, 314.

It was held in *Hussey v. Smith*, 99 U. S. 20, that an occupant has the power to sell or convey his possessory right, and that the purchaser from him may acquire such right to the occupancy as to entitle him to a judgment for a conveyance; but it is not contended that the plaintiff in this case holds any such claim or conveyance. But the plaintiff bases its right to a conveyance of the real estate described in its petition (the same exceeding 100 blocks and parts of blocks of said town-site) upon a compliance with the provisions of the state statute of March 1, 1881, (Laws 1881, p. 237.) In its own language the statement of the claim was: "That the specified right, interest, and estate which * * * petitioner claimed in the parts and parcels of land described in the statement in writing, and hereinafter particularly set forth and described, was the right to occupy and possess such parcels, parts, and tracts of land, and to be entitled to receive a deed from such county judge, conveying to it the legal title to such parcels or parts of land, and the right to and to be the owner of the title in fee thereto." It also relies upon the admitted fact that it "was the only person, company, or association of persons which filed on the lots described in the complaint herein, in the office of J. W. Deane, as county and probate judge, and that no filings were tendered by any one else covering said lots or parcels of ground."

Section 4 of the state statute requires that "each and every person or association or company of persons claiming to be an occupant or occupants, or to have possession, or to be entitled to the occupancy or possession, of such lands, or to any lot, block, share, or parcel thereof, shall, within ninety days after the first publication of such notice, in person, or by his, her, or their duly authorized agent or attorney, sign a statement in writing containing an accurate description of the particular parcel or parts of land in which he, she, or they claim to have an interest, and the specific right, interest, or estate therein which he, she, or they claim to be entitled to receive, and deliver the same into the office of such corporate authorities or judge; and all persons failing to deliver such statement within the time specified in this section, shall be forever barred the right of claiming or recovering said lands, or any interest or estate therein, or in any part, parcel, or share thereof, in any court of law or equity." Section 1 makes it the duty of the corporate authorities or judge

who shall make the entry to dispose of and convey the title to such land, or to the several blocks, lots, parcels, or shares thereof, to the persons described in the act, and in the manner specified therein. Section 2 requires the trustee, by a good and sufficient deed of conveyance, to "grant and convey the title to each and every block, lot, share, or parcel of the same to the person or persons who shall have, possess, or be entitled to the possession or occupancy thereof according to his, her, or their several or respective rights or interest in the same, as they existed in law or equity at the time of the entry of such lands, or to his, her, or their heirs or assigns." There are other provisions, as in section 27, requiring deeds to be executed to claimants, but all are limited to *person, association, and company of persons entitled to the lots and blocks.*

Now, what interest in the numerous lots and blocks of this town-site so claimed by it has the plaintiff disclosed? By virtue of what acts done by it does it become *entitled* to deed in fee-simple? It specifies no act save the filing of its claim within the *ninety days*, couched in the phraseology of the statute, and tender of fees and charges. It sets up no claim as heir or assignee of an occupant, does not claim to be or to have been an occupant of any part of the real estate, or even a resident of the town, and when charged by the respondent with an attempt to acquire the title to this body of lots and blocks for speculative purposes, fails to even deny the charge.

We do not think the act of the legislature will bear the interpretation placed on it by the petitioner, and its counsel. Although not framed as perspicuously as it might have been, it does not seem capable of the construction sought to be placed upon it. But if it did, it would be in plain violation of the intent and purposes of the act of congress, which has frequently been construed to include, as beneficiaries of the trust, occupants of the town-site only.

In *Lecher v. Chapin*, 12 Nev. 71, the court remark, in discussing this point: "In the consideration of this question we must not lose sight of the fact that the act of congress was intended for the benefit and protection of the actual citizens of the town against those making claim to the land for purely speculative purposes;" citing *In re Selby*, 6 Mich. 193; *Town Co. v. Maris*, 11 Kan. 128; *Jones v. City of Petaluma*, 38 Cal. 397.

In *Town Co. v. Maris*, *supra*, the court, in discussing the claim of a town company, announced the following doctrine, which is quoted with approval in *Lecher v. Chapin*, *supra*, and in *Clark v. Titus*, 11 Pac. Rep. 312: "The legislature, in prescribing rules for the execution of the trust, cannot change it by substituting other parties to receive its benefits than those indicated by the law of congress. If individuals or town companies choose to lay out lands for a town-site, and make money by the means, there is no law to prevent it; but they cannot pre-empt the public domain for that purpose under the law of congress. That law was made for the benefit of the occupants of the town, and not for speculators." See, also, *Carson v. Smith*, 12 Minn. 560, (Gil. 458); *Hussey v. Smith*, 1 Utah, 129; *Treadway v. Wilder*, 8 Nev. 98, 99; *Phillpotts v. Blasdel*, Id. 67.

We are of opinion that the court erred in entertaining the application for the peremptory writ of *mandamus*, and in awarding said writ, for the reasons above given. The judgment is reversed and the cause remanded, with directions to dismiss the proceeding.

ELBERT, J., dissenting.

v.15p.no.13—51

(10 Colo. 390)

LONG v. HERR and others.

(Supreme Court of Colorado. November 11, 1887.)

FACTORS AND BROKERS—REAL-ESTATE AGENT—RIGHT TO COMMISSIONS.

A memorandum was given by an owner of land acknowledging that, upon the consideration of the agents' agreement to advertise and use diligence in the sale of the land listed with them, he would, if the sale was effected within three months at a price specified, pay a given commission, and, "if sold or exchanged in the mean time without their agency, one-third of above compensation to be paid." Held, that upon the sale of the land within the three months by another agent, and upon proof of the advertising and diligence of the first agents, the latter were entitled to one-third the commission specified.

Appeal from Arapahoe county court.

Plaintiffs, Theodore W. Herr & Co., were real-estate agents, doing business in the city of Denver. Defendant, William Long, was the owner of lot 9, block 21, East Denver, with improvements thereon, and undertook to sell the same. In 1881 he executed and delivered to plaintiffs the following writing:

"DENVER, COLORADO, July 26, 1881.

"I have this day placed in the hands of Theodore W. Herr & Co. for the period of three months, and until withdrawn by written notice, the following described property, viz., lot 9, block 21, E. D. Wazee, between 17th and 18th streets, six-room frame house, to be sold or exchanged by them at a price not less than twenty-five hundred dollars; they to have as compensation for their time, trouble, advertising, etc., all obtained over said price, and five per cent. commission; and I agree to make a perfect and unincumbered title to the property at price agreed upon, when required. If sold or exchanged in the mean time without their agency, one-third of above compensation to be paid. Terms: \$2,000 may stand at ten per cent.

[Signed]

"WILLIAM LONG, 279 Glenarm."

Memoranda in pencil: "Sold September 8, 1881, to Welsh & Campbell, \$2,400. July 14, 1882, wrote postal."

On the date mentioned in the writing the property was recorded on plaintiffs' books, which books were kept in their office for inspection by all persons desirous of purchasing city lots or lands. It was held for sale, and duly advertised by posting upon the bulletin board in front of the office. The undisputed testimony of the senior partner tends to show that it was also advertised by plaintiffs in one or more newspapers, and that several prospective purchasers were driven to and shown the premises by them, in the endeavor to make a sale thereof. On the eighth of September, 1881, being about six weeks after the execution of the writing aforesaid, defendant, through another agent, without the knowledge of plaintiffs, sold the property. He neither paid nor offered to pay plaintiffs any commission; and when, upon accidentally discovering that the sale had been made, plaintiffs demanded of him such commission, he denied any liability therefor. Thereupon this action was brought before a justice, and, on appeal, judgment given by the county court in plaintiffs' favor for the sum of \$41.67. From that judgment the present appeal was taken.

J. P. Brockway, for appellant. *C. G. Clement*, for appellee.

HELM, J. Appellant contends that the evidence before us wholly fails to show any such employment of plaintiffs as entitles them to commission or compensation from defendant. Fitch, in his work on the subject of Real-Estate Agency, at page 15; with reference to contracts of this nature, uses the following language: "It is not necessary that the employment should be in writing. The leaving a description of the property at the office of the broker by the owner or his agent, with a request to sell it on terms and at a price designated, is a sufficient employment." The doctrine thus stated seems

reasonable, and is sustained by authority. The writing set out in the statement of facts preceding this opinion may not, technically speaking, itself constitute a contract of real-estate brokerage between parties. It is nevertheless a written statement under the signature of defendant, admitting the existence of such a contract, as defined by Mr. Fitch. We think that this contract was perfectly valid. The consideration for defendant's promise to pay the commissions mentioned was the services to be rendered, and the expense to be incurred, by plaintiffs, in their efforts to make a sale of the property. But, by the terms of the employment, if, during the three months specified, and before written notice withdrawing the property from plaintiffs' hands, defendant himself, or another agent for him, disposed of it, he was to pay plaintiffs one-third of the amount to have been allowed them as commissions had they made the sale themselves. Counsel for defendant disputes this construction of the agreement, but we think the matter too plain for serious discussion. The skill and good faith of plaintiffs' efforts under the employment are not questioned. It appears that the property when sold brought less than \$2,500; therefore plaintiffs would be entitled to but one-third of 5 per cent. of that sum. This much we think defendant was clearly liable for, and so evidently thought the county court. The judgment is affirmed.

(10 Colo. 300)

SORENSEN v. TOWN OF GREELEY.

(*Supreme Court of Colorado*. October 18, 1887.)

MUNICIPAL CORPORATIONS—OCCUPATION OF STREET BY RAILROAD COMPANY—LIABILITY OF TOWN TO PROPERTY OWNER.

A railway company was permitted by ordinance of the town of Greeley to remove its roadway, and the owner of a canal was also permitted to move his canal to other streets than those occupied at the time of the ordinance. The railroad company, by an arrangement with the canal owner, performed the labor of moving the canal. In the course of the work the company destroyed a flume belonging to plaintiff, and connecting with the canal, cutting off plaintiff's water supply, and thus injuring his crops. *Held*, that the town was not liable for the damage so caused.

Commissioners' decision. Error to district court, Weld county.

This was an action by plaintiff, Hans Sorensen, against the defendant, for \$284 damages for injury to his crop occasioned by the destruction of the flume and lateral conveying the water supply thereto. It appears from the evidence produced by plaintiff that in the spring of 1881 the plaintiff had a lease of three lots in the town of Greeley. These lots were on the east side of the U. P. Ry. track, being the old D. & P. Ry. track, and the Mill-Power canal was on the west side of this track. The Mill-Power canal was a canal for conveying water for mill-power purposes, irrigation of land not within the town, and for land and lots within the town, and for household purposes for the people in the town of Greeley. The canal belonged to Bruce F. Johnson, with reserved rights in the town of Greeley for water for irrigation of the land and lots within the town, and for household purposes, for which the town had control of the canal, with right to assess the persons so using the water therefrom, and the plaintiff had right to water therefrom for the irrigation of said lots. In the spring of this year, the plaintiff planted the said lots in garden vegetables, and, in order to get the water from the said canal to his lots, plaintiff took the same out of the canal on the west side of and near to the said railroad, and, with the aid of the section hands employed on the railway, he put a flume under the railway track, and then he ran a small lateral down the side of the track, a distance of two or three hundred feet to the lots, and so conveyed the water to and irrigated his lots until the twenty-sixth day of July, when the railway company commenced work there to raise the railway track, and build a bridge at the place where plaintiff's flume was, and did so raise the track for some distance, and did so build a bridge at that place. The plaintiff's flume was

destroyed on the first day of the work, as the work commenced at that point, and its destruction was thereby necessary. By this act, plaintiff's water supply for his lots was prevented from passing over that way, and, plaintiff failing to convey the water by any other way, his crop thereon suffered. On the twentieth day of July, 1881, the defendant, the town of Greeley, passed an ordinance granting the right to said Bruce F. Johnson to change the course of the said canal, so as to occupy certain streets lying east of the said railway of the U. P. Ry. Co. and flume and lateral of the plaintiff. The place where the flume was, and where the bridge was built on the railway, under which the new canal ran, was on Jefferson avenue, and the railway of the U. P. Ry. Co.

It also appears, from the evidence, that the force of men who raised the railway track and built the bridge were in the employ of the U. P. Ry. Co.; that this same force of men dug the new way for the said canal over the said streets, and commenced that work about one week after they had commenced raising the railway track; the section men and this force of men working under one superintendent the first week, and the said flume and lateral of plaintiff's being taken away by the said section men. The whole of said work occupied about 30 days. The old canal was not disturbed until after this work was done, but still continued to carry water therein. It appears from plaintiff's testimony that he could have taken water from the canal to his lots by another way, but that it would have cost him more than his crop was worth: The ordinance above referred to and another ordinance, which were read in evidence, are as follows:

"Ordinance No. 29. Vacating Portions of Olive Street and Washington Avenue for the Mill-Power Canal.

"Be it ordained by the board of trustees of the town of Greeley, state of Colorado:

"Section 1. That so much of the north half of Olive street in the town of Greeley, state of Colorado, as lies between Jefferson avenue and Washington avenue, and so much of the east half of Washington avenue as lies between the south half of Olive street and the point of intersection of said Washington avenue with said Mill-Power canal as at present constructed, be, and the same is hereby, vacated.

"Sec. 2. Be it further ordained that Bruce F. Johnson is hereby authorized and empowered to change the course of his Mill-Power canal along the line of said Olive street and Washington avenue, and to occupy thereon the said Mill-Power canal upon said portions of said streets vacated by section 1 of this ordinance.

"Passed and adopted this twentieth day of July, 1881.

"DANIEL HAWKS, Mayor.

"Attest: B. F. MARSH, Recorder."

"Ordinance No. 27. Vacating a portion of Jefferson avenue, and granting the use of the said portion, and the right to lay down railroad tracks thereon, to the Greeley, Salt Lake & Pacific Railway Company.

"Be it ordained by the board of trustees of the town of Greeley, state of Colorado:

"Section 1. All that portion of Jefferson avenue lying between Maple and Vine streets, in the town of Greeley, save and except the following, to-wit: Commencing at the S. E. corner of block 38 in said town; running thence due east 48 feet to a point; and running thence in a north-north-westerly course along said avenue in a straight line to a point 5 feet and 8 inches due east of the S. E. corner of lot 1, block 23; running thence due west to the S. E. corner of said lot; running thence due south to the point of beginning,—be, and the same is hereby, vacated.

"Sec. 2. The use of that portion of Jefferson avenue which is vacated by section 1 of this ordinance, and the right to lay down railway tracks on said

vacated portion of said avenue, is hereby granted to the Greeley, Salt Lake & Pacific Railway Company.

"Passed and adopted this fifth day of September, 1881.

"DANIEL HAWKS, Mayor.

"Attest: B. F. MARSH, Recorder."

--Which ordinances, on motion of defendant, were afterwards excluded from the evidence by the court.

Plaintiff offered to prove by Jacob Wolaver, who was one of the town board of trustees of the town of Greeley in 1881, and attended the meetings of the council, as follows: "The facts we expect to show by this witness are these: We expect to show that the railroad company wished to occupy and lay their track upon Jefferson street; that said street was then occupied by the old Mill-Power canal; and that the town agreed to vacate said street, and allow the railroad company to run upon it, and, in consideration thereof, the railroad company agreed to dig the new Mill-Power canal, running from Olive street on Washington avenue to intersect with the line of the old canal; and that, for the reason that the title to Mill-Power canal was in Bruce F. Johnson, power was given him, and he was authorized and empowered by the town, to change Mill-Power canal upon streets vacated for that purpose by the town; but that it was the understanding that Johnson was not to do the work, but that the railroad company agreed with the town to move said canal, in consideration of the town giving them Jefferson street to lay their track upon; and that Johnson consented that the railroad company might move Mill-Power canal, by virtue of certain ordinances passed by the town council, offered to be introduced as evidence in this case; and that the loss to Sorensen, the damage to his flume and lateral, was occasioned by the change made in the Mill-Power canal by the railroad company in consequence of this agreement between the town, the railroad company, and Johnson; and that no records of any kind of this agreement between the town and the railroad company have been kept by the town council." All of which was rejected by the court on objection by defendant.

The plaintiff rested, and, on motion of defendant for nonsuit, the court granted the same, and rendered judgment accordingly against the plaintiff. The plaintiff, having duly excepted to the ruling and judgment of the court, to reverse the judgment brings the case here on writ of error. The assignment of errors goes to the rejection of the evidence offered, and to the judgment.

J. E. Garrigues, for plaintiff in error. *Haynes, Dunning & Annis*, for defendant in error.

STALLCUP, C. Accepting all the facts admitted in evidence, as well as those excluded and rejected, the plaintiff is without right of recovery against the defendant, the town of Greeley, for the reason that the acts which stopped the flow of water by the way it was going to plaintiff's lots were the acts of the U. P. Ry. Co., in the construction of a bridge upon its own premises. It is difficult to see any force in the facts shown by the ordinance of September 5, 1881, as it was passed long after the occurrence complained of, and purports to vacate a portion of Jefferson avenue, and to grant right to the Greeley, Salt Lake & Pacific Railway Company to lay railway tracks thereon; while, from the evidence, it appears that a portion of this avenue was already occupied by the railway of the U. P. Ry. Co., and that plaintiff's flume passed under this same railway, at a point on this same Jefferson avenue; that the destruction of the flume was caused by the workmen and employes of the said U. P. Ry. Co. in raising this same railway, excavating, and constructing a bridge thereunder at this point. As to the other ordinance of July 20, 1881, it simply vacated a portion of certain streets lying east of this railway, and granted to Bruce Johnson the right to occupy the said portions so vacated

with the said canal. It is nowhere shown or claimed that the town pretended to grant the right to occupy with the canal the ground occupied by the said railway of the U. P. Ry. Co. and flume of the plaintiff. That Bruce Johnson had any right from the said railway company, or any other source, to cross the said railway with the said canal at this or any other point, does not appear. It would seem that such right would have to come from the railway company, and it appears that the railway company did assent to the same by adjusting its railway to and in excavating for the canal thereunder. There was ample water in the old canal during all this time, so that in this respect the town discharged its duty.

In no view of the case can the town be held liable for the injury resulting from such disturbance of the flume and lateral of the plaintiff. The granting of a right of way on a street for a railway by a municipality does not create a liability against the municipality for the damages occasioned by the corporation exercising the rights so granted. The liability in such cases is against the corporation exercising and enjoying such rights. *City of Denver v. Bayer*, 7 Colo. 113, 2 Pac. Rep. 6. The judgment should be affirmed.

We concur: MACON, C.; RISING, C.

BY THE COURT. For the reasons assigned in the foregoing opinion the judgment is affirmed.

(10 Colo. 508)

PARKISON v. BODDIKER.

(*Supreme Court of Colorado*. November 25, 1887.)

1. NEGOTIABLE INSTRUMENTS—ACTIONS ON—PLEADING—UNVERIFIED ANSWER.

Code Colo. § 66, provides that "when an action is brought upon a written instrument, and the complaint contains a copy of such instrument, * * * the genuineness and due execution of such instrument are deemed admitted, unless the answer denying the same be verified." Under this section, an unverified answer to a complaint on a promissory note by the assignee thereof, which alleges duress, want of consideration, and that the note was not assigned for value to plaintiff before the maturity thereof, will not support evidence of the facts alleged. *ELBERT, J.*, dissents.

2. SAME—SETTLEMENT AS DEFENSE.

An allegation in an answer to a complaint on a promissory note, that there had been a settlement of all matters (connected with which the note was given) between the maker and the payee, is not a good defense if it fail to show that upon such settlement the maker of the note was not found to be indebted to the payee.

3. SAME—WANT OF CONSIDERATION—ACTION BY ASSIGNEE.

An allegation in an answer to an action by an assignee of a promissory note, on such note, of a want of consideration therefor, when not accompanied by an allegation of knowledge thereof by the assignee, presents no defense.

Commissioners' decision. Appeal from county court, Summit county.

The complaint of J. E. Parkison, plaintiff, alleges that the defendant, John C. Boddiker, made his promissory note to one Charles Merrill for the sum of \$100, dated October 13, 1883, payable three days after date, with interest at 2 per cent. per month until paid; that said Merrill on the fifteenth day of October, 1883, indorsed said note to the plaintiff. The amended answer of defendant sets up the following facts as a defense: That at the request of Breeze & Breeze, as attorneys for Charles Merrill, he went to their office in Breckenridge on the thirteenth day of October, 1883, at which time said attorneys claimed to him that he had misrepresented the sale of certain mining property, and had deceived the said Merrill as to the amount received for the same, and that, unless he would at once pay said Merrill the sum of \$100, or give his note for the payment thereof at three days, Merrill, or his said attorneys, would have him arrested and indicted on two criminal charges; that he was not allowed to see or procure counsel after the said threat was

made, and that it was under the said duress that he signed said note; alleges that defendant received no value for said note; that long prior to the signing of said note there was a full and complete settlement by and between the said Merrill and defendant, in connection with the Raven mining claim, out of which this whole proceeding and transaction grew; that said note was not assigned for value to the plaintiff before the maturity thereof. The replication of the plaintiff denies the alleged threats and duress; denies want of consideration; alleges that the note was assigned to plaintiff for a valuable consideration, and before maturity; and, as to any settlement between defendant and said Merrill, alleges that plaintiff knows nothing about it, and cannot answer, and that under the law he is not bound to answer or know anything about defendant's transactions with Merrill. None of the pleadings were verified.

Upon the trial, defendant made the following offers of proof: *First*. "The fact that the said note sued upon was procured through and by fraud, and under duress, and without consideration." *Second*. "That there was collusion between Charles Merrill, the payee of the note sued upon, and J. E. Parkison, the indorsee or assignee, and plaintiff herein, to the effect that there was no value received or passed between them *bona fides*." *Third*. "That the indorsee or assignee and plaintiff herein had full knowledge of how said note was obtained and without consideration, and that he was not a *bona fide* purchaser for value, or otherwise, before the maturity thereof." *Fourth*. "That upon the cross-examination of Charles Merrill, the original payee of the note, the defendant offered to prove the fraudulent obtaining of said note, and that no consideration was paid or given therefor." To the offer and admission of such testimony the plaintiff objected, which objection the court sustained, and to which ruling defendant excepted.

L. C. Northrup, for appellant. *J. M. & L. M. Breeze*, for appellee.

RISING, C. The assignments of error based upon the ruling of the court in sustaining plaintiff's objection to the admission of proof offered by defendant present the only questions we are at liberty to consider, except the question raised by the eight assignment, for the reason that to no other ruling of the court upon which an assignment is based was an exception taken.

Upon the trial the defendant offered to prove that "the note sued upon was procured through and by fraud, and under duress, and without consideration." The court sustained plaintiff's objection to the admission of the evidence. Counsel for appellee, in their argument, base their objection to the admission of this evidence upon the provisions of section 11, c. 9, Gen. St. We do not think that the objection can be sustained upon this ground. This section of the statute provides that, "if any fraud or circumvention be used in obtaining the making or executing of any of the instruments aforesaid, such fraud or circumvention may be pleaded in bar to any action to be brought on any such instrument so obtained, whether such action be brought by the party committing such fraud or circumvention, or any assignee of such instrument, unless such instrument was negotiated before due." This statute is identical with the Illinois statute on the same subject, except that the clause, "unless such instrument was negotiated before due," is not found in the Illinois statute. This clause renders the statute inoperative to effect the purpose for which the Illinois statute was enacted. At common law the defense of fraud in procuring the execution of a note would not defeat an action by an innocent indorsee before maturity, and the Illinois statute was enacted to permit such defense to be made against an indorsee before maturity in cases where such indorsee was a holder for value, and without notice of the fraud. *Taylor v. Atchison*, 54 Ill. 196; *Hubbard v. Rankin*, 71 Ill. 129. In our statute, this clause makes an exception to the application of the general provisions of the statute, and this exception takes away the whole

force of the statute, so far as it attempts to change the common-law rule in such cases. The statute in no way affects the rules of pleading, but goes to the right to interpose a defense, and the application of the statute is to be made to the facts of the case as found from the evidence. If the answer set up a defense, and the evidence offered was pertinent to prove it, it should have been admitted.

The amended answer alleges that the note sued upon was executed under duress; that defendant did not receive value for the same; that the note was not assigned for value to the plaintiff before maturity; that long before the execution of said note there was a full and complete settlement by and between the payee of said note and defendant, in connection with the Raven mining claim, out of which this transaction grew. The complaint contained a copy of the note. The answer not being verified, the question arises as to how it is affected by the provisions of section 66 of the Code, which provides that "when an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the answer denying the same be verified." In determining what issues, if any, are raised by the answer, the admissions made by reason of the failure to verify it must be considered. By the express provisions of the statute, the genuineness and due execution of the note are admitted. Code, § 66; *Watson v. Lemen*, 9 Colo. 200, 11 Pac. Rep. 88.

The first question presented in the consideration of this statute, in its application to this case, is the force and effect to be given to the word "genuineness." Prior to the Code provision, it was provided by statute that "no person shall be permitted to deny, on trial, the execution of any instrument in writing, whether sealed or not, upon which any action may have been brought, * * * unless the person so denying the same shall, if defendant, verify his plea by affidavit." This statute was repealed by the Code. The provisions of the Revised Statutes and the provisions of the Code are upon the same subject, and the fact that the wording is different is an intimation that they are to have a *different* and not the *same* construction. *Rich v. Keyser*, 54 Pa. St. 86-89. From an examination of this statute, it seems to us apparent that the only reason for placing the word "genuineness" in the Code provision was to extend the application of the statute to a class of cases not included within the old statute; that it should cover more ground than the old one did. For the purposes of this case it is not necessary to determine to what extent the application of the new statute to cases not within the provisions of the former statute was enlarged. The fact that the new statute has an enlarged application must, in case there is a conflict in the decisions of the courts upon the construction of similar statutes, lead us to accept the construction giving to the statute the most extended application, if such construction is not clearly beyond the meaning of the statute.

It is not necessary to review the decisions which give to the statute the most limited application, but a review of the decisions which give the statute a more enlarged application may assist us in arriving at a correct conclusion in our application of the statute to this case; and such review will, as we think, show conclusively that the statute is not restricted in its application to a denial which goes only to the proper form of the execution of the instrument, and to its genuineness, as the same may appear to be genuine or otherwise, upon the face of such instrument. In *Hunt v. Weir*, 29 Ill. 83, in an action of *assumpsit* upon a promissory note, the defendants pleaded the general issue, and gave notice that they would prove facts tending to show the non-delivery of the note by them. Held, that the notice went to the execution of the note, and that the evidence of the facts could not be given without plea verified. This decision makes a delivery an essential part of the execution, and this is the question decided; but the opinion seems to go further, and in-

dictate that the denial should go to something more than a denial of the signatures and delivery. BREESE, J., speaking of the notice attached to the plea, says that by it "they call in question the execution of the note, as a note binding on them, and, as strong as language can do it, deny its execution as their note." In *Dewey v. Warriner*, 71 Ill. 198, in an action upon a bill of exchange, the only plea filed by the defendant was the general issue, not sworn to, with notice in writing of special matters relied upon as a defense. Upon the trial the court refused instructions based upon the hypothesis that there was evidence before the jury that the draft had been altered, and hence was not the draft of defendant, and that an issue of that character had been formed, and was for trial by the jury. The court, following *Hunt v. Weir*, *supra*, say: "Had the defendant desired to present to the jury the question of the alteration of the draft by evidence and instructions, he should have filed the proper plea sworn to. That issue did not and could not arise on a plea of general issue, with notice of special matters in writing." In that case the special matter in the notice, relied on as a defense, consisted of facts which would show that the draft was not binding on the defendant; that it was not his genuine draft; not that he did not sign and deliver it, but that it was of no validity as against him. In *McWhorter v. Lewis*, 4 Ala. 198, under a special plea the defendant offered to prove that a note signed "ALVIN A. MCWHORTER, President W. & Coosa R. R. Company," was given by him to the plaintiff, and by the plaintiff accepted as the note of the company. Held, that the plea setting up the facts attempted to be proved must be verified in order to render the proof admissible. Upon the face of this note it was the note of the defendant. It was signed by him and delivered by him. The plea raised the question that the note was not his genuine note, because it was not taken or accepted by the plaintiff as the note of defendant, but as the note of the company. In *Bryan v. Wilson*, 27 Ala. 208-215, it was held that "pleas which amount to nothing more than a denial of an execution of the note sued on, in such a manner as to be binding on the defendant, are bad unless they are verified by the affidavit required by the statute." This decision was not based upon the form or manner of execution. In *Fowler v. Bender*, 18 Ark. 262, it was held that a special plea of *non est factum* must be verified by the affidavit of the party pleading. In *Archer v. Ward*, 9 Grat. 622-631, it was held that the genuineness of a note depended, "not only upon its due execution, but also upon its having remained unaltered (in any material particular, at least) after its execution." This was held in the construction of a statute providing that, in an action upon the indorsement of a promissory note, such indorsement, with the name thereto subscribed, shall be deemed and taken to be genuine, and the name to have been subscribed by the person charged therewith, without proof of the handwriting, unless the defendant shall file with his plea an affidavit that the said indorsement was not made by the person charged therewith.

In this state, in the case of *City of Central v. Brown*, 2 Colo. 703, an action was brought upon certain warrants issued to the plaintiff by persons acting as mayor and clerk of the city. The execution of the warrants was denied by plea verified by affidavits. Held, that the plea was sufficient to put in issue, not only the signatures of the officers, but their authority to issue such paper on behalf of the city. In *City of Central v. Wilcozen*, 3 Colo. 566-569, the holding in *City of Central v. Brown* was approved and followed; the court, in commenting upon the statute requiring a verified plea, saying: "In terms it requires a defendant, if he would deny the execution of the instrument, to file a verified plea for that purpose. Such plea would be a demand that the plaintiff should prove, not only the signatures of the officers who issued the warrants in behalf of the city, but also that they had authority to issue them." We think these cases show that it has been recognized in this state that the old statute covered something more than the mere formal execution of the in-

strument. It seems to us that the cases reviewed all point to the same construction of the statute as that given by the court in *Bryan v. Wilson*, *supra*, and that it is clear, upon principle and authority, that a defense which amounts to nothing more than a denial of the execution of the instrument sued on, *in such a manner as to be binding on the defendants*, must be verified, to authorize the admission of evidence to support it.

Our Code provision is almost a literal copy of the California Code provision, and this statute was construed in *Horn v. Water Co.*, 13 Cal. 62-69, where it was held that a general denial without verification admitted the genuineness and due execution of the note sued on. In *Sloan v. Diggins*, 49 Cal. 38-40, in construing this statute it was said: "An instrument is genuine which is in fact what it purports to be." This seems to be a self-evident proposition. The note in suit purports on its face to be a valid obligation on the part of the defendant for the payment of the sum therein named. To question that it is a binding obligation on the defendant is to question its genuineness; if it was not executed in such a manner as to be binding on the defendant, it is not his genuine note. If the note was signed by the defendant under such duress as is alleged in the answer herein, as between him and the payee, it has no more validity than a note with his name forged to it. In *Daniel*, Neg. Inst. § 857, the learned author says: "Any contract entered into under duress lacks the first essential of validity,—the consent of the contractor,—and bills and notes form no exception to the rule." In 1 Pars. Cont. 392, the same principle is stated.

The duress here spoken of is such duress as renders the contract executed under it of no binding force on the party subjected to it; and, if he is not bound by the terms of the instrument so executed, it is not a genuine instrument as to him. The duress set up in the answer as a defense in this case was such duress as would render a note executed under it of no binding force in a suit thereon by the payee against the maker, and the defense of such duress directly questioned the genuineness of the note, and, not being verified, the court properly rejected proof offered in support of it. The answer setting up duress of the defendant as a defense in this case should have been verified to authorize the introduction of evidence in support of it, for the further reason that this defense, as set up, amounted to a denial of the execution and delivery of the note. The delivery of the note was not the voluntary act of the defendant. He was coerced by threats, and, in the hands of the payee, such a note has no more validity than one obtained against the will of the maker, by physical force. It is not necessary for the defendant to deny that he placed the note in the possession of the payee in order to deny that he delivered it to him. In *Anderson v. Walter*, 34 Mich. 113, 115, MARSTON, J., in the opinion, says: "A defendant cannot be required to swear that the signature appearing upon an instrument is not his genuine signature, in order to deny the execution. The signature may be genuine, and yet the instrument a forgery." Applying the doctrine here announced to the case under consideration, it shows beyond question that the defense of duress set up in the answer was a denial of the execution and delivery of the note.

The construction we have given to this statute is the only one that can be given to it, and give to all the words therein their usual and ordinary meaning. This construction works no hardship to any party. No party should be permitted to lightly question the verity of an instrument to which the party to be charged has affixed his signature; and to require the party making the defense that such instrument is not binding on him to verify it with his affidavit, is not unreasonable. It is proper to require the verification of such a defense, to advise the plaintiff that it is made in good faith, that he may prepare to meet it, and that the plaintiff may not be required to prepare to meet such defense when the party making it will not on his oath say that it is true.

It will be observed that we hold the statute to require verification only when

the plea challenges the *manner* of the *execution* of the instrument. If the signature was forged, if the instrument was never delivered, or if the signature and delivery were compelled, against defendant's objection, by threats and duress, the defense is within the statute, and must be sworn to. Not so with the defenses of fraud, want of consideration, and kindred defenses, connected with the inducement acting upon defendant's mind in *voluntarily* executing the instrument, even though thereby the instrument might be rendered of no binding force as between him and the original payee. The statute under consideration is a part of the chapter on pleading. It prescribes a rule of pleading, and perhaps of evidence also, in plaintiffs' interest. The effect of the statute is not only to obviate the necessity of making formal proof of the execution of written instruments as formerly practiced at common law, but to prevent the defendant from relying upon, and supporting by proof, certain affirmative defenses, unless the same be sworn to.

The allegations of want of consideration and settlement, in the amended answer, must be considered together. The allegation relating to the settlement may be considered as a statement of facts to be relied on to sustain the allegation of no consideration. This statement of facts shows that the presumed consideration grew out of dealings between the defendant and the payee of the note, in connection with the Raven mining claim. It follows, therefore, that the question of want of consideration is wholly dependent upon the allegation of settlement, and this allegation is insufficient to raise the question of want of consideration, in that it does not appear from such allegation but that upon such settlement it was found that defendant was indebted to the payee of the note in a sum equal to the amount of the note in question, and that such indebtedness was due and owing at the time the note was given. The allegation is also defective for the further reason that it fails to aver knowledge by the assignee of the alleged want of consideration.

The allegation that the note was not assigned to plaintiff for value before maturity admits the transfer; and, if unconnected with the defense of duress and want of consideration, the allegation that the transfer was without value is immaterial. This allegation is also fatally defective under the well-known rule of pleading relating to negatives pregnant.

From this examination of the amended answer we come to the conclusion that no issue was raised by it, and therefore that the rejection of proof to support the allegations contained therein was not error. It is unnecessary for us, in the determination of the questions raised upon this appeal, to consider the question whether or not the rights of an innocent holder for value of negotiable paper would be affected by duress of the maker of the character charged in the answer, and upon that question no opinion is expressed.

The eighth assignment of error; "that the court erred in not polling the jury upon the verdict," is not well taken. There is nothing in the record proper showing that the jury were not called when they were brought into court by the officer having them in charge. There is a presumption in favor of the regularity of all proceedings in courts of general and ordinary jurisdiction; and, nothing appearing in the record to the contrary, it must be presumed that the officer in charge of the jury did his duty.

The judgment should be affirmed.

We concur: STALLCUP, C.; MACON, C.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment of the county court is affirmed.

ELBERT, J., (*dissenting*.) I cannot agree to the approval of the opinion of Mr. Commissioner RISING in this case. I dissent from the proposition that an answer of duress, to be available, must be sworn to.

The question of the verification of pleadings, *as such*, is dealt with in a preceding paragraph of the section construed, and it is there provided generally that when the complaint is verified the answer must also be verified. Beyond this the Code lays down no rule respecting the verification of pleadings *as such*. In practice, proof of the due execution of contracts sued upon was often attended with difficulty, and upon the trial of a cause imposed upon litigants a hardship. Hence the enactment in most of the states of statutes similar to our own, providing that the due execution of contracts sued upon, if not denied under oath, should be *deemed admitted*. They prescribe a rule of pleading, but their object is to regulate the practice *as to a matter of evidence*. An answer of duress confesses and avoids; and that it does not come within the reason of the statute is plain, for, whether sworn to or not, it *admits in full* exactly what the statute says shall be *deemed admitted*. It admits the actual signing and delivering of the contract sued upon. It admits also the genuineness of the instrument; that is to say, that it is the *very instrument* which was signed and delivered. No burden of proof is laid, as in other cases under the statute, on the shoulders of the plaintiff, unless the plaintiff is to be held to prove a negative, and this is not claimed in the opinion of the commissioner.

Again, it is plain from the language of the statute that it contemplates an answer which traverses. An answer which confesses and avoids is, *ex vi termini*, without the statute; it denies nothing, but alleges, affirmatively, new matter in avoidance. The answer which the statute provides for is practically the common-law plea of *non est factum*, allowed to be interposed to instruments sued upon, whether under seal or not. This plea, at common law, operated as a denial of the execution of the instrument *in point of fact only*. Chit. Pl. 511; Gould, Pl. 300, 301. I see no reason for saying that it presents any *other* or *broadier* issue under the statute because verified, or because extended to instruments not under seal. The effect, however, of the commissioner's opinion is to say that the verified answer provided for by the statute does present a *broadier* issue than that presented by the plea of *non est factum* at common law; that such an answer puts in issue not only the *formal* execution and delivery of the instrument sued upon, but also its *voluntary* execution and delivery. If this be true, then it logically and inevitably follows that the defense of duress need not be pleaded specially, but may be shown under a verified answer, which, without more, denies in the language of the statute "the genuineness and due execution" of the instrument upon which judgment is sought to be obtained. At common law the defense of duress could not be given under the general issue, *non est factum*, because such a defense was inconsistent with the issue. In such case it was the defendant's *act*, notwithstanding it was not his *voluntary act*. Hence it was necessary to plead the defense of duress specially. Gould, Pl. 300, 301. Under our statute, as construed by the commissioner, this objection no longer obtains. The defense of duress is not only entirely consistent with the issue made by the verified answer, denying the genuineness and due execution of the instrument, but is part and parcel of the issue so made, and can be shown under it. The corollary is as new as the parent proposition. Another result is that the defense of duress in our practice stands solitary and alone as the one and only affirmative defense, which, to be made available, must be sworn to. The object of interpretation is to arrive at the truth. In this case, by an ingenious and more or less plausible process of reasoning, a legislative intention has been discovered which I think in fact had no existence. I think the court below erred in refusing to allow the defendant to prove the duress alleged in his answer, and that the judgment should be reversed.

(10 Colo. 449)

SCHLUTER and another v. JACOBS.

(*Supreme Court of Colorado.* November 18, 1887.)

1. ATTACHMENT—RIGHTS OF INTERVENING CLAIMANTS—EVIDENCE OF CONVERSION.

The return of the officer levying an attachment and execution showing that he took possession of certain chattels under the writ, and had them sold before the trial of an action to determine the title, is sufficient evidence to sustain a verdict for conversion of the property the title to which was shown to be in complainant.

2. SAME—SUMMARY PROCEEDINGS TO TRY TITLE—PRACTICE.

Gen. St. Colo. § 2011, provides for summary proceedings to try the right of property, and, if found to be in claimant, for the assessment of damages by the court or jury, and for costs. *Held* that, having found the property to be in claimant, the court is authorized to receive evidence as to the value of the property taken, although no formal issue of value is raised by the pleadings.

Commissioners' decision. Appeal from Gunnison county court.

Action for conversion, brought by Mary E. Jacobs against Schluter & Spengel. The facts appear in the opinion.

Goudy & Twitchell, for appellant.

RISING, C. On the twenty-fourth day of January, 1884, Schluter & Spengel brought an action in justice's court against H. H. Jacobs, in which action a writ of attachment was issued, and levied upon certain personal property. On the fifth day of January, 1884, the appellee, proceeding under the provisions of section 2011, Gen. St., for the trial of right to property, filed her affidavit with the justice before whom said action was pending, as claimant of two mares and one colt taken under said writ of attachment as the property of said H. H. Jacobs. Issue was made under the provisions of said section, and trial had before the justice, who found that the property was not the property of said Mary E. Jacobs, and entered judgment against her, from which judgment she appealed to the county court. Upon the trial in the county court, the appellee recovered a judgment against the appellants for \$200 as her damages. The return of the officer who served the writ of attachment shows that, on the twenty-fourth day of January, 1884, he levied upon and took into his possession, under said writ, the property described in the affidavit of claimant. It is shown by the evidence that, at the time the writ of attachment was levied on said property, the officer making such levy had in his hands for service an execution in favor of John Bolman against the property of said H. H. Jacobs; that the levy of the execution on said property was made at the same time that the levy of the attachment was made, but that possession of the property was taken only once; that, at the time of the trial of this action in the county court, the officer making said levies had sold the property claimed by Mary E. Jacobs, under said execution levy, for the sum of \$212; that sum being sufficient to satisfy said execution, and leave in the hands of the officer the sum of \$50.25.

The third, fourth, and fifth assignments of error present all the questions argued by counsel.

Under the third assignment, the question of the sufficiency of the evidence to warrant a finding in favor of the claimant upon the question of the right of property is raised. I think the finding as to the right of property is sustained by the evidence.

The fourth and fifth assignments raise the question whether the provisions of section 2011, Gen. St., authorized the court, under the circumstances of this case, to receive and consider evidence of the value of the property claimed, for the purpose of assessing the damages sustained by the claimant. The termination of this question depends upon the construction of said section. That portion of section 2011 providing for the assessment of damages is as follows: "In all cases where, upon trial of the issues thus made, the right of property is found to be in the claimant, the damages suffered by the claimant

by reason of the levy shall be assessed by the court or jury, and the claimant shall recover his costs of the attaching creditor."

It is claimed by counsel for appellants that the value of the property cannot be considered as an item of damages suffered by reason of the levy, under any circumstances, in proceedings under said section. Said section provides for summary proceedings to try the right of property; and at the same time, if such right is found to be in the claimant, to assess his damages for the wrongful seizure and detention of such property. I think it was intended by such summary proceedings to settle, as between the parties thereto, all questions relating to such right and damages, and to give to the claimant all the relief he would be entitled to under any form of action. This view seems to be sustained by the case of *Turner v. Lytle*, 59 Md. 199. The statutes of the state of Maryland, upon the same subject, in their general features, are more like our statute than those of any other state, that I have examined; and, so far as the two statutes affect the question under consideration, I think they are substantially the same. That portion of the Maryland statute relating to the assessment of damages is as follows: "If the plaintiff fails to recover judgment of condemnation for the property so levied upon, the petitioner shall be awarded his costs, and shall recover damages for the wrong and injury done him by reason of the illegal seizure and detention of his property." The plaintiff and defendant in the attachment suit are brought into court to try the right of property claimed by the petition of the claimant. There is a provision in the Maryland statute under which the claimant can give a bond, and have the property discharged from the levy.

In the case of *Turner v. Lytle*, the claimant filed his petition claiming the property seized under the attachment, gave a bond as required by the statute, and the property seized was discharged. The plaintiff in the attachment suit appeared and contested the claimant's right to the property. Upon the trial of this issue, the claimant offered evidence to prove that he was damaged by reason of the seizure and attachment, and the extent of said damages, which evidence was admitted by the court, against the objection of the plaintiff. The claimant obtained a judgment for the property, and for \$100 damages. Upon appeal, the appellant, the plaintiff in the attachment suit, contended that no damages were claimed in the petition, and, there being no issue in that regard, no evidence could be admitted of or recovery had for damages. In the opinion, construing the statute under which the proceedings were had, the court say: "The main object of the statute was to establish a form of proceeding which would give full redress in one proceeding for the wrongful taking by attachment or by execution of another's property. The language of the statute very clearly, we think, indicates that both the right to the property, and damages for its seizure and detention, is to be settled in this summary proceeding, if it is resorted to. We do not mean to decide that the claimant is compelled, if he knows of the levy and seizure, to resort to this method of asserting his rights, to secure the property, and recover damages. It is not necessary for us to decide that question; it is not before us. But what we do decide is that, if resort be had to this method, both the right of property and the damages are then and there to be settled. That all questions as to property may be definitely decided, both the plaintiff in the judgment and the defendant in the judgment are to be notified of the claim, and summoned, that the claimant's right may be contested by either; and it is expressly stated in the latter clause of the second section that the claimant, if he succeeds, shall not only have his costs, but damages he has suffered. The language is: 'The petitioner shall be awarded his costs, and shall recover damage for the wrong and injury done him,' etc. The fact that the petition in terms does not claim damages makes no difference. Regarded as a question of pleading merely, the petition is sufficient by complying with the requirement of the statute, which substitutes the statement of the petitioner's right,

as here presented, for the more formal pleading of another form of action. Substantial conformity to the requirement of the special proceeding created is all that can be required. The law itself affects the parties, plaintiff and defendant, in the attachment, with notice of what may be tried, and takes the place of the more formal notice ordinarily found in the pleadings."

The statute here construed is practically the same as our statute, and it seems to me that the construction given it in the case cited is the proper construction to be given to our statute. Under this view of the statute, there is no error in the judgment, unless the damages assessed are greater than the actual damages suffered by the claimant, by reason of the levy. The amount of the damage sustained must be ascertained from the evidence.

The evidence shows that the property of the appellee was levied upon, and taken into the possession of the officer, under a writ of attachment issued at the suit of appellants. It is well settled that the taking, by attachment, of personalty, not the property of the defendant in the attachment, is a tortious taking, and constitutes a conversion of such property. *Drake, Attachm.* § 196; *Meade v. Smith*, 16 Conn. 346-366; *Woodbury v. Long*, 8 Pick. 543; *State v. Doan*, 39 Mo. 44-50. The provisions of section 2011 make the attaching creditor liable for such conversion. When the claimant succeeds, he shall recover his costs of the attaching creditor. Costs and damages must be awarded against the same party, and at the same time. But, if the statute did not so provide, still the attaching creditor must, in this case, be held liable for the acts of the officer, by reason of his ratification of the taking by the officer, by contesting the claim of the defendant in error. *Perrin v. Clafin*, 11 Mo. 13. The measure of damages for a conversion is generally the value of the property converted, with interest thereon from the time of the conversion. *Field, Dam.* § 792. The evidence in the case would have warranted a judgment for a larger sum. At the time the claimant instituted proceedings under section 2011 she was entitled to recover, from the plaintiffs in the attachment suit, the value of her property, upon establishing her right to such property. The evidence shows, not only that the property was not returned to the claimant, but that it had been sold under the execution levy, and so placed beyond recovery by the claimant or the attaching creditors. The conversion of the property was consummated by the taking. The return of the officer on the writ of attachment shows the taking. The plaintiffs in the attachment suit do not deny the taking, but contest with the claimant their right to the property under such taking. No act of any wrong-doer can relieve the appellants from their liability for wrong done the claimant in taking her property. *Farrar v. Talley*, 4 S. W. Rep. 558. Under the circumstances of this case, the execution and attaching creditors are to be treated as joint trespassers, and the interpleading claimant was at liberty to look to either or both for indemnity. *Stone v. Dickinson*, 5 Allen, 29.

The judgment should be affirmed.

We concur: MACON, C.; STALLCUP, C.

BY THE COURT. For the reasons assigned in the foregoing opinion the judgment of the county court is affirmed.

(10 Colo. 489)

LEACH and another v. LOTHIAN.

(Supreme Court of Colorado. November 18, 1887.)

APPEAL—PRACTICE—RECORD—GROUNDS OF ERRORS.

When the record shows no foundation for the errors assigned, they will be disregarded on appeal.

Commissioners' decision. Appeal from superior court of Denver.

This was an action brought by Thomas Lothian against Samuel Leach and Charles Ross. The judgment below was in the plaintiff's favor, and the defendants appeal.

W. J. Harvey, for appellants. J. L. Jerome and C. H. Toll, for appellee.

STALLCUP, C. The appellants were defendants below. The errors assigned are as follows: "(1) The court erred in not passing upon defendants' motion for a new trial; (2) the court erred in sustaining plaintiff's objection to the several offers of proof by defendants of failure of consideration of the note in suit; (3) the court erred in giving judgment for the plaintiff upon the whole record." The record shows no error in the proceedings and judgment of the court below. There were no exceptions taken there, and the evidence is not shown here. There is no foundation for the said supposed errors assigned, as the matters upon which they are supposed to rest are not at all shown by the record here. The judgment should be affirmed.

We concur: RISING, C.; MACON, C.

BY THE COURT. For the reasons assigned in the foregoing opinion the judgment of the superior court is affirmed.

(10 Colo. 455)

BUCKINGHAM v. HARRIS.

(Supreme Court of Colorado. November 18, 1887.)

1. FACTORS AND BROKERS—REAL-ESTATE BROKERS—RIGHT TO COMMISSIONS.

A real-estate broker is entitled to his commission when he has procured a party ready to purchase on the owner's terms, though he has not made a binding contract for the sale of the real estate with such person.

2. SAME—REFUSAL OF OWNER TO ENTER INTO CONTRACT.

In an action by a real-estate broker for his commission, it was shown that he procured a purchaser who was ready and willing to pay the price set upon the land in the broker's hands for sale by the owner thereof, and that the only reason the owner would not sell was because the commission asked by the broker, being the same provided by his contract with the owner, was more than the owner wished to pay, and that the owner had concluded to hold for a higher price. *Held*, that the broker had performed his part, and was entitled to his commission.

3. SAME—EVIDENCE—VALUE OF SERVICES.

It is not error to admit evidence of the value of services performed by a real-estate broker in corroboration of his statement as to the express agreement for such services, and to support an allegation of the express agreement contained in the complaint.

4. SAME—INSTRUCTIONS—BURDEN OF PROOF.

An instruction that conduct which imputes bad faith upon the part of an agent to sell real estate must be shown by the party claiming it, the burden resting upon him to prove such conduct, is not error.

5. TRIAL—PRODUCTION OF DOCUMENTARY EVIDENCE.

A ruling denying an order to produce letters concerning immaterial facts shown in evidence is not error.

6. SAME—ORDER OF INTRODUCTION OF TESTIMONY—REBUTTAL.

The admission in rebuttal of evidence which has been shown in chief, or which, more properly, should have been introduced in chief, is not error, as it is a matter within the discretion of the court.

7. APPEAL—REVIEW—WEIGHT AND SUFFICIENCY OF EVIDENCE.

Where the evidence tends strongly to support the verdict, the latter will not be set aside for insufficiency of the former.

Commissioners' decision. Appeal from district court, Larimer county.

An action brought by Jesse Harris to recover his commission as a real-estate broker, claimed to have been earned by finding a purchaser for land belonging to Charles G. Buckingham, defendant.

Dunning & Haynes, for appellant. *Rhodes & Love* and *E. A. Ballard*, for appellee.

STALLCUP, C. Appellee was plaintiff below, and recovered judgment. The questions presented for consideration by the 20 errors assigned for the reversal thereof may be arranged as follows: *First*. Was the evidence sufficient to warrant the verdict and judgment? *Second*. Was there error in the instructions to the jury given by the court, or in the refusal to give those requested by appellant? *Third*. Did the court err to the prejudice of the appellant in the rulings on the introduction of evidence at the trial?

First, to the evidence. As to the employment of appellee to sell this 480-acre tract of land, the appellee's evidence is direct to that effect. It is corroborated by the testimony of the witness Norvell, and the acts of appellee in working up a purchaser for the same, and in a measure is conceded by appellant. So, from the whole evidence, the jury was warranted in finding that the appellant, desiring to sell his land, had employed the appellee, a real-estate broker, to procure him a purchaser at a certain price per acre, on terms stated, for which service he had agreed to pay him a certain commission.

As to appellee's performance of his part of the undertaking, it is shown by the evidence that appellee did procure a purchaser in Mr. Rhodes, who was willing, anxious, and able to take the land on the terms given by the appellant, viz., \$40 per acre, subject to the lease upon it,—one-third cash, balance

in one and two years, secured, etc. The evidence discloses but one reason for not consummating the sale; that was, the refusal on the part of appellant to complete the sale on his part. The only reasons given for this refusal were—*First*, that appellee would not accept for his commission $2\frac{1}{2}$ per cent. on the amount of the sale; and, *second*, that appellant had concluded to hold the land for a higher price. As to the commission or compensation appellee was to receive for his services in procuring a purchaser, the evidence for appellee seems conclusive that it was to be 5 per cent. That is the amount stated by appellee to appellant at the time of the employment, and then tacitly acquiesced in by appellant, and afterwards, during negotiations for sale, was spoken of by appellant as the understood rate; so that the contract of employment, and the performance thereof by appellee, are shown by the evidence for appellee. There was some conflict in the evidence as between appellant and appellee, and his witnesses; but the jury's verdict settled that in favor of appellee, and we accordingly accept the facts. From these conclusions, it follows that appellee performed his part of the undertaking, and is entitled to his commission, the same as if the sale had been completed. In the case of *Doty v. Miller*, 43 Barb. 529, the law is stated that a broker or agent who undertakes to sell property for another for a certain commission, when he finds a purchaser willing to purchase at the price, has earned and can recover his commission, though the sale was never completed, if the failure to complete the same was in consequence of a defect of title, and without any fault of the broker or agent. In the case of *Delaplain v. Turnley*, 44 Wis. 31, the law is stated that if a broker, employed to sell property at a price satisfactory to his principal, produces a party ready to make the purchase at a satisfactory price, or to make an exchange satisfactory to the principal, the latter cannot relieve himself from liability to the broker for commission by a capricious refusal to consummate the sale. In the case of *Moses v. Bierling*, 31 N. Y. 462, the law is stated that, until the broker has faithfully discharged the obligation assumed in the contract, he is not entitled to the agreed commission; that a broker employed to make a sale is entitled to his commission when he produces a party ready to make the purchase, and the principal cannot relieve himself from liability by a capricious refusal to consummate the sale, or by a voluntary act of his own disabling him from the performance. In the case of *Hart v. Hoffman*, 44 How. Pr. 168, the law is stated that where a broker, employed to sell real estate, procures a party willing to purchase on the owner's terms, and the owner refuses to convey to the party so procured, the law will presume, in the absence of evidence to the contrary, that the person so procured was solvent, and pecuniarily able to perform the contract he offered to make.

As to the instructions given and denied. The following were the instructions given at the request of appellee, and excepted to by appellant: "*First*. If the principal rejects the purchaser, and the broker claims his commission, he (the broker) must show that the person furnished by him (the broker) to make the purchase was willing to accept the offer precisely as made by the principal, and that he was an eligible purchaser, and such a one as the principal was bound in good faith, as between himself and the broker, to accept. *Second*. When an agent or broker, in good faith, has produced a purchaser who is acceptable to the owner, and able and willing to purchase on terms satisfactory to the owner, or as offered by the owner, he has performed his duty; and if, from any failure of the owner to enter into a binding contract, the sale is not completed, the agent may recover his commission." There is no error in these instructions, as they are in accord with the law applicable to the case, as shown by the cases herein cited, and *Finnerty v. Fritz*, 5 Colo. 174; *Smith v. Fairchild*, 7 Colo. 510, 4 Pac. Rep. 757.

The following instruction was asked on the part of appellant: "If the jury believe from the evidence that the plaintiff was authorized by the defendant

to negotiate a sale of the premises in question upon certain terms, and the plaintiff, either knowing or having reason to believe that he could obtain a purchaser at those terms, sought to induce the defendant to accept a less price than that defendant had so proposed, the plaintiff by such conduct forfeits the right to any commission,"—which the court gave, with the following modification: "But the burden of proof in this matter of defense is upon the defendant,"—to which modification the appellant excepted. We see no error in this modification. The charge imputes bad faith in some way, and thereby an avoidance of liability. Bad faith and fraud are not presumed. To defeat a liability thereby, they must be shown, and by him who so seeks to defeat the liability.

The following instruction was requested by appellant: "The jury are instructed that a broker is not entitled to a commission until he has completed a valid contract of sale, binding upon both the vendor and vendee; and if you believe, from the evidence, that no contract in writing or otherwise had been made, whereby the defendant could have enforced the collection of the money from the alleged vendee, you should find for the defendant,"—which instruction was refused; to which refusal appellant excepted, and it is strongly urged here that, by the law, appellant was entitled to this instruction. It is true that there are a few authorities, sustaining the view stated in the instruction, (*Richards v. Jackson*, 31 Md. 250; *De Santos v. Taney*, 13 La. Ann. 151;) but such view is unreasonable, for, if such were the law, a broker could not consummate a sale, or make a binding contract of sale, so as to be entitled to commission, without the owner had vested him with power over the title. In the general employment of a broker to sell real estate, no such power is given: and it is not necessary, and should not be necessary, to give it, as it would open a channel for confusion and fraud. The owner does not wish to part with the control of his property; simply to obtain the aid of a broker to sell it. He employs a broker to procure a purchaser, retaining in himself the power to make binding contracts and conveyances. The terms of sale are sufficient for the broker. So, in the general employment of a broker, when he procures a purchaser able and willing to buy at the terms stated by the owner, he has performed his part; he has done all he can do, and all he was employed to do. The owner may decline to convey or complete the sale. He may so decline for the reason that he may get more by holding, and raising his price, or for any other reason; but this does not and should not relieve him from his liability to pay his broker for his services in procuring a person able, ready, and willing to purchase at the terms given, the same as if he had completed the sale. Such is the character of the general employment of a broker in the sale of real estate, and it seems reasonable and just, and is supported by the weight of authority upon the subject, as may be seen by the cases first above cited, as well as the following: *Alexander v. Breeden*, 14 B. Mon. 125; *Martin v. Silliman*, 53 N. Y. 615; *Neilson v. Lee*, 60 Cal. 555; *McGarock v. Woodlief*, 20 How. 221; *Lloyd v. Matthews*, 51 N. Y. 124; *Fisk v. Henarie*, 9 Pac. Rep. 322; *Bell v. Kaiser*, 50 Mo. 150; *Hamlin v. Schulte*, 27 N. W. Rep. 301; *Goss v. Brown*, 31 Minn. 484, 18 N. W. Rep. 290; *Mooney v. Elder*, 56 N. Y. 238; *Coleman v. Meade*, 13 Bush, 358.

As to the rulings of the court at the trial. It is assigned and argued that the court erred in admitting the evidence of the appellee and the witness Norvell as to the value of services in the sale of real estate, and the customary charges and commissions upon such sales. It is alleged in the complaint that, by the terms of the employment, appellant agreed to pay 5 per cent. This evidence showed that the customary rate was 5 per cent. The admission of evidence so variant from the allegations of the complaint is urged here as cause for reversal of the judgment. In view of all the evidence, together with the character of the contest, we do not think this evidence was of the character to surprise, prejudice, or mislead appellant. In the case of *Sussdorff*

v. *Schmidt*, 55 N. Y. 320, on this point, the law is stated thus: "Under a complaint to recover an alleged agreed compensation for services, a recovery upon proof of and for the value of the services is sustainable. At most, it is but a variance between the pleading and proof, which may be disregarded, unless it appears that it misled the defendant." And section 81 of our Code provides that such error shall be disregarded: "If the opposite party is by such variance surprised or misled, the court may on terms allow an amendment of the pleading to conform to such proof." No surprise was even claimed here; so it is apparent that such error is insufficient to warrant a reversal of the judgment.

It is assigned and argued that the court erred in admitting the testimony of the witness Rhodes about the letters from Doty, and in refusing a rule on witness Rhodes to produce the letters. The testimony in this regard was as follows: (By appellant's counsel.) "*Question.* Mr. Rhodes, were you acting for yourself, on your own behalf, in making this purchase; were you acting for yourself or somebody else? *Answer.* I was acting for myself in a certain sense. I can explain that, if you wish it explained. *Q.* Well, sir, I would like to have it explained. *A.* Well, we bought some lands here, Mr. Doty and myself, west of town, and were willing to buy some more if we thought we could get some that would pay. I had an arrangement with Mr. Doty by which I could get the money by drawing on him in New York to pay for land that I would see fit to buy, and thought was reasonable, leaving it to my judgment to say whether it should be purchased or not. *Q.* Was this arrangement in writing, Mr. Rhodes? *A.* I think I had some letters from Mr. Doty to that effect, and Mr. Doty was here himself. *Q.* How long before this transaction was it that Mr. Doty was here? *A.* Doty had been here, I think, through the summer. I don't know how long, exactly. I was corresponding with him all the time. *Q.* You had a talk with him about this transaction? *A.* This particular piece of land? *Q.* Yes, sir. *A.* No, I think not. *Q.* You were corresponding with Mr. Doty? *A.* Yes. *Q.* After the time he went away, up to the time of this transaction? *A.* Yes, off and on. *Q.* About making these investments? *A.* Not so much about that as if I was to find any property that was cheap, that we thought some money could be made out of, he would furnish the money to buy it. That was a personal matter between Mr. Doty and myself." Motion was here made by appellant's counsel that the testimony about what the letters contained be struck out. Denied by the court. "*Question.* Have you those letters, Mr. Rhodes? *Answer.* I have a great many letters from Mr. Doty. *Q.* On a former trial of this case, do you remember of producing a certain letter which you claimed was your authority from Mr. Doty? *A.* No, sir; I don't think I presented a letter as my authority for buying this place. I presented a letter in which Mr. Doty said something about drawing on him if I wanted money. It had nothing to do with the purchase of this place. *Q.* You never had any letter relating to this place? *A.* No; I never corresponded with him in relation to this place. My arrangement with Mr. Doty was that I should get the money on my judgment if I wanted to buy real estate. *Q.* That letter which you have referred to was in relation to this arrangement that you now speak of, wasn't it, Mr. Rhodes? *A.* No; I don't think it was. *Q.* Have you that letter? *A.* I don't know whether I have or not." Upon which a motion was made by appellant's counsel for a rule to produce the letters, and denied. There was no error in these rulings, as it appears from the evidence in the case that Rhodes had arranged for the down payment, and was going to take title to himself, so that his relations with Doty were immaterial to the parties to this case.

In rebuttal, over the objections of appellant, certain questions were answered by appellee Harris as follows: "*Question.* Did you state to Buckingham at the time of this first conversation with him that you could not sell the land subject to the lease? *Answer.* No, sir; I think not. I said to him that it

would be difficult to sell it subject to the lease. Q. When did Rhodes first offer you \$40 an acre? A. After we arrived at Boulder, at Brainard's Hotel. Q. The defendant testified that you offered him \$37.50 per acre instead of \$40? A. I offered him \$40, and he remarked that \$960 was a good deal of commission, and he wanted me to accept 2½ per cent. I refused to do so. Q. Did you have any conversation with him at the house about his taking \$37.50 per acre? A. There was nothing; I said nothing in regard to \$37.50 at his house." It is urged here for appellant, that these questions and answers were not admissible in rebuttal, for the reason that they were of the premises previously gone over in chief, and that the court erred in admitting the same. It will be seen that they were in the main responsive to, and contradictory of, independent and affirmative statements made by appellant in his testimony of matters not previously disclosed, and impossible of contradiction except in rebuttal. Besides, it is always within the discretion of the court to admit, in rebuttal, evidence which in strictness should have been produced in chief. *Smith v. Mayer*, 3 Colo. 210.

The judgment should be affirmed.

We concur: MACON, C.; RISING, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

(10 Colo. 431)

ATCHISON, T. & S. F. R. CO. v. BETTS.

(*Supreme Court of Colorado*. November 18, 1887.)

1. RAILROAD COMPANIES—STOCK-KILLING CASES—STATUTES—EXTRATERRITORIAL EFFECT.

The Colorado statute relating to the liability of railroads for stock killed, fixes an unqualified liability against the company. *Held*, in an action in Colorado for stock killed in New Mexico, that in the absence of proof of the New Mexico statute the existence of such law in New Mexico will not be presumed.

2. SAME—STOCK RUNNING AT LARGE.

On the trial of an action brought in Colorado, the right having accrued in New Mexico, the court instructed the jury that defendant company was liable for the value of a mule, if killed by its gross negligence, and that it was so liable under common-law principles, without regard to the statutes of New Mexico. There was no evidence as to defendant's gross negligence, but it showed that plaintiff had turned the animal loose in the evening, and found it killed on defendant's track in the morning. *Held*, that the facts shown would not at common law warrant a recovery.¹

Commissioners' decision. Appeal from Las Animas county court.

This was an action brought by appellee, F. G. Betts, against the appellant, the Atchison, Topeka & Santa Fe Railroad Company, before a justice of the peace of Las Animas county, for the value of a mule which had been killed upon the railroad of appellant. From the judgment of the justice an appeal was taken to the county court, and trial was there had *de novo* and to a jury.

All the evidence given at the trial was the testimony of appellee, which was as follows: "I am plaintiff in this cause. In the month of December, A. D. 1882, I owned a mule which was killed by defendant. I lived at said time in the city of Albuquerque, territory of New Mexico. I was using at said time the mule which was killed, with other teams. There was no hay in town. I turned the mule which was killed loose with the other animals which I was using in the town of Albuquerque, and about one-half mile from the depot of defendant, in said town. It was in the evening when the mule was turned loose, and I found it the next day about 11 o'clock, lying upon the track

¹At common law, a railroad corporation was under no obligation to fence its track or provide cattle-guards, where its line traversed improved land. *Railroad Co. v. Walbrink*, (Ark.) 1 S. W. Rep. 545; *Ward v. Railroad Co.*, 4 Fed. Rep. 862.

of defendant, dead. It was lying in the depot yards near the depot of defendant, with its head lying across the rail of one track. I examined the mule, and found that one side of its head was mashed, and its skull broken. I skinned that part of the head which was injured, and found the skull was mashed and broken. The mule was worth two hundred dollars. The tracks made by the mule indicated that it was struck 18 or 20 feet away from where it lay, on another track, by the cars of defendant. Had notice describing the mule, cause of its death, and value made out, sworn by me, and served on the station or depot agent. Had an appraisal made by two persons, who valued the mule at two hundred dollars. The notice and appraisal were sent to Topeka to the claim agent of defendant, and I was not able to get the papers returned to me."

The witness was here asked the following questions by plaintiff's attorney: "How did defendant operate the road at that place with regard to running its trains and switch-engines?" Question objected to by defendant as immaterial, and not showing any connection with the injury to the animal. Objection overruled, and exception by defendant. "Answer. The defendant was in the habit of running its switch-engines rapidly in and about the depot yards." The witness was asked the following question: "What was the custom of the people in and around Albuquerque as to allowing their stock to run at large?" Objected to by defendant as immaterial to the issues of the case. Objections overruled, and the defendant, by its counsel, then and there excepted. "A. It was the custom of Mexicans and Americans to allow their stock to run at large there, and a large number of stock was running loose in the vicinity. Q. State whether the fact that large numbers of stock were running at large was known to the agents and employes of defendant at said time?" Objected to by defendant as immaterial to the issues. Objection overruled, and defendant, by its counsel, then and there excepted. "A. The agents and employes of defendant knew that such was true. Q. State whether the defendant by any of its agents admitted the killing of the mule." Objected to by defendant for the reason that such admissions would not bind defendant, and that no agency was shown. Objection overruled, and defendant, by its counsel, then and there excepted. "A. The agent at that point said if defendant killed the mule it would pay for it." The witness further testified that defendant did not have its yards or tracks in Albuquerque fenced; that defendant used, for a switch-engine, an ordinary engine, and not a double-header. There was a good deal of business done at that point by defendant, and defendant run its switch-engines very rapidly, night and day, both forward and backward. Albuquerque is situated in a stock country, where stock-raising is the principal business.

On cross-examination, witness testified that he lived in the city of Albuquerque, New Mexico, at the time the mule was killed, and about one-half mile from the depot and yards of defendant, and that he turned the mule loose at his place of residence in the evening, and found it dead upon the track of defendant, and in the yards of defendant in said town of Albuquerque. Did not know how the mule was killed, but from the circumstances as stated on direct examination. This was all the evidence offered by either of said parties to said cause.

The second instruction asked by the plaintiff below, and given by the court to the jury, was as follows: "If the defendant railroad company, by gross negligence, killed plaintiff's mule, then the defendant is liable for the damages, and is so liable under common-law principles, without regard to the statutes of New Mexico."

The third and sixth instructions asked by defendant, and refused by the court, were as follows: "(3) If the jury believe, from the evidence, that the plaintiff turned his mule loose in the city of Albuquerque, New Mexico, and allowed it to stray upon the track of the defendant, where it was killed

by defendant, then the plaintiff was guilty of negligence, and cannot recover the value of the mule." "(6) If the jury believe, from the evidence, that the plaintiff allowed the mule, for the value of which this suit is brought, to stray upon the track of defendant, and was there killed by the cars or engines of defendant, then the plaintiff was guilty of negligence, and cannot recover in this action."

The jury returned a verdict for the appellee, plaintiff below, in the sum of \$200, and the appellant, defendant below, moved for a vacation thereof, and for a new trial, for the following reasons: (1) That the verdict in said cause is contrary to the evidence; (2) that said verdict is contrary to the law in said cause; (3) that the court erred in admitting the testimony of plaintiff concerning the manner of running the engines in yards of defendant, over objections of defendant; (4) that the court erred in admitting the testimony of plaintiff with regard to the general custom of allowing stock to run at large in Albuquerque, and that defendant, by its agents, had knowledge of this fact; (5) the court erred in refusing the third and sixth instructions asked by defendant; (6) the court erred in giving the second instruction asked by plaintiff.

The court overruled the motion for a new trial, and gave judgment for appellee, plaintiff below, upon the verdict. The appellant duly excepted, and brings the case here by appeal, and assigns errors as follows: "*First.* The court erred in admitting improper testimony for and on behalf of the plaintiff in this: that it erred in permitting the plaintiff to testify as to the manner of operating defendant's road with regard to running its trains and switch-engines in the depot yard at Albuquerque; also in permitting the plaintiff to testify as to the custom of the people in and around Albuquerque in allowing their stock to run at large, and that this custom was known to the agents of the company; all of which testimony, as shown in folios 17 to 20, was admitted over the objection of the defendant. *Second.* The court erred in instructing the jury, at the instance of the plaintiff, that the defendant company was liable in the premises if the animal in controversy was killed by gross negligence; there being no evidence whatever in the cause to establish gross negligence, or any negligence whatever, on the part of defendant company. *Third.* The court erred in refusing to give to the jury the third and sixth instructions, and each of them, asked by the defendant. *Fourth.* The court erred in overruling the motion for a new trial. *Fifth.* The verdict is against the law and the evidence, wherefore said appellant prays that the said judgment may be reversed and set aside."

C. H. Gast, for appellant. *J. O. Packer*, for appellee.

STALLCUP, C. Were the facts shown sufficient to warrant the judgment for the value of the mule? In this state we have a statute fixing an unqualified liability against a railroad company for stock killed by it in the operation of its railroad business, which is as follows: "That every railroad or railway corporation or company, operating any line of railroad or railway, or any branch thereof, within the limits of this state, which shall damage or kill any horse, mare, gelding, filly, jack, jenny, or mule, or any cow, heifer, bull, ox, steer, or calf, or any other domestic animal, by running any engine or engines, car or cars, over or against any such animal, shall be liable to the owner of such animal for the damages sustained by such owner by reason thereof." It is urged upon the part of the appellee here that our courts will presume that the laws of New Mexico on this subject are the same as our own. To go that far upon presumption would be against reason and the current of authority. Neither can it be said that this statute makes the liability rest upon the negligence of the railroad company, nor upon the assumption that all killing of stock by railroad companies in the operation of their engines and cars upon their tracks is negligent, and that such negligence is shown by proof of the

killing; for there is no such expression in the statute, and such assumption or conclusion therefrom would be against reason, principle, and the adjudications of the courts on the subject of negligence in such cases. The case of *Walsh v. Railroad Co.*, 8 Nev. 111, was a case for the killing of a cow which had strayed on defendant's railroad track, in the western part of the town of Gold Hill, in Storey county, Nevada. In the decision of the case the court say: "But it is not the law that the mere killing of a domestic animal by a railroad train is evidence of negligence. This question has frequently been before the courts, and invariably ruled against the plaintiff, except where the general rule of law is abrogated by positive statute. The fact of killing an animal of value by the company's engines, says Redfield, is not *prima facie* evidence of negligence. 1 Redf. R. R. 465. And it is so ruled in the following cases: *Scott v. Railroad Co.*, 4 Jones, (N. C.) 432; *Railroad Co. v. Means*, 14 Ind. 30; *Railroad Co. v. Reedy*, 17 Ill. 580; *Railroad Co. v. Patchin*, 16 Ill. 198."

It will be seen, by the language used in our statute creating this liability, that it is independent of any question or element of negligence; neither can such imposition of the liability be regarded as a penalty, for there is nothing prohibited or commanded by the statute, nor any wrong defined or declared thereby. The statute is novel, and does not rest upon any general or commonly accepted principles of law. We see in such a statute that the declared policy of the state is to foster the stock-growing industry, and that the railroad companies, to this extent, shall bear the whole burden of loss occasioned by the conflict or accidental collisions which may occur in carrying on the business of the railroads, and the business of stock-growing within the state. Such statute will be confined in its operation to the limits of our own state, and its adoption elsewhere will not be presumed, in the absence of proof of the fact. Besides, if there is such a law in New Mexico, it would be a law of the legislature of New Mexico, and courts do not take judicial notice of the statutes of other states,—they must be shown like other facts. *Polk v. Butterfield*, 9 Colo. 325, 12 Pac. Rep. 216; also section 387, Code Civil Proc., which provides how the proof may be made. So it follows that we cannot presume the existence of such law in New Mexico, and, in the absence of the proof of the laws of New Mexico, no matter what their provisions may be, they are unavailing to sustain the judgment. Neither can our statute referred to sustain the judgment, for the reason that the wrong or acts constituting the cause of action occurred beyond the limits of this state, so the statute can have no application to this cause of action.

In the consideration of a statute in the case of *Whitford v. Railroad Co.*, 23 N. Y. 465, we have the following from the decision of the court in the opinion delivered by DENIO, J.: "I have thus far assumed, without a formal statement of the principle, that the statute referred to has no force beyond the limits of the state of New York. This is an elementary doctrine, and the contrary was not insisted upon as a general rule in the argument. The laws of New York have no greater operation in respect to transactions which take place wholly within the territory of New Granada than the laws of that republic have in regard to New York transactions. It is no doubt within the competency of the legislature to declare that any wrong, which may be inflicted upon a citizen of New York abroad, may be redressed here according to the principles of our law, if the wrong-doer can be found here, so as to be subjected to the jurisdiction of our courts; but as we could not, by any legislation of this kind, put an end to the liability of the party to the *lex loci*, or divest the foreign government of its jurisdiction over the case, such a statute would rarely be just in its operation, and would be more likely to lead to confusion and oppression than to any beneficial results. * * * This limitation upon the operation of the laws of a country is quite consistent with the practice which universally prevails, by which the courts of one country en-

certain suits in relation to causes of action which arise in another country, when the parties come here, so as to be made subject to their jurisdiction." To the same effect are *Bank v. Earle*, 13 Pet. 519; *Needham v. Railway Co.*, 38 Vt. 307, 308.

It is claimed on the part of the appellee that the judgment is sustained by the principles of the common law, and the charge to the jury given at his request as to gross negligence; while it is urged in behalf of appellant that our courts should presume the existence of the common law in New Mexico, and that, by the principles thereof, the facts in this case show no right of recovery against appellant. It is evident that, under the principles of the common law, the facts shown would not warrant the recovery. Under the common law, an owner turning his domestic animals at large was thereby guilty of such negligence as would defeat his right to recover for injury to them, while so at large, except in cases of gross negligence. The evidence in this case shows no such negligence. In no view of the case does the evidence show a liability. *Railway Co. v. Henderson*, 13 Pac. Rep. 910, (in this court, opinion filed April 30th.)

The judgment should be reversed, and the case remanded for further proceedings.

MACON, C. I concur in the conclusion reached.

RISING, C. I concur.

BY THE COURT. For the reasons assigned in the foregoing opinion the judgment of the county court is reversed, and the cause remanded.

(10 Colo. 112)

KEESE and others v. CITY OF DENVER and others.

(*Supreme Court of Colorado*. May 24, 1887.)

1. MUNICIPAL CORPORATIONS—CONSTRUCTION OF SEWERS—REPEAL OF STATUTE BY IMPLICATION.

The Colorado act of 1877, providing a charter for the city of Denver, gives the right to establish a system of sewers, and to alter, open, etc., sewers. Act February 9, 1879, entitled "An act to enable the city council to establish a system of sewers," provides the power to construct sewers, and also how such power shall be exercised. *Held*, that the act of 1879 was a substitute for the provisions of the charter, and the council must be governed wholly by it.

2. SAME—ORDINANCE—PETITION OF RESIDENTS.

Act Leg. Colo. February 19, 1879, § 3, provides that the city council of Denver shall construct sewers in a district when the majority of the residents petition for it, or the board of health recommends it. An ordinance of the city for the construction of a sewer recited that it was enacted in accordance with the petition of the citizens. It was in evidence that a majority of the residents of the district had not petitioned. *Held*, that the question of whether the majority had petitioned or not was jurisdictional, and the ordinance could not be sustained.

3. SAME—RIGHTS OF TAX-PAYERS—ESTOPPEL BY ACQUIESCENCE.

Plaintiffs, tax-payers, had allowed a city to complete a sewer, and then filed a bill to enjoin the collection of the assessment therefor, alleging that the city was not authorized to build it. *Held*, that the objection was jurisdictional, and the principles of estoppel, through failure of plaintiffs to object, did not apply.

4. SAME—RIGHT TO ASSESS PROPERTY—POLICE POWER.

An assessment for the building of a sewer upon the frontage of a lot is a valid exercise of the police power.

5. SAME—MODE OF ASSESSMENT.

The cost of a sewer was ascertained by a city engineer, and assessed upon the property by an arithmetical calculation. *Held*, that an objection that it was not made by the city assessor, as required by the city charter, should not be sustained, as it was only an irregularity that could not affect the rights of a tax-payer.

6. SAME—ACTIONS TO RESTRAIN—JOINDER OF PARTIES PLAINTIFF.

An action was brought by seven plaintiffs, who each had a separate interest in distinct pieces of real estate, to restrain the sale of the same for the purposes of an

assessment for a sewer; the action being brought for such others as were similarly situated and interested. *Held*, that a demurrer for defect and misjoinder of parties plaintiff was properly overruled.

STALLCUP, C., dissenting.

Commissioners' decision. Appeal from district court, Arapahoe county.

Thomas Keese and seven others, plaintiffs, tax-payers of the city of Denver, filed a complaint to enjoin the sale of lands owned by them under an assessment for the building of a sewer, against the city of Denver and some of its officers, defendants. Judgment for the defendants and plaintiffs appealed.

Markham & Dillon, for appellants. *Rogers & Cuthbert* and *J. F. Shaff-roth*, for appellees.

RISING, C. This action was brought by the plaintiffs to restrain the sale of real estate described in the complaint, for the purpose of collecting an assessment placed thereon to pay for the construction of a sewer, constructed under the direction of the city council of the city of Denver. There are seven plaintiffs, and each has a separate interest in distinct portions of said real estate, and there is no joint interest of any of the plaintiffs in any portion of such real estate, and the same relief is asked for all other persons similarly situated and interested as for themselves. Demurrer to complaint for defect and misjoinder of parties plaintiff, and that complaint does not state facts sufficient to constitute a cause of action. Demurrer overruled, and, upon trial, judgment dismissing bill of complaint, from which judgment plaintiffs appeal.

There is no conflict in the testimony, and the objections urged against the validity of the sewer assessments, and appellees' answer thereto, are based upon the provisions of the charter of the city of Denver, approved April 16, 1877, and an amendment thereto approved February 19, 1879, and upon the following facts: On January 5, 1880, the council passed an ordinance adopting the system of drainage and limits of districts as shown on map of sewer districts prepared by the city engineer, so far as the same applies to district No. 2, as the system of sewers for said sewer district No. 2. On May 6, 1880, the following communication from the board of health was presented to, and adopted by, the city council: "Gentlemen: In accordance with the authority given to the board of health, in section three of an act passed February 9, 1879, entitled 'An act to enable the city council to establish a system of sewerage,' we respectfully recommend as a sanitary measure the construction of district sewers as provided by ordinance. We further recommend that the district sewer on Sixteenth street be constructed this year, from the main sewer on Wyncoop street to Curtis street; also that district sewer on Eighteenth street be constructed this year from the main sewer on Wyncoop street to Lawrence street." An ordinance establishing the Thirteenth-street sewer district, and providing for the construction of a sewer therein, was passed by the city council, and approved by the mayor, on the sixth day of March, 1882, and was duly published. A majority of the property holders resident in said district did not sign a petition for the construction of said sewer, but said ordinance recites that it is enacted "in accordance with the petition of the citizens" in said district. On July 5, 1883, the city council, by resolution, instructed the city engineer to compute the total cost of the sewer, including interest on warrants already issued up to January 1, 1884, and including the cost of collecting the assessments; and on September 6, 1883, the city engineer reported to the city council the total cost of the sewer to be \$113,016.80, which report was adopted, and on the same day the city council, by resolution, instructed the city engineer to make a plat-book of said sewer, and report the same to the council for approval. On October 8, 1883, the city engineer presented to the council a book of plats, showing the area and tax of each lot or parcel of land in said sewer district, and the council by resolution adopted the assess-

ments of sewer tax against lots and parcels of land in said district, as shown in said book of plats, subject to such changes and equalization as might thereafter be made by action of the council, and resolved that a committee of three be appointed as a board of equalization to hear and adjust complaints as to the assessment of sewer tax made against property in said district, and appointed as such committee, C. Gove, G. N. Billings, E. P. McPhilomy. Due notice of the time and place of the meeting of this committee was given, and the committee sat for five consecutive days, and on the twentieth day of October, 1883, reported to the council that no complaints had been made as to the legality of the assessment, or its manner of make-up, and recommended that the estimate of the engineer be made the assessments, and the lots assessed as per the accompanying abstract. On the same day the following resolution was adopted by the council: "Resolved, that the lots and parcels of lots, mentioned in the abstract of lots and assessments accompanying the report of the committee, be assessed at the sums therein mentioned, and that the abstract and plats be forwarded to the county clerk and recorder of Arapahoe county, with instructions to extend the assessments with other taxes upon the lots and parts of lots therein mentioned." The contract for the construction of said sewer was let on the thirtieth day of March, 1882.

All the questions presented by the briefs of counsel are raised by the issues made by the pleadings. The ordinance of March 6, 1882, for the establishment of the Thirteenth-street sewer district, and the construction of a sewer therein, recites that it was enacted in accordance with the petition of the citizens in said district. In their argument, counsel for appellants first attack the validity of the tax or assessments, upon the ground that the petition for the establishment and construction of said sewer was not signed by a majority of the property holders resident in said district, and that the board of health did not recommend the construction of such sewer, and that no recommendation of the board of health was approved by the city council. These objections are based upon the provisions of section 3 of the amendment to the city charter, approved February 19, 1879, which provisions are that "the city council shall cause sewers to be constructed in any district, whenever a majority of the property holders resident therein shall petition therefor, or whenever the board of health recommend the same as necessary for sanitary reasons, and said recommendation is approved by the city council." The evidence clearly shows that a majority of the property holders, resident in said district, did not petition for the construction of said sewer. To authorize the city council to act, under the provisions of said amendment, there must be a petition of property holders, or a recommendation of the board of health, as required by section 3, and a petition not complying with the requirements of said section did not authorize the council to act thereunder. The grants of powers to make local assessments are strictly construed, and must be strictly followed. *Merritt v. Portchester*, 71 N. Y. 309; *Allen v. Galveston*, 51 Tex. 302. Every material requirement of the charter must be strictly complied with before there can be any liability of adjoining lots for such work. *Massing v. Ames*, 37 Wis. 645; *Pound v. Chippewa Co.*, 43 Wis. 63; *Columbus v. Story*, 35 Ind. 97; *Covington v. Casey*, 3 Bush, 698; *In re Sharp*, 56 N. Y. 257; *Kyle v. Martin*, 8 Ind. 34.

The general rule is laid down by Judge Dillon in his work on Municipal Corporations, (section 800,) and is as follows: "Where the power to pave depends upon the *assent or petition of a given number or proportion* of the proprietors to be affected, this fact is jurisdictional, and the finding of the city authorities or council that the requisite number had assented or petitioned is not, in the absence of legislative provision to that effect, conclusive; and the want of such assent makes the whole proceeding void, and the non-assent may be shown as a defense to an action to collect the assessment, or may, it has been held, be made the basis for a bill in equity to restrain a sale

of the owner's property to pay for it." The ordinance of March 6, 1882, cannot be sustained upon the petition therefor.

Was the action of the council in passing the ordinance of March 6, 1882, based upon the recommendation of the board of health? Had the ordinance, directing the construction of the sewers in question, been silent as to the ground upon which the council acted, more difficult questions would be presented than are presented by the facts in this case. The ordinance is not silent on this subject. It expressly declares the action of the council to have been in pursuance of a petition of property owners. Such action shows, not only a total absence of any evidence of an intention to base it upon such recommendation, but positive proof that the action was not induced thereby. We are therefore not at liberty to assume that the action of the council was in pursuance of a recommendation of the board of health, or that the council intended by such action to express a judgment of approval of such recommendation. Not only does the unqualified declaration of the council clearly and unequivocally state the exact ground upon which that body did act, but the facts strongly corroborate the view that the council did not think of the recommendation of the board of health, or attempt to act under it. The recommendation was made to a preceding council, nearly two years prior to the adoption of the ordinance in question. The Thirteenth-street sewer district created by this ordinance is not the district to which the ordinance referred, but a new district carved out of the old one. The ordinance referred to in the recommendation of the board of health adopted a system of sewerage for district No. 2, as marked out on a certain plat prepared by the city engineer, but did not authorize the construction of any of the sewers thus indicated.

An examination of the plats showing the system of sewers for district No. 2, and the system of sewers in the Thirteenth-street sewer district, shows that these systems are so radically different that the construction of sewers in the new district cannot be held to be a construction of sewers as provided by the ordinance establishing a system of sewerage for district No. 2, to which the recommendation related. It is therefore literally true that the board of health could not have recommended the construction of sewers as they were afterwards authorized by the ordinance of March 6, 1882. The action of the council not having been based upon the recommendation of the board of health, or had in pursuance thereof, and the facts showing that such recommendation could not apply to the sewers constructed under the ordinance of 1882, it follows that the recommendation of the board of health has no bearing upon the case. Whether its terms complied with the statutory requirements, or whether the council by using the word "adopted" expressed an approval thereof, are matters of no importance to the present inquiry. The conduct and language of the council, in adopting the ordinance of March 6, 1882, as well as all the facts in the case, show clearly, either that the council had no knowledge of the recommendation of the board of health, and the action of the council thereon in 1880, or that such recommendation was ignored. For the foregoing reasons, the sufficiency of the recommendation of the board of health will not be considered.

It is claimed by counsel for appellees that the power to establish and construct sewers was vested in the city council by the charter of 1877, and that the action of the city council in relation to the construction of the sewers in the Thirteenth-street sewer district can be sustained under the provisions of that charter, defining the powers of the city council, notwithstanding any failure of the council to comply with the provisions of section 3 of the amendment of 1879, to the charter, relating to a petition by property holders, or recommendation of the board of health. The argument in support of this position is that the city council, by the charter of 1877, was authorized to construct sewers, whenever, in the judgment of the council, such construction was necessary, and that the amendment of 1879 was not a limitation upon

the power conferred by the charter; that the provision in relation to the construction of sewers upon the petition of a majority of the property holders resident in any district should be held to be a delegation of power to such property holders to compel, by petition, the city council to exercise the power granted by the charter; that the amendment of 1879 does not in terms repeal the provisions of the charter of 1877, granting to the city council the power to construct sewers, and that if the two statutes can be construed together so as to give effect to each, this should be done, and this upon the well-settled principle of law that a repeal by implication is not favored by the courts. A statute is, by implication, a repeal of all prior statutes so far as it is contrary and repugnant thereto, and upon this principle a statute is impliedly repealed by a subsequent one, revising the whole subject-matter of the first.

Does the statute of 1879 revise the whole subject of the establishment and construction of sewers, as found in the charter of 1877? A comparison of the statute of 1879 with the statute of 1877 is one of the means to be used in determining this question. The charter of 1877 provides (section 40) that "the city council shall have, subject to the provisions hereinafter named, the general management and control of the finances, and all property, real, personal, and mixed, belonging to the corporation, and shall likewise have power within the jurisdiction of the city, by ordinance not repugnant to the constitution of the United States or the constitution of the state of Colorado—*First*, to establish a system of sewerage; * * * *sixth*, to open, alter, abolish, widen, extend, establish, grade, pave, or otherwise improve and keep in repair streets, avenues, lanes, and alleys, sidewalks, drains, and sewers." We think the foregoing quotations from the charter of 1877 contain all the provisions conferring express power upon the city council in relation to the establishment and construction of sewers.

The act of 1879 is entitled "An act to amend an act entitled 'An act to reduce the law incorporating the city of Denver, and the several acts amendatory thereof, into one act and to revise and amend the same so as to enable the city council to establish a system of sewerage.'" Section 1 provides that the city council of the city of Denver have the right to establish and maintain a sewer system, which shall be divided into three classes, viz., public, district, and private sewers. Section 2 provides for the establishment and construction of public sewers, and for the payment for such construction. Section 3 provides for the establishment and construction of district sewers, and for the payment of the cost of such construction. Section 4 relates to private sewers; to manner of contracting for the construction of sewers; to bonds and sureties thereon to be given by contractors; to provisions of ordinances relating to construction of sewers as to making an appropriation to pay for such construction; to the right of any citizen and tax-payer to make complaint to the city council that any work is being done contrary to contract, or that the work done or material used is imperfect, and providing for a hearing upon such complaint, and a determination thereof by the council. Section 5 provides that no public sewer shall be constructed until the question of such construction shall have been submitted to a vote of such tax-payers of the city as are legal voters, and approved by a majority thereof. By the charter of 1877, the city council was empowered to *establish a system of sewerage*, and to *establish sewers and to keep them in repair*. The charter conferred upon the council the naked power to act in the premises, but made no provision for the manner in which the power should be exercised. The statute of 1879 was enacted to cure this defect, by a revision of the whole subject-matter, the object of the enactment being declared in the title to be "To enable the city council to establish a system of sewerage." By section 1 of the law of 1879, the city council was empowered to establish and maintain a sewer system. The power so conferred is equal in extent to the power conferred by the charter, and must have been intended by the legislature to take

the place of the provisions of the charter. The law of 1879 not only confers upon the city council the power to establish and maintain a sewer system, but it provides how such power shall be exercised. The new statute covers the whole subject of the old one, and we think it must be held to be a substitute for it.

In Sedg. St. & Const. Law, 100, note, the author says: "If two statutes relate to the same subject-matter, though in terms not repugnant or inconsistent, if the latter one is plainly intended to prescribe the only rule that shall govern, it will repeal the earlier." *State v. Conkling*, 19 Cal. 501, to same effect. The statute of 1877 and the statute of 1879 each confer the same general power upon the city council, but the statute of 1879 prescribes the only rule that shall govern in the exercise of that power.

In *Bartlett v. King*, 12 Mass. 537, 545, it was held that "a subsequent statute, revising the whole subject-matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must, on the principles of law, as well as in reason and common sense, operate to repeal the former."

The rule that a statute which appears to cover the whole subject-matter of a former statute is a repeal of the former, is laid down in *U. S. v. Tynen*, 11 Wall. 95; *Weeks v. Walcott*, 15 Gray, 54; *Nichols v. Squire*, 5 Pick. 168; *Swann v. Buck*, 40 Miss. 268; *Board Com'rs v. Potts*, 10 Ind. 286; *Pierpont v. Crouch*, 10 Cal. 315. We think the statute of 1879 is a substitute for the provisions of the charter of 1877, relating to the same subject, and that the action of the city council must be governed wholly by the provisions of the statute of 1879, and that the council have no power to act in the construction of sewers except as provided in that statute. The statute having prescribed how and when the council shall act, it has no power to act in any other or different manner.

It is said by Judge FIELD, in *Zottman v. San Francisco*, 20 Cal. 96-102, that "the rule is general, and applies to the corporate authorities of all municipal bodies, that where the mode in which their power on any given subject can be exercised is prescribed by their charter, the mode must be followed. The mode in such cases constitutes the measure of power."

It is urged by counsel for appellees that plaintiffs are estopped from now questioning the legality of the assessment, because they allowed the work to progress to completion without making any objection. The legality of the assessment is attacked upon the ground that the city council was not authorized to cause the sewer to be constructed, and hence not authorized to levy an assessment to pay for its construction. The objection goes to the origin of the proceedings and is jurisdictional. The principles of estoppel have no application to the facts in this case. *City of Chicago v. Wright*, 32 Ill. 192; *In re Sharp*, 56 N. Y. 256.

The fifth objection made by the appellants is that the assessments are illegal, in that they are not based upon value, benefits, or improvements. This raises the question of the validity of the provision of the statute authorizing the cost of sewers to be assessed against the property in the district according to area. The doctrine announced in *Palmer v. Way*, 6 Colo. 106, is decisive of the question. It was there held that an assessment of the cost of a sidewalk upon frontage was a valid assessment under the police power, and the province of the police power was held to be "the preservation of order, and the making of such rules and regulations as shall be conducive to the health, comfort, and protection of society, and not primarily the raising of revenue." The sewer assessments are within this power. *Cooley, Tax'n*, 399.

The sixth objection made by appellants is that assessments were not made by the city assessor as required by the charter. This objection goes to an irregularity that in no way did or could affect the rights of the tax-payer. The cost of the sewer is to be ascertained by the city engineer, and the assess-

ment of such cost upon the property does not call for the exercise of judgment or discretion, but is made upon an arbitrary mathematical calculation. We do not think this objection should be sustained.

The ruling of the court below upon the demurrer to the complaint being favorable to appellants, their appeal does not necessarily require an expression of opinion upon that ruling; but as counsel for both appellants and appellees have argued the questions presented by the demurrer at considerable length, we will, without going into a review of the arguments made and authorities relied upon, state our conclusions upon the questions presented. The two grounds of the demurrer may be treated unitedly. Mr. Pomeroy, in his able treatise on Equity Jurisprudence, has collated all the important cases upon the question of equity jurisdiction in cases of this character, and after an exhaustive review and comparison of the cases, has expressed his conclusions, and from which we quote the following: "Under the greatest diversity of circumstances, and the greatest variety of claims arising from unauthorized public acts, private tortious acts, invasion of property rights, violation of contract obligations, and notwithstanding the positive denials by some American courts, the weight of authority is simply overwhelming that the jurisdiction may and should be exercised either on behalf of a numerous body of separate claimants against a single party or on behalf of a single party against such a numerous body, although there is no 'common title,' nor 'community of right' or of 'interest in the subject-matter,' among these individuals, but where there is, and because there is, merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body." 1 Pom. Eq. Jur. § 269. Equity assumes and exercises jurisdiction in cases of this character in order to prevent a multiplicity of suits. 1 Pom. Eq. Jur. § 260. The rule that one or more plaintiffs may sue for the benefit of all others similarly situated and interested is well settled, and in some states it is held that an allegation of this kind is necessary to confer equity jurisdiction. *Bull v. Read*, 13 Grat. 78; *Kennedy v. City of Troy*, 14 Hun, 308; *Wood v. Draper*, 24 Barb. 187; *McClung v. Livesay*, 7 W. Va. 329. The demurrer was properly overruled. The judgment should be reversed.

I concur: MACON, C.

I dissent: STALLCUP, C.

PER CURIAM. For the reasons assigned in the foregoing opinion that the city council of the city of Denver was without jurisdiction to cause the construction of the sewer in question, the conclusion arrived at in the foregoing opinion is approved, and the decree of the district court reversed, and the cause remanded.

ELBERT, J., did not sit in this case.

(74 Cal. 266)

WAGGLE v. WORTHY and another. (No. 12,221.)

(Supreme Court of California. December 2, 1887.)

1. COVENANT—ACTION FOR BREACH—DISCHARGE IN INSOLVENCY.

To an action for breach of a covenant against incumbrances, given in a deed to land dated July, 1884, which was subject to a lien of a judgment rendered in March, 1884, defendant pleaded a discharge in insolvency in February, 1884. Held that, if the discharge were a bar to the debt on which judgment was entered, it should have been pleaded at that time, and the judgment could not be attacked collaterally.

2. HOMESTEAD—ABANDONMENT—SALE UNDER EXECUTION, AND REMOVAL FROM LAND.

Under Civil Code Cal. § 1243, providing that a homestead can be abandoned only by a declaration of abandonment or grant, one who had claimed a homestead in lands, but permitted them to be sold under judgment, and moved out, it not appearing that this former homestead was worth more than \$5,000, and that steps had been taken for admeasuring the excess as provided in section 1245 *et seq.*, cannot claim a homestead in other lands.

Commissioners' decision. In bank.

Appeal from superior court, Fresno county; R. E. ARRICK, Judge.

William M. Waggle, Sr., plaintiff, sued Robert E. Worthy, and Sarah E. Worthy, defendants, to recover for breach of a covenant of warranty. Judgment was rendered for defendants, and plaintiff appealed.

Nourse & Church, for appellant. *Terry & Terry*, for appellees.

HAYNE, C. This an action upon a covenant against incumbrances implied by statute from the use of the word "grant" in a conveyance of real property. Civil Code, § 1113. The conveyance was made on July 5, 1884. The breach alleged is that the property was at the date of the deed subject to the lien of a judgment "suffered" by the vendor for \$840.30, docketed on the twenty-first of March, 1884, under which the property was sold, and subsequently redeemed by the plaintiff. The cause was submitted on briefs, but no brief for respondent is on file. So far as we can gather, the defenses were two, viz.: (1) That on February 12, 1884, the vendor had filed her petition in insolvency, and received her discharge from such claims as existed at the date of filing her petition; and (2) that the property was the homestead of the vendor, and therefore was not subject to the lien of the judgment. The court below gave judgment for the defendants, and the plaintiff appealed.

1. The discharge in insolvency could only affect such debts as existed at the time of the filing of the petition, viz., on February 12, 1884, (Civil Code, § 51;) and this is all that the discharge in question purported to do. The claim arising from the breach of a covenant made subsequently was not affected by it. It may be that the debt upon which the judgment against the vendor was obtained was within its operation. But that matter was concluded by the judgment. If the discharge was not pleaded in that action, it was waived. If it was pleaded, and disregarded by the court, the judgment, however erroneous, was not void, and is not subject to collateral attack. The defendants cannot retry that action here.

2. The homestead claimed by the defendants to have prevented the lien of the judgment from attaching to the property was declared on June 1, 1881. To show the invalidity of this alleged homestead, the plaintiff proved that the vendor had declared a homestead on other land on March 21, 1873; and in reply the defendants proved that this last-mentioned homestead had (previously to the declaration of the other homestead) been levied upon and sold under two judgments rendered by a justice of the peace. In relation to this the vendor testified as follows: "Immediately after the sale of my first homestead, the purchaser, Jacobs, demanded possession of me, and as I was poor, and dreaded a lawsuit, I gave up possession, and moved off the land. Jacobs went into possession, and since that time I have claimed no interest in the said land embraced in my first homestead." But, so far as this record shows, the sale to Jacobs was of no effect. A homestead is exempt from execution, and, if the land was worth more than \$5,000, (which does not appear,) the proceedings provided by the Code for admeasuring the excess (Civil Code, § 1245 *et seq.*) should have been taken. This not having been done the attempted sale was void. The homestead still existed, and was not abandoned by the claimants moving off the premises. In this state, "a homestead can be abandoned *only* by a declaration of abandonment, or a grant thereof, executed and acknowledged" etc. Civil Code, § 1243. It results that the first homestead was a valid and subsisting homestead at the time the second was

attempted to be declared. A party cannot have two homesteads, and, if he attempts to acquire a second while the first is in force, the second is void. The second "homestead" being void did not prevent the lien of the judgment from attaching to the land conveyed to the plaintiff.

We therefore advise that the order denying a new trial be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the order denying a new trial is reversed, and the cause remanded for a new trial.

(74 Cal. 258)

SHAW v. STATLER. (No. 11,561.)

(*Supreme Court of California.* December 2, 1887.)

COUNTIES—LIABILITIES—PAYMENT OF DEMANDS—PRIORITIES.

Const. Cal. art. 11, § 18, provides that no county shall incur any liability or indebtedness in any manner or for any purpose, exceeding in any year its annual income, without a two-thirds vote of the electors. County government act, § 77, provides that claims shall be paid "according to the priority of time in which they were presented." Petitioner had a warrant issued on a valid claim. There was money enough in the fund on which it was drawn to pay it and all other warrants on claims accruing during that fiscal year. The treasurer refused to pay it, because there were not funds enough for it and outstanding warrants for former years previously presented. *Held*, that the income of each year must be used to pay the debts of that year, and section 77 of the county government act must apply primarily, as between the warrants of any given year. TEMPLE, J., dissents.

Commissioners' decision. In bank.

Appeal from superior court, San Diego county; W. T. McNEALY, Judge.

Shaw petitioned for a writ of *mandamus* to compel Statler, defendant, treasurer of San Diego county, to pay two warrants. The court granted it as to one, but denied it as to the other. Defendant appealed from the judgment granting the writ.

E. W. Hendricks, for appellant. Works & Titus, for respondents.

HAYNE, C. Application for writ of *mandamus* to compel the payment by the treasurer of San Diego county of two warrants which had been duly issued. The court below granted the writ as to the first warrant, (No. 54,) and denied it as to the second, (No. 602.) The petitioner has not appealed from the judgment denying the writ as to the second warrant, and therefore the questions argued as to it do not arise upon the record. The case comes up on the appeal by the defendant from the judgment granting the writ as to the first warrant. This warrant recites that it was issued upon a claim allowed by the supervisors "for services as boss of chain gang, accrued January—, A.D. 1886." The claim was audited and allowed on January 18, 1886, and the warrant was issued on the twenty-seventh of the same month. The validity of this warrant is not questioned; and the fact appears to be that there was at the time of its presentation enough money in the fund upon which it was drawn to pay it and all the other warrants upon claims accruing during that fiscal year. The treasurer, however, refused to pay it on the ground that certain outstanding warrants for previous years had been previously presented, and that there was not enough money in the treasury to pay these outstanding warrants and the one involved here. And in support of his action we are referred to section 77 of the county government act, which provides that claims are entitled to payment, "according to priority of time in which they were presented." The question is whether these outstanding warrants furnish any reason why the treasurer should not pay the one sued on.

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Section 18 of article 11 of the constitution provides that "no county, city, town, township, board of education, or school district shall incur any indebtedness or liability in any manner, or for any purpose, exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors." It will be observed of this provision that it refers in terms to the *incurring* of indebtedness, and not expressly to its payment. There is no express provision that the income and revenue of each year shall be applied to the payment of the indebtedness of such year. But we think that such is the necessary implication. For unless this is so all the income and revenue of a given year might be taken up at its commencement, in the payment of old claims, and, there being no more income or revenue for that year, no more indebtedness could be incurred, and the business of the city, county, or other body would have to stop, which could not have been the intention.

In *Gas Co. v. Brickwedel*, 62 Cal. 642, the court said: "Each year's income and revenue must *pay* each year's indebtedness and liability, and that no indebtedness or liability incurred in any one year *shall be paid* out of the income or revenue of any future year." This was only a dictum, for the proceeding in that case was to compel the *auditing* of a demand. It therefore involved only the validity of the demand, and not the disposition of the funds then in the treasury. But we think it is a correct exposition—at least so far as the revenue of any particular year is required for the expenses of that year. It is not necessary in this case to decide whether, if anything be left over after payment of the expenses of the year, the surplus could be applied to the payment of any outstanding claims for previous years, which might happen to exist and be valid.

It results that section 77 of the county government act must be construed to apply primarily as between the warrants of any given year. We do not see that it is necessary to pass upon the question whether an indebtedness is "incurred" when a service is rendered, or when the claim is audited and a warrant therefor is issued. We therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment is affirmed.

I dissent: TEMPLE, J.

(74 Cal. 271)

VOLLMER *et al.* v. DE CASTILLO. (No. 11,939.)

(*Supreme Court of California*. December 2, 1887.)

MORTGAGE—FORECLOSURE—ISSUES AND FINDINGS—APPEAL.

In an action to recover money due upon a promissory note, and to foreclose a mortgage upon certain lands given to secure it, a personal judgment was rendered against defendant, under a finding that the mortgage had never been delivered, and without findings having been made as to other questions in issue. *Held* that, the appeal being upon the judgment roll alone, and the material issue having been found against plaintiffs, it became unnecessary to make other findings.

Commissioners' decision. In bank.

Appeal from superior court, San Luis Obispo county; D. S. GREGORY, Judge.

Action by Edward and A. Vollmer against Gorgonia O. de Castillo to recover \$1,225 due upon a promissory note executed by defendant, and to foreclose a mortgage upon certain lands, given to secure said note, and to correct the name of defendant, alleged to have been misspelled in the acknowledgment to the mortgage. Defendant denied that the mortgage had ever been acknowledged or delivered, and claimed that execution of it was obtained by

fraudulent representations. A jury having been waived, the court made, in substance, the following among other findings:

That on September 10, 1884, the defendant made, executed, and delivered to plaintiffs said promissory note, and that no part of the same has been paid; that on September 10, 1884, and at the time the mortgage is claimed to have been executed by her, the defendant was a married woman; that she did not at said time, and never did, execute or deliver said mortgage; that she was not at said time made acquainted with the contents of said mortgage by the notary public, or by any one; that in the certificate of the notary public attached to said mortgage the name of the defendant was not misspelled, but said certificate contains, as the name of the person purporting to acknowledge the execution of said mortgage, the name of a different person; that said mortgage was never recorded in the records of the county of San Luis Obispo, etc.

And as conclusions of law found: "(1) That plaintiffs are entitled to judgment against defendant for the amount due on said promissory note, viz., \$1,225, and interest thereon at the rate of ten per cent. per annum from September 8, 1884; (2) that the certificate of acknowledgment set forth in the amended complaint herein should not be altered, amended, or corrected; (3) that the mortgage set forth in said amended complaint is not a lien upon the lands and premises therein described, and that plaintiffs are not entitled to a decree that said land and premises, or any part thereof, be sold hereunder."

Plaintiffs appeal.

S. M. Swinerton, for appellants. *McD. R. Venable* and *C. W. Goodchild*, for respondents.

FOOTE, C. This is an action to obtain a judgment against the defendant for money alleged to be due upon a promissory note, and to enforce a mortgage lien upon certain lands for the purpose of subjecting them to judicial sale, etc. The court rendered a personal judgment against the defendant as prayed for, but found, among other things, that she had never *delivered* the mortgage sought to be foreclosed. Such delivery was one of the issues made by the pleadings, the appeal is upon the judgment roll alone, and since that material issue is found against the plaintiff, it became unnecessary to find upon the other issues as to which the appellant complains there was no finding. The judgment should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

(74 Cal. 280)

STRONG v. STAPP, (MACK *et al.*, Intervenor.) (No. 11,406.)

(*Supreme Court of California*. December 2, 1887.)

1. PARTNERSHIP—DISSOLUTION BY WRONGFUL ACT—PLEADING—ANSWER.

Plaintiff and defendant were formerly partners doing business in Missouri. Defendant sold out the business, and with the proceeds went to California, and engaged in the same business there in his own name. Plaintiff levied an attachment on the property of defendant. The intervenors, who were creditors of defendant, alleged, in substance, in their complaint, the former partnership, and that the same was not dissolved when the defendant sold out and left Missouri. The answer of plaintiff alleged, in substance, that the acts of defendant in selling out were done without plaintiff's knowledge or consent, and that there was otherwise no dissolution of the partnership, and that plaintiff had no knowledge of defendant's whereabouts for a considerable time after he had left Missouri. *Held*, that the answer was not an admission on the part of plaintiff that the partnership was not dissolved by the wrongful acts of the defendant.

2. SAME—CLAIM OF PARTNER—PRIORITY OVER SUBSEQUENT INDIVIDUAL CREDITORS.

Plaintiff and defendant were partners doing business in Missouri. The defendant, without the knowledge or consent of plaintiff, sold out the largest part of the

stock of goods, good-will, etc., and removed to California, taking some of the partnership goods with him, and commenced business there in his own name. Plaintiff sought out defendant at his earliest opportunity, and induced him to give a promissory note for the payment of a *bona fide* debt; afterwards proceeding to attach the stock of goods in defendant's possession, a part of which had been purchased of the intervenors at a time when they had no knowledge of the plaintiff, or that he ever had been defendant's partner. *Held*, plaintiff having elected, under the wrongful acts of defendant, to dissolve the partnership, had a right as a creditor to collect his debt, and, having attached, was entitled, as against the intervenors, to the priority of his superior diligence.

Commissioners' decision. In bank.

Appeal from superior court, San Luis Obispo county; D. S. GREGORY, Judge. *J. M. Wilcoxon* and *Wm. Shipsey*, for appellants. *Venable & Goodchild* and *N. W. Spencer*, for respondents. *Ernest & Wm. Graves* and *J. N. Turner*, for defendant.

FOOTE, C. This action was instituted by Strong, and an attachment was issued and levied upon the property of Stapp. Mack & Co. intervened, demanding a judgment against both Strong and Stapp for a certain amount of money, and praying that the goods thus attached might be subjected to the payment of that judgment. The court rendered judgment by default against Stapp, and in favor of Strong, and the latter had judgment also given in his favor against the intervenors, Mack & Co., that they take nothing by their complaint, and for costs, etc. From that judgment, and an order denying their motion for a new trial, the intervenors have appealed.

An inspection of the pleadings leads us to the conclusion that all of the material allegations of the complaint of intervention are denied by the answer thereto. Nor do we perceive, as is claimed, that the latter pleading admits the partnership was never dissolved which is alleged by the complaint to have existed in Missouri between Strong and Stapp. On the contrary, it appears to us to be alleged in the answer of Strong that Stapp sold out the goods, good-will, business, etc., in Missouri, and left that state, *without Strong's knowledge and consent*, taking with him to California the proceeds of the sale, and a portion of the stock of goods remaining unsold, and that Strong had no knowledge for a considerable period of time after Stapp had left Missouri where he had gone. All that the answer contains which in any manner can be said even in the remotest degree to resemble an admission that the partnership was not dissolved, after such action on the part of Stapp, is where the statement occurs (after the recital of his acts in selling out in Missouri without the knowledge or consent of Strong) that there was otherwise no dissolution of the partnership. It is clear that the answer of Strong most unequivocally negatives the declarations of the intervenors' complaint that the partnership was not dissolved when Stapp sold out and left Missouri. Such is the clear import of the language of the former's pleading, and it cannot, as we think, be held to contain any admission on the part of Strong that the partnership was not dissolved by the wrongful acts of Stapp.

It is evident from the recitals of the answer to the intervenors' complaint, from the findings of the court, and the evidence as it appears in the record, that Stapp sold out the largest part of the stock of goods, good-will of the business, etc., and removed to California, bringing some of the partnership goods with him, without the knowledge or consent of Strong, and set himself up in business here under his own name, buying goods from Mack & Co. on his own sole credit. But the intervenors contend that such acts of Stapp did not work a dissolution of the partnership as it had existed in Missouri; that between Stapp and Strong it still existed; and that Strong's claim was therefore subordinate to theirs, which they assert was entitled to prior satisfaction out of the stock of goods upon which the attachment had been levied. If Strong had agreed to the sale in Missouri, and had consented that the partnership

there existing should be continued in California, we could perceive merit in the intervenors' contention. But, according to the record, the wrongful acts of Stapp towards Strong induced the latter to exercise his right of election, and treat the partnership which had existed in Missouri as having been dissolved; and it was not renewed in California. Strong sought out Stapp in the latter state at his earliest opportunity after ascertaining his whereabouts, and induced him to give a promissory note for the payment of a *bona fide* debt, afterwards proceeding to attach the stock of goods in Stapp's possession, a part of which had been purchased from the intervenors at a time when they had no knowledge of Strong, or that he was, or ever had been, Stapp's partner; they having given the whole credit to Stapp as an individual doing business solely in his own name, and for his own benefit, and without even a suspicion that Strong could be held responsible for any indebtedness of Stapp.

The theory of the intervenors, as we understand it, seems to be based upon the idea that the acts of Stapp were not wrongful, did not work a dissolution of the partnership, and did not authorize Strong to treat the partnership as dissolved, and himself a creditor of Stapp; and that, being still a partner of Stapp in California, Strong should not be permitted to set up his claim against that of the intervenors, and have it satisfied by a sale of the attached goods before the intervenors should have their debt due from Stapp paid in full from the same source, notwithstanding the fact that their goods were sold to Stapp without Strong being known to them in any way as a partner of Stapp, and without Strong knowing of the sale, or claiming to be a partner. As it appears to us Strong has done nothing to make himself liable in any way for Stapp's purchases in California; he has a right as a creditor to collect his debt, if he can, just as Mack & Co. have, and it was a mere question of diligence in the present matter as to which should first obtain satisfaction of his or their demand. Strong has first attached, and we see nothing in the record which should postpone his rights to those of Mack & Co., who intervened.

We perceive no prejudicial error, and the judgment and order should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(74 Cal. 284)

DICK'S ESTATE. (No. 11,841.)

(*Supreme Court of California.* December 7, 1887.)

SPECIFIC PERFORMANCE—REQUISITES OF CONTRACT—DEATH OF OWNER BEFORE APPROVAL OF CONTRACT BY AGENT.

Where a contract for the sale of land had been made by an agent, expressing that it was "subject to the owner's approval," and it was not shown that the owner knew of its execution or that he ever signified his approval in any way, having died within a few days after it was made, *held*, that specific performance could not be enforced under section 1597, Code Civil Proc. Cal., which provides: "When a person who is bound, by a contract in writing, to convey any real estate, dies before making the conveyance, and in all cases when such decedent, if living, might be compelled to make such conveyance, the court may make a decree authorizing and directing his executor or administrator to convey such real estate to the person entitled thereto;" the decedent not having been bound by such contract in his lifetime.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

Wm. & Geo. Leviston, for appellant. Mich. Mullany, for respondent.

SHARPSTEIN, J. This is an appeal by the executrix of the will of Stephen W. Dick, deceased, from an order and decree of the superior court directing ap-

pellant to convey certain real estate, of which the testator died seized, to Charles Mayer. The sole authority for making such a decree is found in chapter 9, tit. 11, § 1597, Code Civil Proc., which contains this provision: "When a person who is bound, by contract in writing, to convey any real estate, dies before making the conveyance, and in all cases when such decedent, if living, might be compelled to make such conveyance, the court may make a decree authorizing and directing his executor or administrator to convey such real estate to the person entitled thereto."

The only question raised by this appeal is, was the decedent in his life-time bound by a contract in writing to convey any real estate to the respondent; *i. e.*, so bound that he might, if living, be compelled to make such conveyance? An agreement for the sale of real property, or of an interest therein, is invalid unless the same, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged, or by his agent; and if made by his agent, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged. In this case, it is claimed that the agreement to sell, or the memorandum thereof, was made by the agents of decedent. Conceding that they were duly authorized to sell, and that the writing which is relied on as an agreement to sell was subscribed by them as such agents, recourse must be had to the writing itself, for the purpose of determining whether the decedent, at the time of his death, was bound to convey any real estate to the respondent. The following is a copy of the agreement made by said agents:

"M. J. Burke.

F. H. Burke.

"OFFICE OF MADISON & BURKE,
"REAL ESTATE AGENTS, 401 AND 403 MONTGOMERY STREET, NORTH-
WEST CORNER CALIFORNIA.

"SAN FRANCISCO, April 5, 1886.

"Received of Charles Mayer one hundred (\$100) dollars, being deposit on account of four thousand (\$4,000) United States gold coin, the purchase price of the property this day sold to him, subject to the owner's approval, and being in the city and county of San Francisco and state of California, and described as follows: Lot on the north-west corner of Guerrero and Twenty-Second street, 61 feet on Guerrero street, by 117½ feet, more or less, to an alley. Terms of sale: Ten days are allowed to examine title, and consummate the sale. At the termination of said time the balance of said purchase money is due and payable, upon tender of the deed of the property sold. If the title is defective, thirty days are allowed to perfect the same; and if after the expiration of said term, unless extended by mutual consent, the title shall not have been perfected, the deposit is to be returned. The purchaser agrees to pay the taxes on said property sold for the fiscal year 1886, from July 1, 1886, to July 1, 1887. If the sale is not consummated according to the foregoing conditions, the deposit is to be forfeited. Time is of the essence of this contract. The said Chas. Mayer hereby agrees to comply with the conditions of this contract. Sale to be consummated at the office of Madison & Burke.

S. W. DICK,

"By MADISON & BURKE, Agents.

"MARTIN."

A counterpart of it was signed by the respondent. This constitutes the memorandum of the contract subscribed by the agents of the party to be charged; and unless it bound the decedent, in his life-time, to convey the property described in it, the decree appealed from is erroneous. No proceedings in specific performance can be had unless it be shown that a contract has actually been concluded. This contract was made "subject to the owner's approval." It is not claimed that he ever signified his approval of it in any way. He died within a few days after it was made, and it is not shown that

he ever knew of its existence. He did not have an opportunity to approve of it. We think the contract relied on as the basis for a decree of specific performance has never been concluded, and for that reason we think the decedent, in his life-time, was not bound by an instrument in writing to convey the real estate described in the decree herein.

Order and decree appealed from reversed.

We concur: MCFARLAND, J.; THORNTON, J.

(74 Cal. 287)

CALIFORNIA ANNUAL CONFERENCE OF THE M. E. CHURCH v. SEITZ.
(No. 9,761.)

(*Supreme Court of California.* December 8, 1887.)

1. LANDLORD AND TENANT—LEASE—PRIVILEGE OF PURCHASE OF BUILDINGS—ASSIGNMENT.

Defendant entered into a contract with a third party for the lease of certain land on which the third party had erected some buildings. The contract provided that at the expiration of the term of the lease the owner of the buildings might remove them, or defendant would purchase them. This contract was assigned to plaintiff, with consent of defendant, in these words: "I hereby sell and assign all my right, title, and interest in and to the within lease to [plaintiff.]" *Held* that, the intention of the assignment being to transfer the ownership of the buildings, the contract to purchase passed with it.

2. SAME—AGREEMENT FOR VALUATION NOT A SUBMISSION TO ARBITRATORS.

A contract for the lease of certain land whereon buildings had been erected by the lessee provided that, at the expiration of the term, the lessee might remove the buildings, or require the lessor to purchase them at a valuation "to be ascertained by two persons, one to be chosen by each party, and, in case the persons so chosen disagree, those two shall choose an umpire, whose decision shall be final and binding on the parties hereto, and their legal representatives." *Held*, that this was an agreement for mere appraisal or valuation, which, though binding upon the parties, is not a submission of a controversy to arbitration, and is not subject to the rules which govern arbitrators.

Commissioners' decision. Department 2.

Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

This was an action to recover \$6,213 upon a contract of sale contained in a lease made by the defendant, Christy Seitz, to William Perkins, and by Perkins assigned to the California Annual Conference of the Methodist Episcopal Church. Judgment was rendered for the plaintiff, and defendant appeals.

W. H. Fifield, R. Thompson, and W. F. Gibson, for plaintiff. *E. W. McGraw*, for defendant.

HAYNE, C. This is an action to recover \$6,213 upon a contract of sale contained in a lease. The defendant was the owner of a lot of land, and one William Perkins was the owner of certain buildings upon it. This being the situation of the parties, they entered into a contract by which defendant leased the land to Perkins at a rental of \$120 per month, and which contained a provision that the buildings should stand as security for the rent, and that at the expiration of the term Perkins should have the option either to remove the buildings, or to require defendant to take them at a valuation "to be ascertained by two persons, one to be chosen by each party; and, in case the persons so chosen disagree, those two shall choose an umpire, whose decision shall be final and binding on the parties hereto, and their legal representatives." Afterwards Perkins, with the consent of the defendant, executed the following paper: "For value received I hereby sell and assign all my right, title, and interest in and to the within lease to the California Annual Conference of the Methodist Episcopal Church." At the expiration of the term

plaintiff and defendant each selected a person to ascertain the value of the buildings; and they (not being able to agree) selected an "umpire," who decided that the value was \$6,213. Defendant refusing to pay, the plaintiff brought this action for the amount. The court below gave judgment for the plaintiff and the defendant appeals.

1. The point is made that the assignment was not sufficient to pass the right to the contract of purchase. The argument is that the right of purchase was a distinct thing from the "lease;" that the title to the buildings was in Perkins; that he did not lease his own property from himself, but only *the land* of the defendant; and that the assignment was only of "the within lease," no words of conveyance of the buildings being used; that, therefore, the title is still in Perkins, and the plaintiff has nothing to sell. This argument is exceedingly plausible, but we do not think it is sound. The parties to the assignment certainly supposed they were transferring the lessee's right in relation to the buildings. For it does not appear the land had any use as distinct from the buildings. A town lot covered with buildings could not well have such distinct use as long as the buildings remained upon it, which, in this case, was to be until the expiration of the lease. But, if the ownership of the buildings remained in the assignor, the right to use them would remain in him also; and upon this theory the assignee contracted for a barren right. We do not think this was the intention of the parties. It seems to us that they intended to transfer the ownership of the buildings, and that the assignment does not defeat this intention. The original parties called their contract a lease. The stipulation not to "assign this lease" without the consent of the lessor certainly included the provision in relation to the buildings. "Lease" was their name for the contract. And the parties to the assignment used the word in the same sense. "The within lease" was their phrase for "the within contract." And this meant the *whole* contract, including the provision as to the sale of the buildings. In other words, the original lessee assigned to the plaintiff the right to compel the defendant to purchase the buildings at a valuation. But in order to compel the defendant to purchase the buildings the plaintiff must have been in a position to sell them. Such a right assumes their ownership. One thing is necessarily implied from the other. Inasmuch, therefore, as it necessarily appears from the writing that it was the intention of the parties to transfer the ownership of the buildings, we think it must be held that such ownership was transferred. This was the practical construction of the parties, including the defendant. For he joined with plaintiff in appointing appraisers preparatory to purchasing from plaintiff the ownership which he now says plaintiff never had. The cases cited for the appellant do not conflict with this conclusion; for in none of them, except *Barroilhet v. Battelle*, 7 Cal. 450, was there an assignment of a contract containing a right of sale to the lessor. In *Barroilhet v. Battelle*, the lease contained such a right; but this feature was not considered. The case related solely to the lien of the lessor upon the building as security for the rent due. The case of *Demarest v. Willard*, 8 Cow. 206, which is most relied upon, simply held that a transfer by the lessor of the lease was not a transfer of the reversion. There was no covenant similar to the one above mentioned.

2. The appellant makes several points which turn upon the question whether the agreement of the parties is to be considered to be a submission to arbitration in the proper sense of the term. If it was such, then the arbitrators should have been sworn, (*Day v. Hammond*, 57 N. Y. 482,) the parties should have had notice of the meeting of the arbitrators, and an opportunity to be heard, (*Curtis v. Sacramento*, 64 Cal. 102;) and it is probable that the agreement did not constitute a sufficient submission in writing,—the appointment of the individuals chosen not having been in writing. The question presented, then, is whether the agreement amounts to a submission

to arbitration. There are two time-honored rules in relation to arbitrators,—one that courts will not enforce an agreement to submit to arbitration, or, in other words, that it can be revoked; and the other that arbitrators must give notice of their sessions so as to afford the parties a right to be heard. These rules rest upon the same idea, viz., that an arbitration is a substitute for proceedings in court. It being considered against sound policy to allow parties to deprive themselves of their right of resort to the courts, agreements to that effect are not binding so long as they are executory; but if the parties choose to resort to other tribunals, such tribunals are held to the more important rules which govern courts in their proceedings. It was found, however, that to apply the above rules to all agreements in which parties regulated their action by the determination of third persons would interfere with the ordinary transactions of mankind, and put unnecessary clogs upon business. Accordingly in the well-considered case of *Scott v. Avery*, 5 H. L. Cas. 811, it was held that a condition in a policy of insurance in a mutual company, that the loss should be “ascertained and settled by the committee,” was not a submission to arbitration in its proper sense, but was a condition precedent to the right of action. Similar decisions have been made in this and other states. *Holmes v. Richet*, 56 Cal. 307; *Loup v. Railroad Co.*, 63 Cal. 103; *Cox v. McLaughlin*, Id. 207; *Old Saucelito Co. v. Commercial Co.*, 66 Cal. 253, 5 Pac. Rep. 232; *Adams v. Insurance Co.*, 70 Cal. 198, 11 Pac. Rep. 627; *Carroll v. Insurance Co.*, 13 Pac. Rep. 863; *Canal Co. v. Coal Co.*, 50 N. Y. 250; *Hudson v. McCartney*, 33 Wis. 344; *Haley v. Bellamy*, 137 Mass. 359; *Flint v. Pearce*, 11 R. I. 577; *Gauche v. Insurance Co.*, 10 Fed. Rep. 355; *Fox v. Railroad Co.*, 8 Wall, Jr. 245.

These cases hold that a contract by which the value of property or the amount of damage is, for the purpose of the contract, to be fixed by third persons, is not a submission to arbitration, and therefore to enforce it does not trench upon the jurisdiction of the courts. Now, if this is so, if such a proceeding is not analogous to the investigation by a court of a controversy between the parties, why need it be conducted according to the rules which govern courts in their investigations? We think that it need not; that the proceeding is a mere appraisal or valuation, which, although binding upon the parties, is not the submission of a controversy to arbitration, and is therefore not subject to the rules which govern arbitrators. And to this effect are the best-considered cases.

The precise point was decided, after careful consideration, in *Norton v. Gale*, 95 Ill. 533. The counsel for the appellant admits this to be a case in point, but characterizes it as a “lonesome American case.” But it is not so lonesome. There are cases which are similar in principle, both in England and America.

In *Collins v. Collins*, 26 Beav. 306, the parties agreed upon a sale of real property at a price to be fixed by valuers, one of whom was to be selected by each party, and the persons so selected were to choose an “umpire.” They failed to choose an umpire, and the question was whether the case was within an act of parliament which provided that “if in any case of arbitration” there was a failure to appoint an arbitrator, the court might appoint one upon application. It was held that the proceeding was not an arbitration. And Sir JOHN ROMILLY, M. R., said: “It appears to me that the case of *Leeds v. Burrows*, [12 East, 1.] draws the proper and fit distinction between an arbitration, in the proper sense of the term, and an appraisal or valuation; for valuation undoubtedly precludes differences, and does not settle any which have arisen. That is the distinction which in my opinion, exists between those cases of appraisal and those of valuation.” See, also, *Bos v. Helsham*, L. R. 2 Exch. 78-79; *Eads v. Williams*, 31 Eng. Law & Eq. 203.

In *Curry v. Lackey*, 35 Mo. 394, the agreement was that the price of a slave to be taken in payment for another slave was to be fixed by a third party. It

was held that this third party was not an arbitrator, and therefore that he need not be sworn. The court said: "A reference to arbitration occurs only where there is a matter in controversy between two or more parties. In this case there was no controversy."

In *Green v. Moore*, 64 Pa. St. 90, 91, the agreement was for the purchase of a stock of horses, etc., at a price to be fixed by three disinterested persons to be selected as provided by the contract. If this was a simple contract, the claim was barred by the statute of limitations; otherwise if the determination of the third persons was an award. It was held to be a simple contract, and not an award. And SHARSWOOD, J., delivering the opinion, said: "An award is the judgment of a tribunal selected by the parties to determine matters mutually at variance between them,—not merely to appraise and settle the price of property contracted for under the stipulation that this term of the contract was to be so ascertained. Had the parties made the contract, and afterwards, on a dispute arising, chosen arbitrators to determine what was due upon it, that might have been an award. The case is entirely different where the parties originally agree to buy and sell at a sum to be fixed by an appraisement to be made by a third person or persons. When the original contract is established by competent and sufficient evidence, then, indeed, the assessment thus made by the authority of the parties, or by authority of law, as in the case of the justice of the peace, may be conclusive as to the price; but there is nothing in the transaction to conclude the parties as to anything else. They may fall back—dispute the existence of any contract at all—or prove that it was tainted with fraud or illegality. Here is a clear and palpable distinction between such an appraisement and an award."

So in *Palmer v. Clark*, 106 Mass. 389, where certain work was to be paid for according to the certificate of a specified engineer, it was held to be no objection that the certificate was based upon the notes by a deputy, of measurements made in the absence of the engineer. The court, per COLT, J., said: "A reference to a third person to fix by his judgment the price, quantity, or quality of material, to make an appraisement of property and the like, especially when such reference is one of the stipulations of a contract founded on other and good considerations, differs in many respects from an ordinary submission to arbitration. It is not revocable. The decision may be made without notice to or hearing of the parties, unless such notice and hearing be required by express provision or reasonable implication; and it may be made upon such principles as the person agreed on may see fit honestly to adopt, or upon such evidence as he may choose to receive." See, also, *Garrard v. Macy*, 10 Mo. 164; *Willingham v. Veal*, 74 Ga. 759; *Gustavesen v. McGay*, 12 Daly, 427.

It is quite true that the facts of the cases above quoted are not absolutely identical with the facts of the case before us. But they proceed upon the same principle, and that makes them authority here. It must be admitted that there are cases to the contrary. But in most of them the distinction does not seem to have received attention. And the cases in which the distinction was noticed do not seem to us to be well reasoned. Certainly, if parties expressly say in their agreement that the "arbitrators" are to determine the question upon their own skill and judgment without examining witnesses or hearing argument, there could be nothing to prevent such agreement from being carried out. And if this can be expressed, it can in a proper case be implied. This is recognized in some of the cases cited for the appellant. Thus in *Wilson v. Boor*, 40 Md. 488-489, the court said: "Parties may waive notice, or the case may be of such a character as not to require notice." See, also, *Wiberly v. Matthews*, 91 N. Y. 649. This seems to be sufficiently obvious. And, if so, it is a mere question as to the intention of the parties in each case. They could stipulate for the formalities of an arbitration if they chose to do so. But in a case like the present, where the reference to a third person is provided for in a con-

tract made long before any controversy arises, which contract is made upon valuable consideration other than the mutual promise to submit to the decision of the third party, the decision being merely one link in the chain of the claim, we think that the proceeding is not an arbitration; and, in the language of the supreme court of Massachusetts above quoted, the decision may be made without notice or hearing, "unless such notice and hearing be required by express provision or reasonable implication." Such a rule seems to us to accord with the intentions of the business men in the great majority of cases. Such transactions are very common. So much so that a provision has found its way into the Code that, where the consideration of a contract is executory, "it may be left to the decision of a third person." Civil Code, § 1610. Surely it could not have been the meaning that the omitted term was to be settled by a proceeding in the nature of a suit between the parties. In this regard ROBERTSON, C. J., delivering the opinion of the supreme court of New York, to the effect that a reference to a third person to fix the amount of loss under a policy of insurance was not within the rule that one partner could not bind the firm by a submission to arbitration, said: "There is scarcely a day in which in commercial transactions the valuation of property or estimate of damages is not intrusted to third parties, and no one has yet dreamed of looking upon them as arbitrations, and subjected to all the formalities imposed on them by the Revised Statutes, with the paraphernalia of oaths, witnesses, and notices of trials. It is most frequently confided to the personal skill, knowledge, or experience, or even acquired information of appraisers." *Brink v. Insurance Co.*, 5 Rob. (N. Y.) 123. This was the practical construction put upon the contract by the parties here; for the defendant "was present one day there," but made no offer of evidence or request to be heard.

3. Several other points are made by the learned counsel for the appellants, which may be mentioned briefly: (a) It is said that there is nothing to show that the plaintiff entered into possession of the premises, and that therefore there was no privity between it and the lessor. But the complaint alleges that Perkins entered into possession, and that "he and his assignee continued in said possession to the end of the term." The averment in the answer related to the possession of Perkins "since the termination of said lease," which is quite a different matter. Assuming, therefore, that the objection is good in point of law, it has no foundation in fact. If the assignee went into possession of the premises under the lease, it does not matter that Perkins remained there also. (b) It is objected that the rent due at the expiration of the lease was not paid. The complaint alleges that the rent was paid by the plaintiff and Perkins. The answer denies that it was paid by the plaintiff. This admits that it was paid. If the "rent" was paid it is immaterial which of the persons in possession paid it. The defendant is not entitled to have it paid twice. (c) There was probably a variance in proving a reduced rent without pleading the agreement of reduction. But, under the circumstances, it could not have misled the defendant to his prejudice, and therefore it is to be disregarded. Code Civil Proc. § 469. (d) The testimony of the witness Wilcox was merely as to the fact of his selection as "arbitrator." And this being so it was properly admitted. The objection was in effect to the form of the question. The other points do not require special mention.

We therefore advise that the judgment and order denying a new trial be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

(74 Cal. 298)

LOVELAND v. GARNER and others. (No. 12,209.)

(Supreme Court of California. December 9, 1887.)

CORPORATIONS—ACTIONS AGAINST—ANSWER OF DIRECTORS ON INFORMATION AND BELIEF—FACTS WITHIN THEIR KNOWLEDGE—JUDGMENT ON THE PLEADING.

The California act of April 23, 1880, prescribes certain duties to be performed by directors of mining corporations, and for failure to perform they should be liable in the sum of \$1,000 liquidated damages, at the suit of any stockholder. Plaintiff brought action under this act, and his complaint contained all the averments necessary. Defendants denied upon information and belief. *Held*, that as the matters alleged in the complaint were all within the knowledge of the defendants, a denial thereof upon information and belief was insufficient, and the plaintiff was entitled to judgment on the pleadings.¹

In bank. Appeal from superior court, San Bernardino county; HENRY M. WILLIS, Judge.

J. S. Loveland, as stockholder in a mining company, brought suit for \$1,000 liquidated damages against W. B. Garner and others, directors of said company, for failure to comply with the provisions of the California act of April 23, 1880, requiring directors of mining corporations to make certain reports. Judgment was rendered for the plaintiff on the pleadings, and defendants appealed.

Hargrave & Gray, for plaintiff. *Harris & Gregg*, for defendants.

McFARLAND, J. On April 23, 1880, the legislature passed an act amendatory of "An act for the better protection of stockholders in corporations," etc. It was intended for the benefit of stockholders in mining corporations, and prescribes, with great detail, the duties of directors, presidents, superintendents, secretaries, and other officers of such corporations. St. 1880, (State Ed.) 134. It is sufficient to say here that section 1 of the act provides that the directors shall, on the first Monday of each month, cause to be made and posted in the office of the company an itemized account or balance-sheet embracing a full statement of all receipts and disbursements; also all existing indebtedness or liability, the amount of money on hand, etc.; and that section 3 provides that if the directors fail to comply with section 1, they shall be liable in the sum of \$1,000, liquidated damages, to any stockholder bringing an action therefor.

In the case at bar the complaint, which is verified, avers the existence of a certain mining corporation; that the defendants are, and at the times mentioned were, the directors of said corporation; and that plaintiff is and was a stockholder therein. It then avers that said corporation was seized and possessed of divers valuable mining claims and mineral lands, and also of certain mills, machinery, and other property of great value; that certain persons named were superintendent, president, and secretary; that defendants, as directors, had the management and control of its property and business; that during the months of January, February, March, April, May, June, and July, 1885, said mines and mills were operated, and large sums of money were received and disbursed, liabilities incurred, etc.; and that defendants failed to cause any itemized account or balance-sheet to be made, etc., as provided by said act. All facts necessary to make a complete cause of action under said act of April 23, 1880, are set forth in the complaint with great particularity.

The only positive and direct denial of the answer is the denial that the corporation "was seized or possessed of any mill or mills, or any machinery of

¹If the facts alleged in a complaint are presumptively within the knowledge of the defendant, he must deny positively, and a denial on information or belief will be treated as an evasion. But if the facts alleged are not such as must be within the personal knowledge of the defendant, he may deny knowledge or information thereof sufficient to form a belief. *Railroad Co. v. Railroad & Nav. Co.*, 22 Fed. Rep. 245. So held in *Wisconsin*. *Stacy v. Bennett*, 18 N. W. Rep. 26.

any nature or kind whatever." All the other averments of the complaint which are attempted to be denied at all are denied "upon information and belief." No new matter was set up as a defense. Plaintiff moved for judgment upon the pleadings. The motion was granted, and judgment was rendered for plaintiff for \$1,000; this court having held, when the case was here before, that there could be a recovery for only one month's failure. 12 Pac. Rep. 616. From this judgment defendants appeal.

The judgment of the court below should be affirmed. It is settled practice here that judgment for plaintiff may be rendered upon the pleadings where the material averments of a sufficient complaint are not denied by the answer. *Felch v. Beaudry*, 40 Cal. 439; *Hemme v. Hays*, 55 Cal. 339; *Gay v. Winter*, 34 Cal. 153; *Fitzgibbon v. Calvert*, 39 Cal. 261. It is equally well settled "that if the facts alleged in the complaint are presumably within the knowledge of the defendant, he must answer positively; and a denial upon information and belief will be treated as an evasion." *Curtis v. Richards*, 9 Cal. 38. And in such a case the defendant should at least show "how it happened that he was without knowledge as to such facts." *Brown v. Scott*, 25 Cal. 190. And the rule applies as well to corporations and their officers as to natural individuals. *Gas Co. v. San Francisco*, 9 Cal. 453. Now, the only positive denial in the answer, namely, that the corporation did not own any mill or machinery, is immaterial. The complaint is perfect without the averment of that fact. The other denials, upon information and belief, are all of matters within defendants' knowledge,—things which they presumably knew. For defendants to say, practically, that they do not know whether for seven months a certain person was their superintendent, or whether, during that time, the the corporation of which they were directors worked or developed any mine, or extracted any ores or minerals, or employed any miners or teamsters, or incurred any liabilities, or disbursed any money, or was engaged in conducting the business of mining, or received any money whatever, is to indulge in a playful frivolity not consistent with the solemnity of sworn pleadings in a court of justice. Judgment affirmed.

We concur: SEARLS, C. J.; TEMPLE, J.; THORNTON, J.; SHARPSTEIN, J.; MCKINSTRY, J.; PATERSON, J.

(74 Cal. 301)

BREEN v. DONNELLY *et al.* (No. 9,566.)

(*Supreme Court of California.* December 10, 1887.)

1. EQUITY—REFORMATION OF DEED—MISTAKE—LIMITATION.

Two tenants in common, wishing to divide 48,000 acres grazing land, employed a surveyor in 1867, and conveyed by deeds to each other one-half each, according to his description. In 1880, upon survey for purposes of taxation by the state, it was discovered that defendants' ancestor had 500 acres too much. In less than two years plaintiff filed a bill to correct the mistake in the deed, and defendants pleaded the statute of limitations. Code Civil Proc. Cal. § 323, subd. 4, provides that, in an action for relief on account of mistake, the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the mistake, and it must then be brought in three years. *Held* that, as there were no circumstances by which plaintiff could be held to have knowledge, before the actual discovery of the mistake, the action was brought in time.

2. BOUNDARIES—LINES ESTABLISHED BY UNITED STATES SURVEYOR.

In the absence of anything to the contrary, the boundaries of a *rancho* established by the final survey of the United States surveyor general, approved by the government, and incorporated into the patent, and followed in establishing a partition of the *rancho*, should be taken as correct.

Department 2. Appeal from superior court, Santa Clara county; F. E. SPENCER, Judge.

Edward J. Breen, plaintiff, sued A. J. Donnelly and E. T. Donnelly, executors of James Dunne, deceased, and others, to correct a mistake made by James Dunne in a deed in 1867.

T. H. Laine, W. Matthews, and Montgomery & Ryland, for appellants.
S. F. Leib and Briggs & Hawkins, for appellees.

MCFARLAND, J. This is an action to reform a deed. Judgment went for plaintiff in the court below; and from the judgment and order denying a new trial defendants appeal.

The following are the material facts: On and before December 18, 1867, Patrick Breen and James Dunne were the owners in fee and in possession, as tenants in common, of a large tract of land containing over 48,000 acres, and known as the "Sobranste de San Lorenzo Rancho," each owning an equal undivided interest. Prior to said last-named day they had agreed upon a partition of the *rancho*, to be accomplished by ascertaining a line drawn from the easterly to the westerly side of the land, which should divide it exactly into two halves or equal parts, and interchanging deeds of conveyance so that each would own a half in severalty. To this end they had employed one Smith, reputed and believed by them to be an honest, competent, and skillful surveyor, to run said line, who had reported that he had surveyed and established a certain line which divided the *rancho* into two equal areas as contemplated. This line was marked by stakes, and was afterwards designated for some distance by a plow furrow. Both Breen and Dunne were informed by Smith, and believed, that he had correctly computed the areas on each side of said line, and that they were equal. Thereupon, in accordance with their agreements, on the said eighteenth day of December, 1867, said Breen executed and delivered to said Dunne a deed of conveyance of the north-east half of said *rancho*, and said Dunne in like manner conveyed to said Breen the south-east half, and in each deed the description by metes and bounds included said line run as aforesaid by said Smith as a boundary line. The land was then, and ever since has been used solely for the purpose of grazing; and after the date of said deeds each party occupied separately his supposed part of said *rancho* as divided and designated by said Smith line. Said Patrick Breen died in December, 1868, and said James Dunne died in 1874. The plaintiff, Edward J. Breen, as heir and purchaser from other heirs, is the successor in interest of said Patrick Breen, deceased; and the defendants, as heirs and personal representatives, are the successors in interest of said James Dunne, deceased. The parties to this action have occupied said land in like manner as it had been occupied by said Patrick Breen and James Dunne in their lifetime.

As a matter of fact, the said line run by said Smith was not correct. It left in the north-east part deeded to said Dunne 1,110.64 acres more land than was in the south-east part deeded to said Breen. This mistake was not discovered until about June, 1880. Its discovery came about in this way: The state constitution adopted in 1879, and statutes passed under it, required large tracts of land to be sectionized where the same had not been done by the United States government, for purposes of assessment and taxation; and plaintiff, for the purpose of complying with this requirement, employed a surveyor to sectionize his land, who, for the first time, discovered and made known the said mistake made by said Smith. Upon the discovery of the mistake, plaintiff requested defendants to rectify it, and they refused to do so.

This case has been argued by counsel for appellants upon the theory that there should be applied to it the rule that where coterminous owners of land establish a boundary line between them, and acquiesce in its correctness during the period of statutory limitation, such line cannot afterwards, be disturbed. Such is certainly the general rule in actions of ejectment, to quiet title, etc., although it is, perhaps, not definitely settled to be the rule, even in those cases when there has been a mutual mistake. See *Sheils v. Haley*, 61 Cal. 157, and *Smith v. Roberts*, 9 Pac. Rep. 104. But this is an action to reform a deed,—to correct a mistake in a written instrument, and make it

conform to the real intent of the parties. That a court of equity has power to correct such a mistake in a proper case is of course beyond doubt, and that the facts here make a proper case is equally clear. It is established beyond doubt that the two tenants in common intended to convey by deed to each other the half of a tract of land, and that by pure mistake the deed sought to be reformed failed to convey such half. There is no question here of innocent purchasers. Neither are there any equities by reason of defendants having put any improvements on the land not included in the deed. They have had the benefit of the use of the land for pasturage since the date of the deed, and have not expended upon it any money whatever. In good conscience, they ought to correct the mistake; and their only defense is founded upon the naked plea of the statute of limitations.

But we think that the action was commenced in time. Section 338, Code Civil Proc., enumerates the kinds of actions which must be commenced within three years; and subdivision 4 of said section is as follows: "An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to *have accrued* until the discovery by the aggrieved party of the facts constituting the fraud or mistake." In the case at bar the discovery of the mistake was not made until 1880, at which time the cause of action "is deemed to have accrued." The action was commenced in less than two years afterwards. It was therefore commenced in time, unless the circumstances were such that plaintiff ought to have known the mistake, and therefore should be held in law to have had knowledge of it before the time of its actual discovery. But we think that there were no circumstances from which he should be charged with such knowledge. After the partition line had been run by a surveyor believed to be competent and honest, and who had been specially employed for that purpose, there was nothing to excite the suspicion of either party that such line did not divide the *ranchito* into two equal parts. Looking at, or walking or riding over, or using for grazing purposes, a tract of land containing over 24,000 acres, would not indicate to any one that it was 500 acres more or less than the half of another tract containing over 48,000 acres.

The court below did not err in holding that, in the absence of any showing to the contrary, the boundaries of the *ranchito* established by the final survey of the United States surveyor general, made under the direction of and approved by the United States government, which was incorporated into the patent, and followed by said Smith in fixing said partition line, may be taken to be correct.

Judgment and order affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

(74 Cal. 311)

In re LETELLIER'S ESTATE. (No. 11,240.)

(*Supreme Court of California.* December 12, 1887.)

EXECUTORS AND ADMINISTRATORS—POWER TO PETITION FOR DISTRIBUTION OF ESTATE.

An executor is not authorized to petition for partial distribution of an estate under Code Civil Proc. Cal. §§ 1653, 1660, providing for it upon petition by "heirs, devisees, and legatees," after the lapse of four months from the issuance of letters testamentary or of execution, and that notice of such application must be served upon the executor or administrator personally.

Commissioners' decision. Department 2.

Appeal from superior court, Alameda county; N. HAMILTON, Judge.

Alexander Letellier died in the county of Alameda on the twentieth day of April, 1884, leaving a will in the French language, which was, on the twelfth day of May, 1884, admitted to probate, and letters testamentary issued to Peter Portois, the executor named therein. The will contains eight specific pecun-

iary legacies, aggregating \$1,100, and a devise of real estate and the dwelling-house thereon to Eugenie Couturier. On the thirteenth day of December, 1884, the executor filed a petition for the distribution to Madame Couturier of the real estate mentioned in the devise, which showed that the condition of the estate would make it impossible to pay any of the pecuniary legacies, but that petitioner did not know of any objection to making distribution of the real estate to the devisee. The hearing of this petition was set for December 29, 1884, on which day one Eugenie A. R. Letellier filed objections to the granting of the petition, in which she set forth that she was the widow of the deceased, and that deceased also left him surviving three children, none of whom were mentioned in the will, and all of whom, as well as the widow, resided in France.

On the matter being reached for hearing on the twenty-ninth December, 1884, the contestant appeared in court, by her attorney at law, and moved for a continuance of the hearing for such reasonable time, not exceeding two months, as would enable the heirs to present proofs of their heirship, and in support of such motion read in evidence a power of attorney from the widow to Mr. E. J. Le Breton, and another power from six persons, claiming to be children of the deceased; and also a document in the French language, known as an "Acte de Notoriété," and purporting to contain the declarations of two witnesses as to the marriage of the deceased with the contestant, and that the children were the issue thereof. The court thereupon announced its ruling upon the motion for a continuance in the following language: "This is not sufficient proof of heirship. The will leaves the property in question to Eugenie Couturier. Your remedy is by contesting the will. If there are any lawful heirs the decree setting apart and distributing the property will, in that event, be inoperative. I cannot see any objection to a distribution at this stage,"—and denied the motion for a continuance, and made the decree of distribution. Subsequently, the contestant moved for a new trial, which motion was denied. Appeals have been taken, both from the decree of distribution and the order denying the motion for a new trial.

Stanly, Story & Hayes, for appellants. *Geo. E. Lawrence* and *E. J. & J. H. Moore*, for respondents.

HAYNE, C. This is an appeal from a decree of partial distribution, made upon the petition of the executor. The provision of the Code of Civil Procedure is as follows: "Sec. 1658. At any time after the lapse of four months from the issuing of letters testamentary or of administration, *any heir, devisee, or legatee* may present his petition to the court for the legacy or share of the estate to which he is entitled, to be given to him upon his giving bonds, with security for the payment of his proportion of the debts of the estate." And the next section provides that "notice of the application must be given to the executor or administrator personally, and to all other persons interested," etc. These sections are the only ones authorizing partial distribution to be made. It seems to us that they do not contemplate a petition by the executor, to whom it is of no concern whether an heir, devisee, or legatee gets paid in advance or not. There being no authority in the statute for the proceedings taken in the court below, they were unauthorized, and should be set aside. We think this point arises upon the record, whether the decree of partial distribution is to be considered as a judgment or as an order. We therefore advise that the decree appealed from be reversed and the cause remanded.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the decree appealed from is reversed, and the cause remanded.

In re LETELLIER'S ESTATE. (No. 11,666.)

(Supreme Court of California. December 12, 1887.)

Commissioners' decision. Department 2.

Appeal from superior court, Alameda county; N. HAMILTON, Judge.

Stanly, Story & Hayes, for appellants. Geo. E. Lawrence and E. J. & J. H. Moore, for respondents.

HAYNE, C. The decree ought to be set aside. The motion for a new trial having been reversed in *Re Letellier's Estate*, ante, 847, it is unnecessary to consider the question made in this appeal.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the decree appealed from is reversed, and the cause remanded.

(74 Cal. 341)

WEIMMER et al. v. SUTHERLAND. (No. 12,039.)

(Supreme Court of California. December 18, 1887.)

JUDGMENTS—BY DEFAULT—WHAT CONSTITUTES—SETTING ASIDE BY JUSTICE OF THE PEACE. Code Civil Proc. Cal. § 859, provides that justices' courts can set aside judgments by default within 10 days. Defendants were served, and filed an answer, in a suit before a justice, but were not present on the day of trial, not having received notice from the justice, and judgment was rendered against them. *Held*, that this was not a judgment by default, and an order setting it aside was error.

In bank. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

James Sutherland, plaintiff, sued E. Weimner and wife, defendants, before A. A. Smith, justice, and obtained judgment, which the justice set aside. Plaintiff took a writ of *certiorari* from the superior court, which declared the order vacating the judgment void, and defendants appealed.

W. D. Grady, for appellants. Tupper & Tupper and Babcock & Mickle, for respondent.

McFARLAND, J. This is an appeal from a judgment of the superior court of Fresno county, rendered upon a writ of *certiorari* directed to a justice's court. James Sutherland (the respondent therein) brought an action in the justice's court of A. A. Smith (appellant) against E. Weimner and wife, (also appellants herein.) In said action in the justice's court, the defendants therein (Weimner and wife) appeared, and made a motion to quash the summons. The motion was denied, and they then demurred to the complaint. The demurrer was overruled; and then, on June 22, 1886, they filed an answer. On July 9th the case was set for trial for July 19, 1886, at 1 o'clock P. M. At the last-named time the defendants failed to appear, and the court, after having waited one hour, proceeded with the trial; and after hearing witnesses, and taking evidence on the issues made by the pleadings, rendered judgment for the plaintiff thereon, (Sutherland.) On July 26th defendants, upon affidavits, moved the court to "vacate and set aside" the judgment, upon the ground that defendants had no notice of the time of trial. The hearing of the motion was continued to September 10th, when the court found that defendants had not received notice of the day of trial, (when notice seems to have been deposited by the justice in the United States mail, directed to defendants,) and thereupon entered an order "that said judgment is hereby set aside and vacated." It does not appear that plaintiff had notice of this motion, or was present when it was heard. On the application of the plaintiff, Sutherland, the superior court granted a writ of *certiorari* to review the action of said justice vacating said judgment. On the seventh day of January, 1887, after a full hearing, both parties being present by counsel, the superior

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court rendered judgment that the said order of said justice's court vacating the said judgment in said court was void, and of no effect, etc. From this judgment of the superior court this appeal is taken.

Justices' courts have no power to review their own judgments, unless by some method expressly provided by law. In *Winter v. Fitzpatrick*, 85 Cal. 269, it was held that a justice of the peace could not vacate a judgment rendered by him; and that an order attempting to do so, not being appealable, should be annulled on *certiorari*. However, at the time *Winter v. Fitzpatrick* was decided, the civil practice act provided that only those sections embraced in the title which prescribed the proceedings in justices' courts, and such other sections as were specially mentioned in that title, should be applicable to justices' courts. At the present time, section 925, Code Civil Proc., is as follows: "Justices' courts being courts of peculiar and limited jurisdiction, only those provisions of this Code which are in their nature applicable to the organization, powers, and course of proceedings in justices' courts, or which have been made applicable by special provisions in this title, are applicable to justices' courts, and the proceedings therein." It is therefore argued that *Winter v. Fitzpatrick* has no bearing on the present case; and that by virtue of said section 925 all the broad powers granted to courts of record by section 473, Code Civil Proc., may be exercised by justices' courts. The language of section 925 is certainly of difficult construction; and cases might well arise where it would be extremely doubtful whether or not certain acts of a justice's court were justified by its provisions. It will be observed, however, that the section expressly preserves the notion of the "peculiar and limited jurisdiction" of these courts; and, moreover, that its general character is negative, rather than positive. The grant is somewhat in the shape of a parenthesis in a clause of limitation. If, therefore, that part of the Code which expressly deals with proceedings in justices' courts, prescribes the powers of those courts in relation to a general subject about which the powers of courts of record are expressly prescribed in another part, then we think that the powers of the justices' courts with respect to that subject are to be looked for in the former, and not in the latter, provision.

Now, the power in question here, *i. e.*, the power to relieve from a judgment taken through surprise, excusable neglect, etc., is expressly given to courts of record by section 473, and is expressly given to justices' courts by section 859. Both sections relate to the same general subject. But while section 473 gives this power to relieve, in general terms and in all cases, within six months in some instances, and one year in others, after judgment, section 859 confines the power in justices' courts to cases of a "judgment by default," and limits the time to "ten days after the entry of the judgment." We think, therefore, that the latter section is determinative of the question here involved, and not section 473. And, of course, in the case at bar, there was no "judgment by default." A default occurs when a defendant fails to answer or demur as described in sections 850 and 871 *et seq.* Not being a judgment by default, the defendants could have appealed to the superior court; and, if aggrieved, that was their remedy.

The judgment of the superior court is affirmed.

We concur: SEARLS, C. J.; TEMPLE, J.; SHARPSTEIN, J.; MCKINSTRY, J.

PATERSON, J., (*concurring*.) I concur, but express no opinion upon the question as to the proper remedy. Section 850, Code Civil Proc., provides that, "when all parties served with process shall have appeared, * * * the justice must fix a day for the trial of said cause, and notify the plaintiff, and the defendants who have appeared, thereof." If this requirement be jurisdictional, and the time for appeal elapsed before defendant had notice that the case had been set for trial, a trial had, and judgment entered against

him, it would seem to be a harsh rule which would preclude him from showing upon *certiorari* that he had never had any notice of the trial; because it must be remembered the justice is not required to enter in his docket any minute of the service of notice of the time of trial, nor is he required to file any proof of such service, (section 911, Code Civil Proc.,) and there is nothing in the record, therefore, to show that judgment has been entered against the defendant without a hearing, or notice of hearing.

(74 Cal. 323)

STEELE v. PACIFIC COAST RY. CO. (No. 9,884.)

(*Supreme Court of California.* December 15, 1887.)

1. RAILROAD COMPANIES—LIABILITY FOR NEGLIGENCE—FIRES—INSTRUCTIONS AS TO OTHER FIRES.

In an action for damages from a fire caused by sparks from a locomotive, the court instructed the jury that, if they found from the evidence that defendant's engines had dropped fire at other times before or after the time alleged in the complaint, such facts should be considered in determining the negligence of the defendant. The defendant objected to the instruction, on the ground that it did not set a limit as to time. *Held* that, as the jury could only know whether the defendant's engines had dropped fire at other times by the evidence, the range of time that was allowable to be considered by the jury should be determined when the testimony was introduced.

2. SAME—DEFECTIVE APPLIANCES—ACCUMULATION OF GRASS ON RIGHT OF WAY—INSTRUCTIONS.

In an action for damages from a fire caused by sparks from a locomotive, the complaint contained two counts of negligent acts,—negligence in running the engine, and negligence in allowing dry grass and hay to accumulate on defendant's right of way. The defendant asked the court to instruct the jury that, if they found that defendant's engine had all the best appliances for preventing the escape of fire, then defendant was not guilty of negligence in the escape of the fire, nor liable therefor, unless it escaped through the negligence of defendant in managing the machinery. *Held* that, as the instruction ignored entirely the question of negligence in allowing dry grass and weeds to accumulate on the right of way, it was properly modified so as to distinguish the two questions.¹

3. SAME—TRIAL—OBJECTIONS TO EVIDENCE.

In an action against a railroad company for damages from a fire caused by sparks from a locomotive, a witness for plaintiff testified that another fire had occurred at a certain time prior to the one complained of. He was then asked if he knew of any fire that had occurred between the two. Defendant objected, as irrelevant and immaterial and too remote. *Held*, that the objection was too general, and was properly overruled.

In bank. Appeal from superior court, San Luis Obispo county; D. S. GREGORY, Judge.

The facts are stated in the opinion.

V. A. Gregg, for plaintiff. R. B. Treat and J. M. Wilcoxon, for defendant.

SEARLS, C. J. Action to recover of defendant the value of a lot of hay and grain destroyed by fire on August 7, 1884, claimed to have been set on fire by the negligence of the defendant in using its railroad locomotive, and in allowing dry grass and inflammable materials to accumulate along its right of way. Judgment passed for plaintiff; from which, and from an order denying it a new trial, defendant appeals.

At the trial, there was evidence tending to prove that defendant was a corporation, authorized to run and operate a railroad, and lawfully engaged in that occupation, and was such at all times mentioned in the complaint; that David Howell, on or about the seventh day of August, 1884, was the owner and possessed of a stack of unthrashed wheat in said county, adjoining the

¹As to the imputation of negligence, in actions against railroad companies to recover damages for loss by fire, from the fact that the company allowed combustible material to accumulate on its land, see *Railroad Co. v. Benson*, (Tex.) 5 S. W. Rep. 822, and note.

right of way of the railroad of defendant in the field; that the stubble from which said grain was cut was continuous upon the soil of said field from the stack of wheat to the right of way of defendant's railroad, as were grasses and weeds, also, that were then dry, and capable of communicating fire; that defendant had before August 7, 1884, permitted wild oats, weeds, squirrel grass, and other grasses to become dry and inflammable on its right of way, continuous between its track and the field of Howell adjoining, and had cut the same, and had placed it in small bundles or cocks on its right of way, and near the fence inclosing the field upon which said stack of wheat then was, and had allowed it to remain there three or four weeks prior to the fire; that defendant caused a swath of said wild oats, etc., to be cut and left lying close up to its track, and adjacent to the ends of the ties upon which its rails were laid, and that it had become dry and inflammable; that the stubble from which said wild oats, etc., on said right of way had been cut was left standing, and had, at the date last set forth, and for some time prior thereto, become dry and inflammable; that said stack of wheat had been cut and placed in the field about three weeks prior to August 7, 1884; that defendant had on at least two different times prior to August 7, 1884, and in that year, attempted to burn the grass, weeds, etc., cut and lying upon its right of way, but was unable to do so because of the dampness of the same; that where the right of way of the defendant adjoins the field of said Howell as aforesaid, during all the year from about April 1st to about December 1st of each year, the prevailing winds are from the south-west and west, the track of defendant running nearly east and west at that point; that by reason of the lay of the country in that vicinity the winds generally blow very hard each day, between the dates aforesaid, between the hours of about 10 A. M. and sundown, but the weather was calm at this point for about a week prior to August 7, 1884; that in the mornings of nearly each day prior to the fifth of August, 1884, fogs were prevailing in that vicinity; that in the mornings between the dates when said grass, etc., was cut on the defendant's right of way, as set forth, and August 5, 1884, the said grasses, etc., were too wet to burn, and later in the day the winds prevailed to such an extent as to render it hazardous to burn the same, without danger of the fire escaping and getting beyond the control of the persons having charge of the same, and into the fields adjoining the right of way; that during the summer season of the year 1884 defendant caused a great portion of its right of way in other localities, but not in this, to be burned over, and most of the inflammable vegetation removed therefrom, employing servants for that purpose especially, expending thereabout money to the amount of \$3,000 or thereabout; that defendant's track, where it adjoined said Howell's field, is on an up grade, going south-easterly, of about 90 to 100 feet to the mile; that locomotives emit more sparks and drop more fire going up grades than on levels or down grades; that a fire originated on August 7, 1884, on defendant's right of way, between the track and the fence inclosing Howell's said field; that said fire spread to and was communicated by vegetation in a dry state to the field of said Howell, and thence across the same to his said stack of wheat, and the same was destroyed by fire, said stack being about 200 feet from defendant's right of way; that from thence the fire was communicated to a field belonging to plaintiff, upon which was stubble and weeds in a dry state, and destroyed a lot of hay lying in said field; that said hay had been cut by plaintiff, and allowed to remain in his field, adjoining the field of said Howell, in cocks, since the month of May, 1884; that some rain fell in June and July of the year 1884 at this point; that within five minutes prior to the said fire the passenger train of defendant passed on its right of way, using fire on the locomotive thereof, and ascending the grade, hauling seven loaded cars, the locomotive pulling said train being No. 2, and graded at that amount of cars for its load; that said engine No. 2 had on several occasions emitted fire, prior to August 7, 1884, and was the worst engine belonging to defendant,

and used on its road, to emit sparks and fire; that on said August 7, 1884, said engine was run by a competent and careful engineer in charge thereof, and was provided with the most approved appliances to arrest and prevent the escape of fire in both its stack and ash-pan; that all the appliances upon said engine were at that time in good condition; that an examination of the condition of the engine aforesaid was made on the same day said fire occurred, and within an hour thereafter, and its machinery and appliances for the prevention of the escape of fire from it were found to be in good condition; that said engine was on said August 7, 1884, provided with the best appliances made use of on other roads, in this state for the prevention of the escape of fire therefrom; that, in going up said grade by the engines of defendant, fire had been seen to escape from them prior to August 7, 1884; that the hay in plaintiff's field had been allowed to become dry and inflammable; that said Howell knew of the condition of the right of way of defendant, and the lay of the land adjoining his said field, and the prevailing course of the winds during the year 1884, and prior to August 7, 1884; that no fire had ever been communicated to the fields along the line of defendant's right of way in the vicinity of the one above set forth during the year 1884; that no fire had ever been communicated or originated along the defendant's right of way from any of its locomotives for a period of about two years, except once during that period, to-wit, about two years since, when it burned a field adjoining the field of Howell; that on said August 7, 1884, said engine No. 2 was being carefully and skillfully managed by the engineer thereof; that neither Howell nor plaintiff, in the year 1884, prior to August 7, 1884, and after they had harvested their said crop, ever dug up the soil, or removed the vegetation therefrom, on their lands, or took any other precaution or measures on their land to prevent the communication of fire to their fields from the right of way of defendant, except to notify an employe of defendant of the danger, which they did some three or four weeks before the seventh day of August; that the engines of defendant run on its road in the month of August, 1884, were all supplied with the same appliances to prevent the escape or dropping of fire as said engine No. 2; that said Howell assigned his claim against the defendant, prior to the commencement of this action, to the plaintiff.

Defendants assign the giving of the fourth instruction by the court as error. It is as follows: "If you find from the evidence that defendant's engines emitted or dropped fire at other times, before or after the occurrence of this fire alleged in the complaint, these will be circumstances or facts to be considered and weighed by you in determining the question of whether the fire was dropped or emitted by the engine by the negligence or carelessness of defendant." The objection urged against the instruction is that it is not limited as to time, place, or the particular engine by which the fire in question may be supposed to have been communicated. The limitations which appellant claims should have been included in the instruction, it seems to us, are those which are to be applied to the introduction of testimony on the subject, and were not necessary to an instruction. The jury could only know that defendant's engines had "emitted or dropped fire at other times, before or after the occurrence of this fire," from the evidence, and whatever range was proper on that subject in admitting evidence was a question to be determined when the testimony was offered. It has been held in this state, in like cases, that testimony of like character is admissible. This being so, the instruction is proper. As to the proximity of time and place to which the proofs must be confined, questions must arise which can only be determined in view of the circumstances as the testimony is offered.

The court gave the fourth instruction asked by defendant, but added to it a modification, to which defendant excepted. The instruction as given is as follows, the portion in brackets being the modification as added by the court: "If you believe from the evidence that the damages claimed by the

plaintiff, if any has been sustained, were caused by fire escaping from defendant's engine, and find, further, that the engine was in good order, properly constructed, and supplied with the best appliances in use to prevent the escape of fire, then the defendant was not guilty of negligence in such escape of the fire, and is not liable for the escape of the fire, unless it escaped through the negligence of the agents or servants of the defendant in managing or running the engine machinery. [But this instruction applies only to negligence by the escape of fire from the engine, and not to negligence—if such there was—in maintaining, suffering, or permitting dry grass or hay or other inflammable substance to remain on its track or right of way, if it did so.]” A reference to the complaint will show that plaintiff counted upon two separate acts of negligence on the part of defendant, viz.: (1) Its negligence in conducting and running its engine whereby the fire escaped therefrom, and caused the injury complained of; and (2) negligence of defendant in cutting and leaving upon the ground upon its right of way, near and against its railroad track, the dry and inflammable grass, weeds, wild oats, etc., which had grown on said right of way, whereby the fire from its engine was communicated to such dry materials, and thence to plaintiff's property, etc. From this it will be seen that defendant may have exercised due care and caution in the construction and management of its engine, so that no liability would attach to it on account of fire escaping therefrom, and yet have been guilty of such negligence in leaving its right of way so incumbered with inflammable material as to render it liable. It was in view of this dual question of negligence that the court added, and as we think properly, the portion of the instruction in brackets.

The fifth instruction asked by defendant was properly refused for a like reason. It limited defendant's liability to negligence in the construction or management of its engine, and wholly ignored the question of negligence in leaving material adjoining its road.

There was no sufficient evidence of contributory negligence on the part of plaintiff to call for the instruction asked on that point by defendant. Plaintiff and his grantor had a right to cut, harvest, stack, and retain their hay and wheat upon their own land in the usual and customary manner, during the summer season, without being amenable to the charge of negligence for so doing; nor were they bound to plow, remove, or segregate the stubble left upon their land after gathering their crops, to avoid a like implication.

The instructions given by the court on behalf of plaintiff and defendant stated the law of the case clearly and properly.

The only other question necessary to be considered relates to the admission of testimony. A witness for plaintiff was asked as follows: *Question*. “Do you know of any fire occurring upon the right of way of this defendant subsequent to the fire you have spoken of, and prior to the one that occurred that destroyed that stack?” To which the defendant objected, on the grounds that it was irrelevant and immaterial, and being too remote. The court overruled the objection, and permitted the witness to answer the question; to which ruling of the court the defendant then and there duly excepted, and the witness answered as follows: *Answer*. “About two years before this fire of mine, there was a fire broke out on the place adjoining me, a little west,—before the fire of the seventh of August,—burned quite a large country.” The testimony given at the trial is not set out in the transcript. It is apparent, however, from the tenor of the above question, that the witness had already spoken of a fire upon defendant's right of way prior to the one in question in this action. To this question, or the answer thereto, no objection is apparent. He is then asked as to his knowledge of other fires subsequent to the one spoken of, and prior to the one under consideration. If the question was open to objection, it was because the time was not limited to some recent period. Had the answer shown a knowledge of other fires within a

day or two of the one in question, manifestly, under our decisions, and upon the weight of authority, it would have been proper. *Henry v. Railroad Co.*, 50 Cal. 176; *Butcher v. Railroad Co.*, 67 Cal. 518, 8 Pac. Rep. 174; *Field v. Railroad Co.*, 32 N. Y. 339; *Sheldon v. Railroad Co.*, 14 N. Y. 218; *Shear. & R. Neg.* 333; *Gandy v. Railroad Co.*, 30 Iowa, 422. The objection that the question was "irrelevant and immaterial" was too general. It did not call the attention of the court to the point that the question, although proper within a limited range, was too broad in its scope, and might call for an answer covering too remote a period. An objection to testimony should specify the grounds of the objection. *Winans v. Hassey*, 48 Cal. 634; *Satterlee v. Bliss*, 36 Cal. 489. Had a motion been made to strike out the answer, perhaps it should have been granted as being too remote, but none was made.

The judgment and order appealed from are affirmed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.; TEMPLE, J.; MCKINSTRY, J.; PATERSON, J.; THORNTON, J.

(15 Or. 464)

DAY v. HOLLAND and others.

. (Supreme Court of Oregon. December 6, 1887.)

1. APPEAL—EFFECT ON DECREE—MALICIOUS TRESPASS—ENTRY UNDER DECREE APPEALED FROM.

Const. Or. art. 7, § 6, provides that the supreme court shall have jurisdiction only to revise the final decisions of the circuit courts. Hill, Code Or. § 539, provides that, in certain cases, proceedings shall be stayed when an undertaking for appeal only is filed. Section 514 provides that an action is pending from its beginning until its determination on appeal, or the expiration of the time allowed for appeal. Held that, in an action for malicious trespass on real estate, a decree in a former suit for the possession of the property in favor of the defendant in the trespass suit was a complete justification for the entry, although the appeal from the decree was pending. LORD, C. J., dissenting.

2. MALICIOUS TRESPASS—ENTRY UNDER DECREE APPEALED FROM—EVIDENCE TO REBUT MALICE.

In a suit for malicious trespass on real estate, defendant can introduce in evidence a decree quieting the title to the same in her as against the plaintiff, to rebut the charge of malice, though the decree had been appealed from.

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge. Ellen Day, plaintiff, sued Margaret Holland and others, defendants, for malicious trespass on real property, and recovered judgment for \$600, and defendants appealed.

A. L. Frasier and F. V. Holman, for appellants. H. T. Bingham, A. B. Coleman, and Cornelius Taylor, for respondent.

STRAHAN, J. This is an action to recover damages for a malicious trespass on real property alleged to have been committed in said county of Multnomah on the sixth day of October, 1886. The actual damage alleged was \$60, but, by reason of the alleged malice of the defendants and the aggravated circumstances of the trespass, the plaintiff claimed damages in the sum of \$1,000. Upon a trial before a jury, she was awarded the sum of \$600. From that judgment this appeal is taken. The cause was tried on the twenty-sixth day of February, 1887.

For the purpose of justifying their entry upon the premises in question, the defendants offered in evidence upon the trial a properly certified copy of the judgment roll in a suit theretofore finally determined in department No. 2 of the circuit court of Multnomah county, wherein Margaret Holland was plaintiff, and Ellen Day, James Day, Lizzie Day, Mary Day, and Frank Day were defendants. The final decree in said last-named suit was entered on the twenty-seventh day of September, 1886, the object of which was to quiet the title of the plaintiffs to the real property upon which the alleged trespass was

committed. The court, by its decree, found for the plaintiff as to the particular parcel of land where the injury complained of in this case was committed, and decreed that "the said defendants, and each of them, and all persons claiming through, by, or under them, be, and they are hereby, forever barred of any and all right, title, estate, or interest in or to the said real estate, or any portion thereof, and are hereby restrained and enjoined forever from claiming or asserting or exercising, or attempting to exercise, any right, title, or interest therein or thereto, or in any manner interfering with the title or possession of said plaintiff in and to the said property; and that the legal title and the right to the immediate and continued peaceable possession in and to the said property is hereby confirmed, ordered, and decreed," etc. It further appeared from the said judgment roll that an appeal had been taken from said decree by the defendants to this court, and that on such appeal the undertaking was given for an appeal only. It did not appear from said judgment roll that said cause had been remanded from this court to the court below. The judgment roll was excluded, to which ruling an exception was taken; and this is the only material question presented by this appeal.

It is claimed by the appellant that this decree was competent evidence for either one of two purposes: (1) That it constituted a full and complete justification for all of the alleged trespasses charged in the complaint; or (2) that it was competent evidence to be submitted to the jury tending to negative and disprove malice. The jurisdiction of this court is appellate and revisory only. It can exercise no original jurisdiction. Article 7, § 6, of the constitution, vests and limits its jurisdiction in these words: "The supreme court shall have jurisdiction *only* to revise the final decisions of the circuit courts. * * *" This *revisory* jurisdiction is exercised by means of a statutory appeal. The same statute regulates the method of appeals in both actions at law and suits in equity. The only distinctions which it makes in the two classes of cases is that, if the appeal be from a decree, the appellant need not specify in the notice of appeal the grounds of error upon which he intends to rely, and, if the evidence has been taken in writing, the cause shall be tried anew upon the transcript and evidence accompanying it. If the evidence has not been taken in writing in the court below, an equity case is re-examined here only upon the exceptions which were taken in the court below.

The first question therefore is, what effect did the appeal have upon the decree in said cause? Was the decree in question vacated and broken up by the appeal, so that it ceased to be binding upon the parties, or was its enforcement stayed pending the appeal by force of section 539, Hill, Code, and what was the effect of such "stay," if it existed? In such a case as this, the statute has not declared the effect of an appeal during its pendency upon the decree; we are therefore compelled to examine the question on reason and authority outside of the state.

In *Dutcher v. Culver*, 23 Minn. 415, it was held that, where the statute provides that a party may appeal, no certain inference can be drawn from the term "appeal" alone, as to its effect upon the proceedings below; and that, in determining what the effect was, the court might properly look at the general policy of the law of appeals as furnishing a valuable analogy, and to the practical consequences of giving to the appeal the effect to stay proceedings below, or the contrary effect. Applying this view to the case, the court was of the opinion that the appeal from the order of the probate court did not vacate or suspend the operation of the order.

The case of *Railroad Co. v. Railroad Co.*, 71 N. Y. 430, involved, as I think, the precise question presented by this record. In that case, as here, the final decree enjoined the defendants from doing certain things. The parties enjoined appealed, and gave the undertaking to stay the judgment, and then claimed that their appeal, during its pendency, relieved them from the

effects of the injunction. But the court held otherwise. The court said: "If the respondent here is right in its contention, pending an appeal from a judgment staying waste, which if committed will destroy the freehold, the appellant, in simply staying the plaintiff's proceedings on the judgment, may with impunity do the very act forbidden, and destroy the freehold. This would be to give the latter injunction, staying action by the one party upon the judgment, effect, as working a dissolution of the permanent and general injunction before granted, restraining the other party from doing any act affecting the subject of the litigation. The judgment, so far as it enjoined the defendant, needed no execution. It acted directly, without process, upon the defendant, and the stay only operated to prevent the collection of the costs awarded."

So in *Nill v. Camparet*, 16 Ind. 107, it was held that the only effect of an appeal to a court of error, when perfected, is to stay execution upon the judgment from which it is taken. In all other respects, the judgment, until annulled or reversed, is binding upon the parties, as to every question directly decided.

So in *Cain v. Williams*, 16 Nev. 426, it was decided that the pendency of an appeal when the appellate court has no other duty than to affirm, reverse, or modify the judgment appealed from, does not suspend the operation of the judgment; the judgment is good until set aside.

So, also, in *Swing v. Townsend*, 24 Ohio St. 1, it was held that the appointment of a receiver, while the cause is in the common pleas, is not vacated or suspended by an appeal to the district court, and the powers and duties of the receiver will continue notwithstanding the appeal. These cases also are to the same effect: *Lewis v. Railroad Co.*, 59 Mo. 495; *Orleans v. Platt*, 99 U. S. 676; *Burton v. Burton*, 28 Ind. 342; *Insurance Co. v. De Wolf*, 33 Pa. St. 45; *Loan & Trust Co. v. Railroad Co.*, 4 McCrary, 546; *Allen v. Mayor, etc.*, 9 Ga. 286; *Chase v. Jefferson*, 1 Houst. 257; *Suydam v. Hoyt's Adm'r*, 25 N. J. Law, 230; 2 Daniell, Ch. § 1467, and note 3; *Paine v. Insurance Co.*, 11 R. I. 411.

And this rule seems to be sustained by the weight of authority, and is elementary. Freem. Judgm. § 328; Wood, Pr. Ev. 735.

In reaching the conclusion indicated by these authorities, we have not overlooked the distinctions which existed prior to the enactment of the Code between the effect to be given to an appeal and the suing out of a writ of error. But such distinctions are swept away by the Code. The entire procedure is now governed by one statute, and no sufficient reason appears to us for making the distinction claimed by the respondent. This very case is a good illustration why such distinction should not be tolerated or recognized. In the original case of *Holland v. Day*, as has been shown, a final decree was entered in favor of the plaintiff, adjudging her to be the owner of the premises then in dispute, and perpetually enjoining the defendant from claiming the same, or in any manner interfering with the plaintiff's peaceable enjoyment of the same, from which decree the defendant appealed. After the entry of that decree the plaintiff, present defendant, undertook to enter under it, and was resisted, and for that alleged wrong this action is brought, in which the plaintiff is awarded \$600 damages. Upon the appeal in said suit, this court affirmed the decree of the court below, so far as the particular premises in controversy in this action are concerned; so that it is apparent that this defendant is mulct in \$600 damages and costs for an attempted entry on her own premises under a valid and unreversed decree of the circuit court of the Multnomah county. A construction which may produce such results is unsound, and cannot receive the sanction of this court.

Our attention has been called to the latter part of section 514, Hill, Code, which provides: "An action or suit is deemed to be pending from the commencement thereof until its final determination upon appeal, or until the expiration of the period allowed to take an appeal." But this section has no

direct bearing upon the question involved here. To adopt the respondent's construction of this section would be to hold, in effect, that a judgment or decree is ineffectual and without any force until the time allowed to take an appeal has expired, for the reason that during that time the action is to be deemed pending. The facts of this case do not require a construction of this language further than to say that the one suggested on argument cannot be adopted. Judgments and decrees are constantly enforced and executed long before the time for an appeal has expired, and the right to do so has never been before questioned in this court. But if a construction of that language were really necessary to a proper determination of this case, we should feel disposed to hold that it is, in effect, declaratory of the rule of law as it existed before the enactment of the Code. In other words, that after judgment a party may take such steps in the action as are sanctioned or provided by law, and that for these purposes and thereby only the action is "to be deemed pending," and not that the whole action, for all purposes, and before the judgment is vacated or set aside, is still *sub judice*. To give this language the construction contended for would be to hold that, until the time for appealing had expired, a judgment is without legal force or effect, and that during that time neither party is bound by it.

It is claimed by respondents' counsel that under section 539, Hill, Code, this decree was stayed by the appeal without the usual undertaking. But this does not affect the result. The "stay," in either case, would only prevent the enforcement of the decree so far as it required the enforcement of money. The other part of the decree needed no enforcement. It operated upon the *status* of the thing, and fixed it irrevocably, unless changed on appeal.

2. In this class of cases the usual and ordinary measure of damages is the amount which will fully compensate the plaintiff for the actual injury which he has sustained; but where a tort is committed with a bad motive, or so recklessly as to imply a disregard of social obligations, and generally when the defendant appears to have done the act wantonly, maliciously, or wickedly, the jury may, in their discretion, give exemplary damages. But, to enable them to act intelligently and justly in such case, it is important that every fact and circumstance bearing upon the motives of the defendant, or affecting his conduct at the time, and all the circumstances under which he acted, should be fully laid before them. The defendant, therefore, had the right to place before the jury in this case the decree offered in evidence as explanatory of his motives, and as tending to rebut the charge of malice. It tended to prove a reason for the defendant's conduct other than that charged in the complaint, and for this purpose it was wholly immaterial whether the decree was in full force or not, if the defendant honestly believed that it was, and that she had a right of entry under it. These considerations lead to a reversal of the judgment; but, inasmuch as the decree offered in evidence furnished a complete justification for the entry complained of, we think it unnecessary to order a new trial. (The question of costs reserved for the present.)

LORD, C. J., (*dissenting*.) At common law a writ of error was the appropriate remedy by which a party aggrieved by the judgment of an inferior jurisdiction could remove the judgment for examination into a superior tribunal having jurisdiction to revise it. It lies for some supposed mistake in the proceeding of a court of record, and only upon matters of law arising upon the face of the proceedings. 3 Bl. Comm. 406. It was defined as "a commission by which the judges of one court are authorized to examine a record upon which a judgment was given in another court, and, on such examination, to affirm or reverse the same according to law." *Cohens v. Virginia*, 6 Wheat. 409; *Jaques v. Cesar*, 2 Saund. 101, notes 1, 2; Tidd, Pr. 1134. The writ was grantable, in civil cases, *ex debito justitiæ*; in criminal cases, *ex gratia regis*. The distinction between an appeal and a writ of error is that an appeal is a

process of civil-law origin, and removes the cause entirely, subjecting the fact as well as the law to a review and revisal; but a writ of error is of common-law origin, and it removes nothing for re-examination but the law. *Wiscart v. Dauchy*, 3 Dall. 321; *U. S. v. Goodwin*, 7 Cranch, 111. It is said to have been taken from the civil law, and introduced into the procedure of courts of equity and admiralty; and thence again from these it has been adopted into the codes of reform procedure. In a technical sense, the main features which distinguish it from a writ of error are that the party aggrieved by the decree applies to the supreme court to rehear his cause; and when the appeal is allowed or perfected by citing the other party to appear, and having the record of the proceedings transmitted to the appellate court, it is heard anew, and tried and decided as if it had not been adjudicated. As a consequence, it is the original theory that an appeal, when perfected, annuls the decree below. "A writ of error is an adversary suit. It is a new suit, and must have the requisite parties." (*Hutchinson v. Hutchinson*, 15 Ohio, 301;) but the judgment which is brought to annul and set aside is not vacated or affected pending the proceeding. Said Mr. Justice DEADY, a writ of error "was considered a new action to annul and set aside the judgment of the court below; and if the writ was seasonably sued out, and bail put into the action, it was a *supersedeas*, so far as to prevent an execution from issuing on the judgment, pending the writ of error, but left it otherwise in full force between the parties, either as a ground of action, a bar, or an estoppel. 2 Bac. Abr. 87; 3 Bl. Comm. 406; *Railway Co. v. Twombly*, 100 U. S. 81. But, in equity and the admiralty courts, the remedy for an erroneous decree is an appeal, which removes the whole case into the court above, for trial *de novo*. There is no decree left in the lower court, and, pending the hearing on appeal, there is no decree in the case, and there can be no estoppel by reason thereof. The tendency during the last half century has been to assimilate proceedings in equity and law cases; and in states where the modern code prevails, the proceeding by which judgment is reviewed in the appellate court is generally known as an appeal, although in effect it is more like a writ of error than an appeal, *Sharon v. Hill*, 26 Fed. Rep. 245.

Now, to what extent has these two modes of review, as thus distinguished, been modified by statute regulation in our Code? In the practice codes of many of the states, the old forms of action have not only been abolished, but they have abolished the distinction between actions at law and suits in equity. In this state the distinction between the forms of action at law has been abolished; but proceedings in equity are still kept distinct from an action at law. *Burrage v. Mining Co.*, 12 Or. 172, 6 Pac. Rep. 766. "Our Code," said THAYER, J., "presumes the forms of actions and suits as distinct from each other," (*Beacannon v. Liebe*, 11 Or. 443, 5 Pac. Rep. 273;) and also in the result reached after trial the distinction of judgment or decree is still preserved. For the review of a judgment or decree, the Code has made ample provision, and the proceeding is known as an appeal. *Hill*, Code, §§ 537-547, [527-537,] inclusive.

In actions at law, upon appeal, it is necessary to specify the grounds of error relied upon, but not so when from a decree in equity. When the appeal is from a judgment in an action at law, the judgment can only be reviewed as to questions of law appearing on the transcript, and is only to be reversed or modified for errors substantially affecting the rights of the appellant; but upon an appeal from a decree the suit is required to be tried anew upon the transcript and evidence. And in either case, whether of a judgment or decree, if a stay of proceedings is denied during the pendency of the appeal, an undertaking or bond is required to be given to effect that result. The object of the stay is to prevent the execution of the judgment or decree pending the appeal, and, when this is affected by a proper bond, it operates to suspend the right to execution; but, in the absence of a statute regulation, leaves the

judgment, until annulled or reversed, subject to the common-law rule, binding and conclusive on the parties as to every question directly decided, and the decree inoperative for any purpose whatever during that time. The provisions of the Code which we are now considering do not undertake to declare or prescribe what effect shall be given to a judgment or decree pending the appeal. In all this, however, it will be noted that the appeal from a judgment at law under our Code of practice corresponds more nearly with the writ of error, and in effect is more like it than appeal; while an appeal from a decree in equity, in bringing up the whole record and evidence to be tried *de novo*, substantially conforms to the original theory of an appeal as introduced from the civil law into the equity and admiralty practice, and leaves no decree in the case to operate as a bar or estoppel, unless the provisions for a stay by some legerdemain has the effect to retain the decree in full force, and placed it upon the same footing as to its conclusive character until reversed as a judgment at law. In that event, a judgment or decree, pending the appeal, would be *res adjudicata* as to every matter directly decided, until annulled or reversed. This is the result reached by my associates, and I confess it has always been my impression, from a cursory view of the provisions of our Code in reference to appeals, that, when a judgment or decree is rendered in the circuit court, and an appeal is taken from it, and a stay-bond given, such judgment or decree is binding and conclusive upon the parties and their privies in every other court until such judgment or decree is annulled or reversed. Hence I have supposed a decree, like a judgment, pending appeal, is allowable as evidence between the parties in any case when pertinent and proper.

The present discussion, however, has called our attention to a provision of the Code which has hitherto been overlooked by me. I refer to section 514, [505,] which provides that "an action or suit is deemed to be pending from the commencement thereof until its final determination upon appeal, or until the expiration of the period allowed to take an appeal." What does this mean, if not to say that, while an action or suit is pending, no judgment or decree rendered therein is conclusive on the rights of the parties until finally determined on appeal, or until the time for appeal has passed? If the action or suit is to be deemed pending until finally determined on appeal, it is still under judicial consideration during such pendency, and not judicially determined. It is impossible that an action or suit should be pending, that is, under judicial consideration, and at the same time be *res adjudicata*, or a final determination, which is conclusive on the rights of the parties. It is a contradiction of terms to say that a matter in litigation is pending, undecided, and at the same time is decided and *res adjudicata*. With the exception of California, no other state, so far as my inquiries have extended, has a like provision. In that state, section 1049 is identical with our own, and has been construed by an eminent judge of that state to mean that a case upon an appeal is still pending, still *sub judice*, until finally decided, and cannot, therefore, during such pendency, be regarded as *res adjudicata*, or having any effect as evidence. In *Sharon v. Hill*, 26 Fed. Rep. 722, Mr. Justice SAWYER, referring to section 1049 as expressly providing that "an action is deemed pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed," says: "By the express terms of this section, therefore, a judgment is not final as to the subject-matter,—is not a final or conclusive determination of the rights of the parties,—not only until the final determination on appeal," but where no appeal has been taken,—"until the time for appeal has passed." Until the time indicated, the action is deemed to be pending; that is to say, remains inconclusive, not finally determined, and liable to be changed or altogether vacated and annulled. The action is therefore still pending, and the subject-matter remains *sub judice*." And again: "By the express terms of the statute, the

action is still pending" and undetermined. The litigation of the matter is not ended. It is still flagrant. The subject-matter is still *sub judice*, and a matter still *sub judice* cannot possibly be *res adjudicata*, in any proper sense of that phrase. To say that a matter *sub judice* is at the same time *res adjudicata* would be a contradiction of terms. The two conditions with reference to the same subject-matter cannot possibly be found to exist. After showing that the effect of an appeal upon a judgment as *res adjudicata* had been previously settled by the decisions of the supreme court, independently of the provisions of the Code referred to, he then adds: "But there can be no possible doubt, it seems to us, under the provisions of the present Code cited, that a case upon appeal is still pending—still *sub judice*—until finally decided, and that it cannot be regarded as *res adjudicata*, or as having any effect as evidence. The effect or value of a judgment is therefore *fixed by the Code* and the decisions of the supreme court. This being so, it will be unprofitable to examine the few cases cited from other states, arising under a different practice, and presenting different conditions, to support the opposing view." In the same case Mr. Justice DEADY reached a like conclusion. Referring to and quoting section 1049, he tersely said: "The effect of this provision appears to be that the judgment in the court below is only a step in the proceeding to a final judgment in the appellate court, in case of an appeal, and otherwise to hold it in suspense as a ground of action or defense in another suit until the time for taking an appeal has passed."

As section 514 [505] applies both to actions and suits, if this be its proper construction,—its meaning and purpose,—it affects judgments and decrees alike, and not only stays their execution pending an appeal, but suspends their operation for all purposes, so that neither is admissible in evidence in any controversy between the parties. It reverses the common-law principle as to the conclusive effect to be given to a judgment until annulled or set aside by the appellate court. In legal parlance, the word "pending" means nothing more than "remaining undecided," (*Clindentin v. Allen*, 4 N. H. 385; *Wentworth v. Farmington*, 48 N. H. 210;) and, if the subject-matter in litigation between the parties is pending during an appeal, it is undecided, not finally determined, but *sub judice*, and not *res adjudicata*, and therefore cannot have any effect as evidence, or operate as a bar or estoppel. In the absence of this provision, our statute substantially preserves the distinction as it existed at common law as to writs of error and trials *de novo* in equity upon appeal; and it occurs to me there are many reasons why the distinction should still be preserved, and would be the better rule of practice. But our duty is not to make the law, but to expound and declare it; and in the light of the construction given to section 514, [505,] and what seems to me to be its plain purport and meaning, I am constrained to think that the court committed an error in admitting the decree as evidence, *res adjudicata*, as to the rights of the parties. In the course of the argument something was said as to a late act of the legislature authorizing parties in suits of equity, if they so preferred and consented, to try the case as an action at law, without reducing the evidence to writing, and to bring it up on a bill of exceptions, etc., and that in such case it would be treated on appeal as an action at law. That probably may be so, but it is not material to the question here; for our statute makes no distinction pending an appeal in respect to actions or suits, and consequently neither a judgment nor decree would be conclusive on the parties as evidence until finally determined on appeal, or the time of appeal has passed.

(2 Ariz. 315)

GANT v. BROADWAY.

(Supreme Court of Arizona. December 22, 1887.)

1. SALE—CHATELS—DELIVERY.

What constitutes a delivery of a chattel must depend upon the nature of the chattel. The same acts are not required with reference to ponderous or bulky articles as are required of articles easy to be handled.

2. SAME—DELIVERY OF CHATEL IN POSSESSION OF ANOTHER.

Delivery of a chattel in possession of another may be made by transfer of the right of possession.

(Syllabus by the Court.)

Appeal from district court, Maricopa county; PORTER, Judge.

A. C. Baker, for appellant. N. B. Lighthizer, for appellee.

BARNES, J. This was a suit in replevin of hay in bale. Defendant justified seizure as sheriff by virtue of attachment against one Thompson. It appeared in evidence that the hay had been cut and baled and piled up by one Kellogg on his farm, and that he had sold the hay to Thompson where it stood. That thereafter Thompson sold the hay to Gant, plaintiff. When Gant purchased, he said he would buy it if Kellogg would let the hay stay where it was until he wanted to move it. Kellogg assented to it, and Gant bought and paid for the hay. He had moved none of it when defendant seized it as Thompson's hay by virtue of an attachment issued in favor of Goldman. The cause was tried by a jury, and the appellant, the defendant below, assigns for error the charge of the court, which was as follows:

The court gave the following instructions to the jury for the plaintiff: "The jury are instructed: (1) That a delivery of personal property must be a transfer of possession and control, made by the seller with the purpose and effect of putting the goods out of his hands. This is sufficient delivery, whatever its form. Hence it may be constructive, as by delivering the key of a warehouse, or even a receipt, or without such when the goods are bulky and difficult of access, as in the case of the hay in suit." "(3) Actual change of the situation of cumbersome property is not necessary to the immediate delivery and actual and continued change of possession required by our statutes to render a sale valid as against the creditors of the vendor, so that other circumstances connected with the sale preclude a continued ownership or possession in the vendor, and which, taken all together, exclude from the transaction the idea of fraud. (4) When the goods at the time of the sale are in the possession of the third party, an actual receipt by or delivery to the vendee takes place when the vendor, the purchaser, and the third party agree that the latter shall cease to hold the goods for the vendor, and shall hold them for the purchaser." "(7) The jury are further instructed that, under the evidence, the possession of Thompson of the property in dispute, as derived by his purchase thereof from Kellogg, the property still remaining on the premises of the latter at the time of the sale by Thompson to plaintiff, was at best but a constructive possession; and that, therefore, any *bona fide* change of property therein, from Thompson to plaintiff, which would give to the latter the immediate control of the same, and his (the plaintiff's) ownership as open and notorious as was the previous ownership of Thompson, and of such character as to the apparent custody of the property as to put one dealing with the vendor, with respect to such property, upon inquiry, or such at least as might suggest a change of ownership, would constitute such an immediate delivery, and actual and continued change of possession, as to render the sale valid as against the creditors of Thompson, and entitle plaintiff to a verdict. (8) If the jury believe from all the evidence that, by the terms of the sale from Thompson to plaintiff, the property in dispute was, before the levy thereon by defendant, placed unequivocally within the power and under the exclusive dominion of plaintiff, as absolute owner,

discharged of all lien for the price, or that the change of ownership was substantial and permanent as between the parties to said sale, and that the apparent custody of the property was such as to put one dealing with the vendor with respect to it upon inquiry, or such, at least, as might suggest a change of ownership, or that there was such advertisement of the plaintiff's claim as would enable an ordinarily prudent man to ascertain that he could no longer rely on his knowledge of the former ownership of Thompson, then, as a matter of law, would said sale be valid as against the attaching creditors of Thompson, and the jury will find for the plaintiff. (9) The jury are further instructed that, if they believe from all the evidence that the plaintiff, in good faith, purchased the property in dispute from Thompson before the levy thereon by defendant, and that, by the terms of such purchase, the plaintiff took immediate possession and control thereof, and that there was such advertisement of plaintiff's claim as would enable an ordinarily prudent man to ascertain that he could no longer rely on his knowledge of the ownership of the former proprietor, (Thompson,) then will the jury find for the plaintiff."

The question raised was whether there was what in law amounts to a delivery of the chattels. The statute provides (Comp. Laws, 2128) that every sale by a vendor of chattels in his possession or under his control, unless the same be accompanied by delivery, and followed by an actual and continued change of possession, shall be conclusive evidence of fraud, as against creditors. As was said in *Lay v. Nevill*, 25 Cal. 553, "the acts that will constitute a delivery will vary in the different classes of cases, and will depend very much upon the character and quantity of the property sold, as well as the circumstances of each particular case. The same acts are not necessary to make a good delivery of a ponderous article, like a block of granite or a stack of hay, as would be required in case of an article of small bulk, as a pound of bullion." To the same effect is *Chaffin v. Doub*, 14 Cal. 384.

In this case, Kellogg was the ostensible owner of the hay. He had cut it, baled and piled it up on his land. Had his creditors levied upon it, the question would have been clearly before the court. Thompson's possession was constructive and good as between him and Kellogg. He transferred to Gant all the title and possession he had. Kellogg had given him permission to leave it where it was, and Kellogg gave to Gant the same permission. Kellogg being the ostensible owner, and apparently in the possession, a stranger is charged with notice of his possession. But his possession is not attacked; it is Thompson's, who was not ostensibly in possession. Thompson never had any actual possession; and when the levy was made, he had no right or title. That had passed to Gant. The issues were fairly presented. We see no error in the charge. The judgment is affirmed.

WRIGHT, C. J., and PORTER, J., concur.

(38 Kan. 31)

WURLITZER and another v. SUPPE.

(Supreme Court of Kansas. December 10, 1887.)

ACTION—JOINDER OF CAUSES—ACCOUNT NOT DUE WITH NOTE DUE.

When the plaintiff's petition states three separate demands, the first two on promissory notes past due, and the third on an account not due, there is a misjoinder of action.

(Syllabus by Simpson, C.)

Commissioners' decision. Error to district court, Lyon county; C. B. GRAVES, Judge.

Cunningham & McCarty, for plaintiffs in error. *Kellog & Sedgwick*, for defendant in error.

SIMPSON, C. On the sixth day of December, 1884, the plaintiffs in error commenced an action in the district court of Lyon county. Their petition set forth three alleged causes of action. The first two were on promissory notes; the third, on an account. All were alleged to be due in the petition, but the fact was that the account set forth in the third cause of action was not due at the time of the commencement of the action, and did not become due until the tenth day of January, 1885. An order of attachment was issued at the commencement of the action, and levied on certain goods found in possession of one Wilkins, who claimed to own them. On the twelfth day of December, 1884, an affidavit for an order of attachment was caused to be filed by the plaintiffs in error, and this affidavit conformed to sections 230 and 231, Code Civil Proc. The order of the district judge was obtained for an attachment for so much as was claimed to be not due on the third cause of action stated in the petition. The order of attachment was issued by the clerk, and levied upon the identical property bound by the lien of the first order of attachment. An answer was filed on the seventeenth day of December, containing—*First*, a general denial; *second*, that the debt sued on was not due at the commencement of the action, nor at the filing of the answer. On the nineteenth of March, 1885, Suppe filed a motion to discharge the attachment issued on the twelfth day of December, 1884. Among the various causes enumerated for a dissolution of this attachment, two only become material in the inquiry, and they are the third: "No bond as required by law upon which said order of attachment of December 12, 1884, was based, was ever filed herein;" and fifth: "The action in which said order of attachment was used was prematurely brought before the claim sued on was due, and this attachment was not obtained nor issued at the commencement of the suit." On the nineteenth of March, and between the hours of 10 o'clock A. M. and noon of said day, the defendant's counsel gave oral notice to the plaintiffs' counsel of the filing of the motion to dissolve. On the twentieth of March the case was reached for trial regularly on the docket, and the defendant's counsel called up their motion to dissolve the attachment. Counsel for plaintiffs objected to its consideration, because no reasonable notice of its hearing had been given. The court overruled the objection, and proceeded to consider the motion. It was shown by the admissions of Suppe that he always had and does now disclaim any right, title, or interest in the goods attached under the order he was seeking to have dissolved; and for this reason the plaintiffs in error objected to the consideration of the motion to dissolve. This objection was overruled. On the thirtieth of March the court made an order overruling the motion to dissolve, on all the grounds stated in the motion, except the third,—that of the want of a bond,—and ordered the third cause of action in the plaintiffs' petition stated to be dismissed without prejudice, and dissolved the attachment issued on the twelfth day of December, 1884. Exceptions were saved to all these rulings. It is insisted here that there was no reasonable notice given of the filing of the motion to dissolve the attachment, and of the hearing thereon; that it was proper to join causes of action not due with causes of action that were due, in one and the same suit; that when Suppe disclaimed any interest in the attached property, the court should not have entertained his motion to dissolve the attachment by which it was held; that the court erred in the dismissal of the third cause of action; that the court erred in dissolving the attachment on the third ground set forth in the motion, as a good bond was already on file in the action.

1. As to the notice. Whether the notice was reasonable or not, under all the circumstances of the case, is a question that, in the absence of some express rule controlling it, must largely rest in the discretion of the trial court.

Our attention has not been called to any rule in the judicial district in which the case arose, prescribing what shall be deemed a sufficient notice of a motion of this kind, nor is it alleged or shown that sufficient time was not given the plaintiffs in error for the necessary preparation for the hearing, nor was there any application or showing in the court below for time for that purpose. Under all these circumstances, we are not authorized to say that the court erred in hearing the motion to dissolve the attachment on the twentieth of March.

2. The next question, and indeed the controlling one, in the case, is whether an account not due can be joined in the same action with causes of action that are due. So far as the claims or demands alleged in the petition are concerned, there can be no question that they could all be joined in the action if all were due. They consist of two promissory notes and an account; and if the account had been due, and separate actions had been instituted on each note, and on the account, they might have been consolidated. The two promissory notes were past due at the time this suit was instituted. The account was not due. They constituted the causes of action as alleged in the petition, and as to two of them there existed a right of action generally; and, as to the account, the right of action depended on the existence of the grounds of attachment prescribed by section 230 of the Code. The law does not create causes of action; these are created by the acts and contracts of persons. It only gives a right of action under certain conditions and limitations on the cause. The court is of the opinion that only such claims or demands as are due at the time of the commencement of the suit can be joined in one and the same action. Ordinarily, an action cannot be instituted on a claim or demand not due; it is only by express statutory authority that such an action can be maintained; and then the right to bring the action is dependent upon the existence of facts entirely disconnected with the contract, claim, or demand. A fraudulent intent or disposition of property by the debtor must exist, before an action can be brought on a claim or demand not due. The whole object of the permission accorded is accomplished then, when property is seized by the process of the law, and held awaiting the maturity of the claim or demand, and the final determination of the rights of the parties by the court. This anomalous proceeding, necessary, perhaps, to protect creditors who have just demands maturing, is not to be regarded as coming within the meaning and operation of the second subdivision of section 83 of the Code, that classifies causes of action arising in contracts expressed or implied, and permits them to be joined in one and the same suit, but must be viewed as one of those exceptional proceedings to provide against a failure of justice by the reason of the removal or disposition of the property of the debtor that ought rightfully to be applied to the payment of his just debts. It will be noticed that, in the section of the Code permitting an action to be brought on a claim before it is due, it does not designate it as a cause of action. To constitute a cause of action in cases of this character, there must be a duty to be performed, a right to be enforced, and a failure, omission, or refusal to perform, or an infringement of the right. On an account not due these elements are wanting. There is no failure, omission, or refusal to pay. The right to enforce payment is not infringed, because that right does not accrue until the time for payment has expired. It seems to follow that the statute allowing an attachment to issue, under certain circumstances, on a claim before it is due, does not make it a cause of action, as designated in the article of the Code upon the subject of the joinder of actions. It necessarily follows that the order of the court below dismissing the third cause of action set forth in the petition of the plaintiff in error must be affirmed.

With this view, it is hardly necessary to consider the question of the attachment bond, as, when the cause of action is dismissed, the ancillary proceedings inevitably go with it. If a separate action had to be commenced on

the account not due, another attachment bond is imperatively required by section 234 of the Code.

It is recommended that the judgment of the district court of Lyon county, be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

(38 Kan. 62)

GABBEY and Wife v. FORGEUS, Adm'r.

(*Supreme Court of Kansas. December 10, 1887.*)

1. HUSBAND AND WIFE—MORTGAGE ON HOMESTEAD—DURESS—TESTIMONY OF WITNESS.

If proper exceptions are taken, witnesses are not ordinarily permitted to state in general language their conclusions "that a wife did not want to sign a mortgage on her homestead," and that "she was forced to sign the mortgage," and other expressions of similar import. In all cases they should state the facts, recite the declarations of the parties present and participating in the transactions, describe the acts of the parties in interest, and let the jury arrive at their own conclusions.

2. SAME—EVIDENCE—COMMAND OF HUSBAND.

An angry command by the husband to the wife, "to dry up that crying, and go write your name," unaccompanied by threats of personal violence, or any attempt to exercise it, is not sufficient to establish the defense of duress in an action to foreclose a mortgage on the homestead of the wife, in which she alleges that her signature to, and acknowledgment of, the same was procured by threats of personal violence by her husband, in presence of the mortgagee.

3. SAME—BURDEN OF PROOF—INSTRUCTION TO JURY.

In such a case, when it is stated by the wife that the signature to the mortgage is her genuine signature, and the mortgage is duly acknowledged and certified by a proper officer, it is not error in the trial court to charge the jury that the burden of proof, to sustain the defense of duress by the husband, and that the signature was procured from the wife by threats of violence on the part of the husband, was on those pleadings such a defense; nor is it error in the trial court to charge the jury on that state of facts that a such a defense could not be sustained by doubtful, uncertain, unsatisfactory, and insufficient testimony.

4. SAME.

The due execution of the mortgage being established, it is incumbent on those who seek to avoid the liability created by it, by proof that the signature of the wife was procured thereto by compulsion, to make it clearly manifest that such was the case. The genuine signature and duly certified acknowledgment of the mortgage could not be resisted by doubtful and unsatisfactory statements and circumstances. The evidence to impeach it should be strong and convincing.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Error to district court, Shawnee county; JOHN MARTIN, Judge.

A. H. Case and *R. A. Frederick*, for plaintiff in error. . *W. P. Douthitt* and *Vance & Campbell*, for defendant in error.

SIMPSON, C. This was an action to foreclose a mortgage on 160 acres of land in Shawnee county. The land was the homestead of Robert S. Gabbey and his wife, Annie W. Gabbey, who resided thereon. The suit was instituted by R. T. Lee, who claimed a mortgage thereon, and he made William J. Norris, who claimed a second mortgage lien thereon, a party defendant. Norris answered, and filed a cross-petition, claiming that the defendants, Robert S. Gabbey and Annie W. Gabbey, executed and delivered to him a mortgage on the same land to secure a note for \$1,500, dated April 9, 1872, due in 12 months thereafter, with interest at the rate of 12 per cent. per annum, the note signed by the husband, the mortgage signed and acknowledged by both husband and wife, and asking that it be declared a lien, and be foreclosed. Annie W. Gabbey filed an answer to the cross-petition of Norris, in which she alleges her homestead rights in the land; that more than the sum of \$3,000 of the purchase money of the land had been her personal property, derived from the estate of her father; that her signature to the mortgage was pro-

cured by fraud of both her husband and Norris, and was by force and violence as well as by fraud, extorted from her by her husband, with the full knowledge of Norris; that the fraud and violence spoken of consisted of threats of personal violence by her husband if she did not sign the mortgage, and of actual force; that, without this fraud, and threat of personal violence, she would not have signed the mortgage. She asked that the mortgage be declared void, and her answer was verified by her oath. The case was tried to a jury; and the assignments of errors are various exceptions to the ruling of the trial court in excluding testimony, and many exceptions to the instructions of the court to the jury. The jury found for Norris, and the court overruled a motion for a new trial.

The exceptions to the exclusion of testimony are quite numerous, but all are of the same class, a few instances giving a general idea of the whole. E. E. Abbott, a witness for Mrs. Gabbey, stated in his deposition: "Annie W. Gabbey did not want to sign the mortgage because it was on her homestead; but her husband insisted that she must do it, and forced her to sign it against her will." The refusal of the court to permit this sentence to be read to the jury is assigned as error. It is very evident that this is but a statement of the conclusions of the witness, and not a recitation of facts showing the acts and declarations of Mrs. Gabbey respecting the mortgage, and what acts or declarations of Gabbey that had forced his wife to sign. The same witness recited what was done at the time of the signature, and commented on the "excitement and distress" of Mrs. Gabbey, and adds, "And we all pitied her;" and this was very properly excluded. Mrs. Gabbey testified: "I also swear that my signature to the mortgage now held by Wm. J. Norris on my homestead was not my voluntary act and deed, but was only obtained through fear of personal violence on the part of my husband." This was excluded, because she did not attempt to state what particular acts of her husband caused the fear of personal violence. There are, perhaps, two instances in which the facts stated by the witness ought to have gone to the jury; but they were not important and controlling enough to be considered material errors. Apart from these two instances, the court seems to have been unusually liberal in the allowance of testimony to the jury, and especially so in the case of Dr. Gabbey and his wife.

The instructions are criticized, and much complaint is made of the eighth, ninth, tenth, eleventh, and twelfth. The instructions complained of are as follows:

"(8) Now, if you find from the evidence that the defendant Annie W. Gabbey did sign the Norris mortgage, but that she signed it under compulsion or coercion on the part of her husband, Robert S. Gabbey, and that the acts of the defendant Robert S. Gabbey that caused and induced her to sign this mortgage were such as to make the act on her part wholly involuntary, and that the threats and conduct of her husband, Robert S. Gabbey, were such as to reasonably create in her mind a fear of personal injury if she disregarded his demands, and that, under these circumstances, and that because and by reason of such fear produced and induced by the violent actions and conduct of her said husband, Robert S. Gabbey, she did sign the mortgage, then, and under such circumstances, such signing and acknowledgment would constitute a legal defense against the defendant Forgeus, as executor of the Norris estate in this action, and, under such circumstances, your verdict should be for the defendant Annie W. Gabbey, and that the defendant Forgeus, as executor of the Norris estate, had not a lien for the payment of the debt due him from Robert S. Gabbey, upon the land described in said mortgage. Now, in order to make duress or compulsion effective as a defense in this action, and sufficient to invalidate the Norris mortgage, the compulsion must have been so great as to take away the voluntary consent of the defendant Annie W. Gabbey, because her consent and acknowledging the instrument must have

been voluntary, and therefore the compulsion must have been of such a character as to excite a sense of fear on her part of some grievous wrong, as of death, or personal violence, or great bodily injury, or unlawful imprisonment. It is not enough that she signed the mortgage reluctantly or hesitatingly simply, or that she signed it under protest, or even against her best judgment; but it must have been such compulsion as would in fact destroy for the time being her freedom of action, and overcome her ordinary powers of resistance. And if you so find that there was such compulsion used by her husband, Robert S. Gabbey, to induce her to sign the mortgage, and that under and by virtue of such compulsion she did sign and acknowledge it, then your verdict should be that the defendant Forgeus, as executor of the Norris estate, has not a lien upon the land described in his answer and cross-petition, for the amount due upon the promissory note sued upon by him." To which instruction the defendants, Robert S. Gabbey and Annie W. Gabbey, at the time excepted.

"(9) I further instruct you, gentlemen, that when a mortgage, regular in appearance, and bearing the genuine signature of the person, and such mortgage is duly acknowledged and certified by the mortgagors or grantors, and such mortgage is attacked to avoid liability thereunder, the evidence must be clear and convincing, and in such case the burden of proof rests upon the person disputing the liability of overcoming the presumption of validity arising from the terms of the written instrument of that character. And in such case, if the proof be doubtful, uncertain, and unsatisfactory, and insufficient to overcome the presumption of validity, then it should be held that the writing correctly and fairly states the intentions of the parties; and testimony sufficient to destroy a written instrument, signed, acknowledged, and delivered, as I have already stated, should be plain and convincing beyond all reasonable controversy." To the giving of this instruction, the defendants, Robert S. Gabbey and Annie W. Gabbey, at the time duly excepted.

"(10) If, gentlemen of the jury, you believe from the evidence in the case that Annie W. Gabbey did not sign the Lee mortgage, then your verdict should be for the defendant Annie W. Gabbey, as to that mortgage; and I further instruct you that if you find that she did not sign or acknowledge it originally, that the evidence in the case shows no signs of ratification as would bind her and make it her own act; and if you find from the evidence that the land mentioned in the Norris mortgage was the homestead of Robert S. Gabbey, at the time of the execution of the Norris mortgage, and that it did not exceed one hundred and sixty acres of farming land, and that it was occupied by the defendant Robert S. Gabbey as a residence for himself and family, and if you further find that Mrs. Gabbey signed the Norris mortgage, but that she signed it through compulsion on the part of her husband, and such a compulsion as I have hereinbefore described, then you will find for her as to the Norris mortgage; and I further instruct you that if you find from the evidence that the defendant Annie W. Gabbey did not give her consent to the execution,—that is, to the signing, acknowledgment, and delivering of the Norris mortgage,—but that she signed it through fear of her husband, that he would do her bodily harm or personal violence if she did not sign it, then, and under such circumstances, the jury should find for the defendant Mrs. Gabbey." To the giving of which instruction, the defendants, Robert S. Gabbey and Annie W. Gabbey, at the time duly excepted.

"(11) I further instruct you, gentlemen, that if you find from the evidence that Annie W. Gabbey signed the Norris mortgage, under such circumstances as would in law amount to duress and compulsion, as I have hereinbefore instructed you, then you will find a verdict for her as to the Norris mortgage; and under such circumstances it would be wholly immaterial whether Norris acted in good faith or not." To the giving of which instruction the defendants, Robert S. Gabbey and Annie W. Gabbey, at the time duly excepted.

"(12) I further instruct you that, under the exercise of reasonable fear of

violence, which would in fact overcome the power of reason, or the power of voluntary action on the part of Annie W. Gabbey, under the circumstances which she had been placed at the time of signing the Norris mortgage, would be sufficient in law to invalidate the mortgage as to her, and the word 'consent,' as I have used it in these instructions, means the voluntary act, free and voluntary act, and not an involuntary act procured by the violence of another. So, if she signed the Norris mortgage under such duress and compulsion as I have described, then she never gave that consent to the alienation of the homestead that the law requires and recognizes." To the giving of which instruction the defendants, Robert S. Gabbey and Annie W. Gabbey, at the time duly excepted.

These instructions, taken together, each modifying the other, very fairly presented the law upon the subject of duress, if this question was presented by the evidence. The record before us contains all the evidence presented. Both Mr. and Mrs. Gabbey testified in the case, and were permitted to give their version of the facts attending the signature and acknowledgment of the mortgage. Mrs. Gabbey said: "On the morning of April 9, 1872, Wm. J. Norris, C. W. Higginbotham, Dr. R. S. Gabbey, my husband, came to my house, Norris and Higginbotham remaining in the south room or parlor, and the doctor passed into the north room where I was crying for fear I should be compelled to sign a mortgage on the homestead. The doctor approached, and in a very angry and threatening manner said: 'Dry up that crying, and go write your name.' I went into the parlor at his command; spoke to no one, neither did any one speak to me. The doctor followed behind me. I took the pen and signed some paper without reading it, or knowing positively what it contained. The papers were then folded up and the parties went away." Dr. Gabbey said that his wife did not sign the mortgage of her own free will, but did so at his command. Higginbotham, the notary who drew the mortgage and took the acknowledgment, said: "Mrs. Gabbey was not in the room when we first went to the house. Dr. Gabbey went out of the room, and she came back with him. I do not remember her saying anything. She was very much distressed, and tears were on her cheeks, and she was crying. My impression is she used the words, 'this is the last.' I cannot say that I told her it was a mortgage. I will not say that she said that this is the last, or that she said anything. My best recollection is that I did not ask her if she signed it of her own free will. I saw nothing to show that she did not want to sign it, except the shedding of tears and sobbing."

This is the sum and substance of all the testimony offered upon the defense of duress. Perhaps the most liberal expression of the analogous doctrine of cruelty that has judicial sanction, is the view of this court expressed in the case of *Carpenter v. Carpenter*, 30 Kan. 712, 2 Pac. Rep. 122. It may not be applicable in any, or all of its phases to such a case as we are considering; but they are kindred questions, and every consideration prompts us to deal with the rights of the wife in the homestead with as much liberality as we do questions affecting her marital rights. We have no doubt but that cases can be presented wherein the husband, by many acts of omission or commission, and without resort to threats or to actual personal violence, can so conduct himself as to create such an apprehension on the mind of his wife, as separation from her, the loss of the presence and society of her children, the destruction of the home feeling, and a hundred other such manifestations of ill feeling, as to cause duress, and to cause in her mind the belief that if she does not sign away her rights or incur them, one of these, to her, most important, things will happen. If such a case was presented, the doctrine of duress might be illustrated by a novel state of facts. So far, we have not had occasion to determine whether such acts would constitute duress or not. In the only two cases passed upon by this court wherein mortgages are held void because of the duress under which the wife signed, we find only the most ordi-

nary examples of brutality on the part of the husbands. In the case of *Anderson v. Anderson*, 9 Kan. 112, when the wife declined to promise to sign the deed to the homestead, the husband struck her with his fists on the head three times, and pulled her hair. Then in the evening, he brought the ax into the house, sharpened a large knife, and was very angry, and said that in the morning he was going to get Squire Streeter to take the acknowledgment of the deed. In the case of *Helm v. Helm*, 11 Kan. 19, the duress consisted of threats on the part of the husband and purchaser to take the life of the wife if she did not sign the deed, and, in apprehension of great danger from such threats, she signed. In this case the wife does not claim that the husband either exercised, or threatened to exercise, any personal violence, but commanded her, in an angry tone, to "dry up and sign her name." This is too indefinite to come within the most liberal interpretation of duress. It will be seen from an examination of these instructions that the trial court covered almost every phase of the question of duress, and the jury could have, consistent with the instructions, found it, if it had been in the case. Particular criticism is directed against instruction 9, for the supposed reason that the court intimates that the evidence offered in support of the defense of duress is "doubtful, uncertain, unsatisfactory, and insufficient." We do not think that is the fair meaning of the language used by the court, or that it is susceptible of the construction placed upon it by counsel. It is not only a fair statement of the law applicable to the state of facts established by the evidence, but it is supported by excellent authority. See *Smith v. Allis*, 52 Wis. 344, 9 N. W. Rep. 155; *Insurance Co. v. Nelson*, 103 U. S. 544.

Another objection to the instructions is that the court erred in its statement that the burden of proof rested upon Mrs. Gabbey. It must be recollected that at the time this instruction was given the fact presented by the evidence was that the signature to the mortgage was the genuine one of Mrs. Gabbey, and the precise question was whether or not that signature was the result of duress exercised by her husband. Of course, when she had stated on the witness stand that she had signed the mortgage, the burden of proving that her signature was not freely and voluntarily made rested on her. This is not a question as to which party had the burden on the pleadings; but it arises after the facts have gone to the jury. The due existence of a written instrument having been established, it was incumbent on those who sought to avoid the liability created by such instrument, by proof that the signature thereto was obtained by compulsion, to make it clearly manifest that such was the case. The genuine signature and duly certified acknowledgment of the mortgage could not be resisted by doubtful and unsatisfactory statements and circumstances. The evidence to impeach them should be strong and convincing. We will not go to the extent of saying that such evidence must establish the fact of coercion "beyond a reasonable controversy," as is stated in the conclusion of the ninth instruction, because it is using an expression that might be a subject of varied construction; and yet the language is used by the supreme court of the United States in a similar case, and we do not hold that its use is error in this case.

There is no material error in the record, and it is recommended that the judgment be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

(38 Kan. 53)

HUCKELL v. MCCOY.

(Supreme Court of Kansas. December 10, 1887.)

1. REPLEVIN—JURISDICTION OF JUSTICE OF THE PEACE.

Where an action of replevin is commenced before a justice of the peace by a resident of the county against a non-resident, and the defendant is properly served

with summons in the county where the action is commenced, but the property is not obtained, and the property has never been wrongfully detained in the county where the action is commenced, but has been and is wrongfully detained by the defendant in the county where the defendant resides, the court has jurisdiction to hear and determine the case as one for damages only.

2. TRIAL—MISCONDUCT OF COUNSEL—NEW TRIAL.

Where counsel for the plaintiff, in his closing argument to the jury, repeatedly makes improper remarks, prejudicial to the interests of the adverse party, and such remarks are permitted to go to the jury over the objections of the adverse party, and the verdict is afterward rendered in favor of the plaintiff, and may have been procured by reason of such remarks, a new trial should be granted.

(*Syllabus by the Court.*)

Error to district court, Mitchell county; CLERK A. SMITH, Judge.

Ellis & Ellis, for plaintiff in error. *Frank J. Kelley*, for defendant in error.

VALENTINE, J. This was an action of replevin, brought by J. C. McCoy against William Huckell, before a justice of the peace of Cawker township, Mitchell county, Kansas, to recover three head of swine. The case was tried before the justice, without a jury, and judgment was rendered in favor of the plaintiff, McCoy, for one of the hogs in controversy, and in favor of the defendant, Huckell, for the other two hogs, and the defendant appealed to the district court, where the case was again tried before the court and a jury, and judgment was rendered in favor of the plaintiff and against the defendant for \$30 damages, and the costs of suit, and to reverse this judgment the defendant, as plaintiff in error, brings the case to this court. Two principal grounds are urged for reversal: *First*, that the court below had no jurisdiction to hear and determine the case; *second*, misconduct on the part of the prevailing party. We shall consider these grounds for reversal in their order.

1. We think the court below had jurisdiction to hear and determine the case. The exact question, however, which the plaintiff in error, defendant below, desires to present to this court, can hardly be considered as in the case; for it was not raised at all in the justice's court, nor fairly raised in the district court, nor raised in the supreme court, until it was presented to the court by the brief of the plaintiff in error. That question is this: When an action of replevin is commenced before a justice of the peace, by a resident of the county, against a non-resident, and the defendant is properly served with summons in the county where the action is commenced, but the property is not obtained, and the property has never been wrongfully detained in the county where the action is commenced, but has been and is wrongfully detained by the defendant in the county where the defendant resides, has the court jurisdiction to hear and determine the case as one for damages only? The facts upon which this question is desired to be raised, are as follows: Huckell resides in Jewell county; and if he ever had any of McCoy's hogs in his possession, he had them in his possession, only in Jewell county. McCoy resides in Mitchell county, and he commenced this action in Mitchell county. The summons was served upon Huckell in Mitchell county; but the officer never obtained possession of the hogs. The case was tried before the justice of the peace, and no question of jurisdiction was raised in that court. The case was appealed by the defendant to the district court, where it was tried as an action for damages only. It is not claimed that any question of jurisdiction was raised in the district court, until the defendant below filed his demurrer to the plaintiff's evidence, and it is now claimed that by such demurrer the question was raised. The demurrer, however, was in the following words: "And now comes the said defendant, William Huckell, and demurs to the evidence of the said plaintiff, for the reason that said evidence does not prove a cause of action." We do not think that this demurrer raises any question of jurisdiction. Neither does the exception taken to the ruling of the court upon this

demurrer, nor the motion for a new trial, nor the exception to the ruling thereon, nor any exception; nor does the petition in error present the question. Under such circumstances, we think the district court certainly did not err in entertaining jurisdiction of the case. But even if the defendant below had properly raised the question of jurisdiction in the justice's court, still we think it would have been unavailing; for we think the justice of the peace had ample jurisdiction to hear and determine the case, as one for damages only, over any objection interposed by the defendant below. Justices' Code, § 67.

2. The alleged misconduct of the prevailing party is the alleged misconduct of the counsel of the plaintiff below, in making statements of alleged facts to the jury in his closing argument, which alleged facts had no connection with the case, were not supported by any evidence, and were highly prejudicial to the rights of the defendant. The statements were principally that the defendant had a very bad reputation, that he was continually in litigation, and that he was a liar and a thief. Among the statements are the following: "I do not know what Mr. Ellis [the defendant's counsel] meant by his statement in regard to 'a good man,' unless the public clamor has been so loud about the bad reputation of his client that you have heard it." "Afraid of a prosecution! From whom? A man who, when he knows more than any one else, who of all men knows whether those hogs were stolen or not, dares not become a witness. A thief seldom exposes his work to the noonday sun." "If he [meaning the defendant] had come on the stand, we would have shown you that he [meaning the defendant] would swear to a lie,—that he is a liar as well as a thief." "Mr. Ellis says that the boy has never been on the stand before. He probably don't know what everybody else knows, what all the neighbors know, that Huckell is all the time in court,—always having a lawsuit."

The defendant was not a witness in the case, and was not impeached. There was no evidence tending to show that he had a bad reputation; no evidence tending to show that he was "always," or had been at any time, in litigation; no evidence tending to show that he was either a liar or a thief; no evidence that he stole the particular hogs in controversy, or that he had ever stolen anything; and no evidence, indeed, that the hogs in controversy were ever stolen by anybody, except evidence tending to show that they were at one time in an inclosure on the plaintiff's farm, and were afterwards found in an inclosure on the defendant's farm. It appears from the evidence that the plaintiff had about 127 hogs on his farm; that the defendant had about 200 hogs on his farm; that their farms were near each other; that some time in March or April, 1885, about 11 of the plaintiff's hogs were missing; that some time afterwards the plaintiff went to the defendant's farm, looked at the defendant's hogs, and found, as he believed, three of his own among the defendant's hogs; that he then demanded these three hogs of the defendant; but that the defendant refused to deliver them to him, claiming that they were his own. The plaintiff then commenced this action to recover the hogs. The evidence upon the trial was very conflicting as to which of the parties owned the hogs. Some of the witnesses testified that they belonged to the plaintiff, and others testified that they belonged to the defendant.

After the evidence was all introduced, and prior to the argument of counsel, the defendant's attorney asked, and the court consented, to submit two special questions of fact to the jury, for the purpose of having the jury determine as to how the hogs in controversy came into the possession of the defendant; whereupon the counsel for the plaintiff objected, and said: "I admit that, if I have not proven a demand in this case, the plaintiff is not entitled to recover in the action." And thereupon the court refused to submit said questions to the jury, and struck out from its general charge all matters intended to have been given, upon the possible theory that the defendant's pos-

session of the hogs prior to the plaintiff's demand for them might have been wrongful or unlawful. This action on the part of the plaintiff's counsel and the court settled the question, in favor of the defendant, that he did not wrongfully have the possession of the hogs prior to the plaintiff's demand for them, and therefore that the defendant did not steal them. The plaintiff's counsel then addressed the jury, and then the defendant's counsel, and then the plaintiff's counsel again. This was his closing argument, and the one in which he used the aforesaid language, objected to. When the objection was made to the first paragraph of this language above quoted, nothing was said by either the court or the plaintiff's counsel, except as follows: "The court remarked that he had not paid attention, and had not understood the words used; but the counsel should confine his remarks to the facts disclosed by the evidence, and that the jury should pay no attention to assertions of counsel unless they were supported by the evidence." When the other three paragraphs were objected to, and they were objected to, severally, nothing was said by either the court or the plaintiff's counsel. These objectionable matters were not withdrawn from the jury by either the court or the plaintiff's counsel. No retraction, no apology, no expression of regret, was elicited or came from the plaintiff's counsel, but he proceeded with his argument as though nothing had happened. After this argument of counsel, the jury retired to their room for deliberation, and on the first vote taken by them seven were in favor of finding a verdict in favor of the defendant, and five only were in favor of finding a verdict in favor of the plaintiff. Then commenced a discussion among the members of the jury, and the principal question discussed by them was whether the charges made by the plaintiff's counsel against the defendant were true or not; and the jury, from their final verdict, evidently believed they were true. We might also here state that, at the commencement of the trial, the plaintiff had 13 witnesses sworn, and afterwards examined only three of them, and this left the jury to infer that the other 10 were sworn for the purpose of impeaching the defendant, if he testified in the case, and therefore that the third charge made by the plaintiff's counsel was true. Such language as was used in this case by the plaintiff's counsel might not ordinarily require a new trial; but, in a case like the present, we think it must. In all probability, the plaintiff never would have obtained or received a verdict in his favor from this jury if the aforesaid language had not been used. Two of the jurors so testified, and there was no evidence tending to show otherwise; but, of course, this testimony was incompetent. We might also state another fact that tended very strongly to give the objectionable language force and efficacy. It is admitted that the plaintiff's counsel is a man of high character, of good standing as a lawyer, and well known.

We think the court below erred in refusing to grant the defendant a new trial. Certainly, where counsel in his closing argument to the jury repeatedly makes improper remarks, prejudicial to the interests of the adverse party, and over the objections of the adverse party, and the verdict is afterwards rendered in favor of such counsel's client, and may have been procured by reason of such remarks, a new trial should be granted. *Brown v. Suineford*, 44 Wis. 282; *Bremmer v. Railroad Co.*, 61 Wis. 114, 20 N. W. Rep. 687; *Bullard v. Railroad Co.*, (N. H.) 5 Atl. Rep. 838; *Paper Co. v. Banks*, 15 Neb. 20, 16 N. W. Rep. 833; *Hall v. Wolff*, 61 Iowa, 559, 16 N. W. Rep. 710; *Henry v. Railroad Co.*, (Iowa,) 30 N. W. Rep. 630; *Campbell v. Maher*, 105 Ind. 383, 4 N. E. Rep. 911; *Bedford v. Penny*, 58 Mich. 424, 25 N. W. Rep. 381; *Insurance Co. v. Cheever*, 36 Ohio St. 201.

The judgment of the court below will be reversed, and cause remanded for a new trial.

(All the justices concurring.)

(38 Kan. 71)

WHITTAKER v. VOORHEES, Sheriff.

(Supreme Court of Kansas. December 10, 1887.)

1. DEPOSITION—INDORSEMENTS—TITLE AND CAUSE.

Where an envelope containing a deposition is indorsed with the names of the plaintiff and defendant, and the name of the officer before whom the deposition was taken, and is addressed to the clerk of the district court where the case is pending, *held*, a sufficient description of the title and cause.

2. SAME—CERTIFICATE—TIME AND PLACE OF TAKING.

Where a notice states that the deposition will be taken at the store-house of M., in Bismarck, Dakota territory, on the thirteenth day of April, between the hours of 8 A. M. and 6 P. M., and the certificate attached to the deposition states that the deposition was taken at the store of M., in Bismarck, Dakota territory, on the thirteenth day of April, as specified in the notice attached, *held*, that "as specified in the notice" relates to the place, the day, and the hours of the day, as stated in the notice.

3. SAME—SUPPRESSION—IMMATERIAL EVIDENCE.

Where a deposition has been erroneously suppressed by the court for the reason of a defect in the indorsement on the envelope, and in the certificate of the officer taking the same, yet where the contents of the deposition show that said evidence is so indefinite and uncertain as to render it of no value, *held*, that the suppression of the deposition is not sufficient error to require a reversal of the judgment.

4. TRIAL—ADMISSION OF IMPROPER EVIDENCE—CURING BY INSTRUCTIONS.

Where the question in a trial is whether the mortgage and sale of a stock of goods were for the purpose of defrauding the creditors of the vendor, and the court permits incompetent evidence to go to the jury, and afterwards discovers the error, and instructs the jury that they must disregard the evidence, *held* that, in some instances, there may be such strong impressions made upon the minds of the jury by incompetent and improper evidence that its subsequent withdrawal will not remove the effect caused by its admission; and in such a case the original objection may avail on appeal or writ of error; but such instances are exceptional. *Further held*, after excluding all the improper testimony admitted in this case, the record still shows that the verdict of the jury is sustained by such a preponderance of the evidence, and is apparently so correct and just, that the judgment will not be disturbed by reason of the error in the admission of incompetent evidence.

(Syllabus by Clogston, C.)

Commissioners' decision. Error to district court, Nemaha county; DAVID MARTIN, Judge.

Action brought by Whittaker against Voorhees, sheriff of Nemaha county, Kansas, to recover damages for the alleged wrongful taking and conversion of a stock of goods. At the April, 1885, term of the district court of Nemaha county the defendant recovered a judgment in said action. The plaintiff brings the case here. The opinion states the facts.

W. W. Guthrie and Everest & Waggoner, for plaintiff in error. *Conwell & Wells, Jackson & Royse, Smith & Solomon, Taylor & Bassett, and J. A. McCaul*, for defendant in error.

CLOGSTON, C. From some time in 1882 up to January, 1884, O. O. Marbourg was engaged in the hardware business at Sabetha, Kansas, and at that time had a large stock of hardware and agricultural implements. The plaintiff and W. W. Marbourg, a brother of O. O. Marbourg, resided at Atchison, Kansas. On January 3, 1884, O. O. Marbourg executed to his brother W. W. Marbourg a chattel mortgage on all his stock of goods, who took immediate possession of said mortgaged property, and the next day he sold the entire stock of goods in bulk, without invoice, to the plaintiff, for the alleged consideration of \$21,000; one thousand alleged to have been paid in cash, and four promissory notes for \$5,000 each,—and plaintiff took immediate possession. At the time of the transfer of the goods by O. O. Marbourg to his brother, he was largely indebted to different parties for goods purchased of them, being part of the stock in question. On the sixth day of January, 1884, and on each succeeding day up to the 12th, suits were commenced by attach-

ment by said creditors against O. O. Marbourg, and the goods in question were attached by said defendant as sheriff of said county; said attachments aggregating \$17,000. No redelivery bond was given, and on the twelfth of January this action was brought by said plaintiff, Whittaker, for the value of the goods, against said defendant as sheriff. In answer to the plaintiff's action, the defendant alleged the indebtedness of O. O. Marbourg, and the fraudulent mortgage and transfer by him to W. W. Marbourg, his brother, and the fraudulent sale thereunder by W. W. Marbourg to the plaintiff, and that said transfer was made for the purpose of defrauding the said creditors of O. O. Marbourg.

The first complaint made by the plaintiff in error is to the suppression of a deposition of W. S. Moorehouse taken by plaintiff in error. The record shows that this deposition was suppressed upon two grounds: *First*, that the indorsement on the envelope was not according to law; and, *second*, that the certificate of the officer taking the deposition did not show that it was taken at the time and place set forth in the notice served upon the defendant. The indorsement on the envelope is as follows: "*Henry L. Whittaker, Plaintiff, vs. D. R. Voorhees, Defendant, Sheriff, etc.* Depositions taken by me, John E. Garland, notary public, Dakota, to J. H. Gleason, clerk of the district court of Nemaha county, at Seneca, Kansas." This deposition was suppressed upon the claim of the defendant that the title of the case was not set out in this indorsement. The statute requires that the envelope containing a deposition shall be indorsed with the title of the cause, and the name of the officer taking the same, and shall be by him transmitted to the clerk of the court where the action is pending. We think this indorsement was sufficient. It stated the name of the plaintiff and the name of the defendant, and was addressed to the clerk of the district court of Nemaha county, where the cause was pending. While, in strict terms, the title of a cause includes the title of the court where the cause is pending, yet where the deposition is directed to the clerk of the proper court, and is otherwise sealed up, indorsed, and transmitted in due form, the failure to state the title of the court more fully by indorsement is not sufficient ground for suppressing the deposition.

The notice provided for the taking of this deposition at the store-house of W. S. Moorehouse, in the city of Bismarck, in the county of Burleigh, territory of Dakota, between the hours of 8 o'clock A. M. and 6 P. M. of said day. The certificate to the deposition is as follows: "I, John E. Garland, a notary public within and for the said county and territory, do hereby certify that the above-named W. S. Moorehouse, the witness whose name is subscribed to the foregoing deposition, was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, in the cause aforesaid, and that the deposition by him subscribed was reduced to writing by me, and that the said deposition was so reduced to writing and subscribed by said witness in my presence, and the same was taken on the thirteenth day of April, 1885, at the store of W. S. Moorehouse, in Bismarck, Dakota territory, as specified in the notice hereto attached, and that I am not a relative or attorney of the parties, or otherwise interested in the event of the action. JOHN E. GARLAND, Notary Public." Now, the defendant insists that this certificate does not show that it was taken within the county of Burleigh on the said thirteenth day, between the hours of 8 and 6 o'clock, at the store-house of Moorehouse. We think this objection is technical only. The caption to the certificate shows the territory of Dakota, county of Burleigh. The certificate states that it was taken on the thirteenth day of April at the store of W. S. Moorehouse, in Bismarck, Dakota territory, as specified in the notice. We think this is a sufficient description of the place and of the time. The notice states the time and place where the deposition was to be taken, and the officer certifies that it was taken at the time and place specified in the notice. The time mentioned not only means the day, but within the proper hours of that day. There was no show-

ing made that the defendant had attended at the place named in the notice, or that the deposition was not taken as specified therein. All of the presumptions are in favor of the officer, that he did his duty. We think the court erred in sustaining the motion to suppress this deposition.

This brings us to the next question presented by this deposition; that is, was the evidence contained in said deposition material, and for that reason does it require a reversal of this judgment? One of the claims made by W. W. Marbourg was that the mortgage executed by his brother to him was to secure him (W. W. Marbourg) for money advanced, and for notes that he held against O. O. Marbourg. To establish this claim was the purpose in taking this deposition. It seems from the evidence that this witness Moorehouse had formerly been in the employ of W. W. Marbourg, in Atchison, Kansas, and that, while so employed, he was present at a settlement between O. O. Marbourg and W. W., when the indebtedness was ascertained to be something over \$6,000, and a note for that amount was given by O. O. Marbourg to W. W. Marbourg. He also testified that previous to that, and some time between the years 1874 and 1876, W. W. Marbourg had advanced money to his brother and the firm of Marbourg & Black; also that at one time he was at Sabetha, Kansas, and was given \$2,000 by O. O. Marbourg to take to Atchison to his brother, W. W. Marbourg, to apply upon account and interest. That was the substance and purport of this deposition. The period during which these transactions, or any of them, took place, covered a number of years. It may have been as early as 1876, it may have been in 1880; it was more than two years before the transfer of these goods took place. At most, it was remote evidence of the existing indebtedness. The court permitted a note to be given in evidence which purported to be the note described by this witness. This note, the court instructed the jury, imported a consideration. It showed upon its face a consideration. Without some evidence to destroy this transaction, the jury were bound to consider this note as claimed by the plaintiff. While we conceive of no good reason why the court should have refused to admit this deposition, yet it was of such a character that it would have been of little consequence, and therefore not so material as to require a reversal of the action. *Doolittle v. Railroad Co.*, 20 Kan. 329; *Germond v. Littleton*, 22 Kan. 730. The transaction could be established if true by the testimony of O. O. Marbourg, W. W. Marbourg, and the note itself. Also, plaintiff introduced the evidence of Floyd P. Gerow, who was an employe of W. W. Marbourg from 1879 to 1880, who testified to Marbourg's being in possession of a note from his brother, O. O. Marbourg, for more than \$5,000; also the evidence of Thomas J. White, who was in the employ of W. W. Marbourg from 1880 to 1881, who testified to having seen a note of the same description in the possession of W. W. Marbourg. This evidence was offered to establish the existence of this note; and, while the deposition suppressed would have been a circumstance tending to establish this same fact, yet being so indefinite as to time, and in view of all the other testimony upon that subject, and the fact that there was no evidence to directly contradict the giving of the note therein stated, we do not think the case ought to be reversed for the exclusion of this evidence alone.

At the trial of the case, the court permitted evidence to be introduced, over the objection of the plaintiff, showing the declarations of O. O. Marbourg as to his financial condition long before he engaged in the hardware business, and following up to and during the first year of said hardware business; his own repeated declarations of his financial standing; and also the statements of bank officers, made to salesmen who were selling and trying to sell him bills of goods, long before the transfer of his stock. Also to show the dealings in connection with the Western Hardware Company at Atchison, Kansas, of which W. W. Marbourg was president and general manager,—a firm that had gone out of existence long before the indebtedness, or any of it, accrued for which the at-

tachment was issued,—under which the defendant claimed the right to the possession of these goods. The declarations of a grantor immediately before and at the time of a sale are admissible in evidence to show his fraudulent intent. *Bridge v. Eggleston*, 14 Mass. 245; *Gillet v. Phelps*, 12 Wis. 392; *Chase v. Chase*, 105 Mass. 385. His declarations made long before that time or afterwards, and not in the presence of the vendee, are not competent for any purpose, and many of the declarations complained of by plaintiff ought to have been excluded by the court. Indeed, they are too numerous for each to be examined by itself, and the court seems to have discovered its error, for, when he came to instruct the jury, he recalled from them all such testimony to which the plaintiff had urged his objections. "It is true, in some instances, there may be such strong impressions made upon the minds of the jury by illegal and improper testimony that its subsequent withdrawal will not remove the effect caused by its admission; and in that case the original objection may avail on appeal or writ of error. But such cases are exceptional. The trial of a case is not to be suspended, the jury discharged, a new one summoned, and the evidence retaken, when an error in the admission of testimony can be corrected by its withdrawal, with proper instructions from the court to disregard it." *Hopt v. People*, 7 Sup. Ct. Rep. 618; *State v. May*, 4 Dev. 330; *Goodnow v. Hill*, 125 Mass. 589; *Smith v. Whitman*, 6 Allen, 562; *Hawes v. Gustin*, 2 Allen, 402; *Dillin v. People*, 8 Mich. 369; *Specht v. Howard*, 16 Wall. 564.

But admitting everything claimed by the plaintiff in error against the incompetent evidence, yet upon a careful perusal of the record, with all of the objectionable and improper evidence eliminated, we are free to say that the conclusions reached by the jury were correct, and the judgment founded thereon ought to stand. The evidence clearly shows and establishes that O. O. Marbourg was legally indebted to his creditors for the goods he was transferring to his brother. The record does not satisfactorily show any large amount of indebtedness between the brothers, and, while there may have been some indebtedness, yet no such an amount as claimed by them existed. Again, the relation of W. W. Marbourg to the plaintiff Whittaker was such that the jury might well infer that the transfer from Marbourg to Whittaker was made without any consideration whatsoever, but done for the benefit of W. W. Marbourg, in carrying out his scheme to transfer the goods beyond the reach of O. O. Marbourg's creditors. In fact, the testimony of the plaintiff himself is so unsatisfactory that the jury evidently came to the conclusion that he had not in good faith purchased the goods. Therefore, while we think the court ought to have excluded some of the evidence, yet, having admitted it, we still think the verdict of the jury was correct, and therefore the judgment must be affirmed. See *Marbourg v. Manufacturing Co.*, 32 Kan. 629, 5 Pac. Rep. 181. It is therefore recommended that the judgment of the court below be affirmed.

By THE COURT. It is so ordered; all the justices concurring.

(37 Kan. 773)

ATCHISON, T. & S. F. R. CO. v. WATSON.

(Supreme Court of Kansas. December 10, 1887.)

1. MALICIOUS PROSECUTION—PROBABLE CAUSE—PROVINCE OF COURT AND JURY.

In an action for malicious prosecution, the question of probable cause is primarily one for the court; but, if the facts tending to establish the existence or want of probable cause are in dispute, then it is the duty of the court to submit the question to the jury.

2. SAME—INSTRUCTIONS.

It is generally the duty of the trial court, in such a case, where there is a substantial dispute about the facts constituting the existence or want of probable cause, to submit the evidence to the jury, with instructions to determine its credi-

bility, and what facts are proved, and that the facts amount to proof of probable cause, or that they do not. The court should group the facts which the evidence tends to prove together in the instructions, and tell the jury, if they find such facts have been established, they must find that there was or was not probable cause.

3. SAME—FACTS SUBSEQUENT TO THE PROSECUTION.

The conduct of a person who commences a criminal prosecution against another must be weighed in view of what then appeared to him to be the acts and declarations of the accused, and not in the light of subsequently appearing facts.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Error to superior court, Shawnee county; W. C. WEBB, Judge.

This is an action for damages for a malicious prosecution, brought against the Atchison, Topeka & Santa Fe Railroad Company and William Higgins in the superior court of Shawnee county. Leon Watson, the plaintiff below, was arrested at Topeka on the fifteenth day of April, 1884, on complaint sworn to by William Higgins, an agent and employe of the railroad company, charging Watson with unlawfully, feloniously, and willfully displacing a switch connected with the line of the railroad at Osage City, Osage county. Watson was taken to Osage county, and confined in the county jail from April 16 to May 3, 1884. The proceedings were dismissed by the county attorney of Osage county without a hearing, and the railroad company paid the costs. The defendant railroad company filed its answer, in which it alleged that the arrest was made strictly at the suggestion and request of the board of railroad commissioners. Copy of the correspondence between the railroad company and the board of railroad commissioners is attached in the pleadings, and is as follows:

"TOPEKA, KANSAS, September 17, 1883.

"*Railroad Commissioners, Topeka, Kansas*—GENTLEMEN: On September 1st an accident occurred on this road at Osage City, caused by a brakeman by the name of Watson carelessly and negligently throwing the switch. Watson has escaped. If desired on your part we will endeavor to effect a capture, and turn him over, to be dealt with according to law. An early reply will greatly oblige. This accident resulted in the fireman losing a leg, and severely bruising the engineer.

C. M. FOULKS, Claim Agent."

"TOPEKA, KANSAS, September 21, 1883.

"*C. C. Wheeler, Esq., Gen. Manager A., T. & S. F. Rld., Topeka, Kansas*—DEAR SIR: We are in receipt of a letter from C. M. Foulks, claim agent of your road, covering account of an accident on your road at Osage City, on the first inst., caused by Brakeman Watson negligently throwing the switch in front of an approaching train, occasioning severe injuries to the fireman and engineer; and further advising us that, if desired on our part, an endeavor will be made to effect a capture of the brakeman, who has escaped, to be turned over to us, to be dealt with according to law. Accidents of a similar nature have heretofore occurred quite recently on your line from the same cause, and, in view of this fact, we think it would have a salutary effect to capture the absconding brakeman, if possible, and turn him over to the proper authorities, to be held accountable for his conduct. The courts in Osage county have jurisdiction of the matter.

"Yours, truly,

BOARD OF RAILROAD COMMISSIONERS."

The court instructed the jury as follows:

"This action was brought originally as an action for false imprisonment and malicious prosecution; but the plaintiff has dismissed so much of his petition as relates to the supposed false imprisonment, and the plaintiff now bases his right of recovery only on the ground of malicious prosecution, as alleged in his petition.

"(1) It is admitted by the defendant Higgins that he made the complaint alleged in plaintiff's petition, and the original of which complaint was read to you in evidence; and it is admitted by the defendant the Atchison, Topeka

& Santa Fe Railroad Company that it authorized, approved, and sanctioned the making of said complaint by said Higgins. The offense charged in said complaint against Leon Watson, the plaintiff in this action, is a crime of felony under the laws of this state; and if you believe from the evidence that defendants made said complaint, and caused the plaintiff to be arrested and prosecuted on said complaint, through malice, and without probable cause or reasonable grounds for so doing, and that such action or prosecution was finally ended before the commencement of this suit, then plaintiff is entitled to recover in this action.

"(2) Notwithstanding the actual innocence of the plaintiff of the offense charged in said complaint, if you should so find from the evidence, and the further fact, if you should so find, that defendants caused plaintiff to be arrested and prosecuted on such complaint from malicious or unworthy motives, and that plaintiff thereby sustained damages or injury in his reputation and person, he is without remedy therefor if defendant had just reason to believe, upon the facts and circumstances within their knowledge, that the plaintiff had committed the crime charged upon him. Probable cause is such state of facts and circumstances as would lead a man of ordinary caution and prudence, acting conscientiously, impartially, reasonably, and without prejudice, upon the facts and circumstances within his knowledge, and such reasonable representations consistent with the guilt of the party accused, made to him by credible persons, claiming to know the facts they represent, respecting the committing of such supposed offense, and honestly believed by him to be true, to believe that the person accused is guilty of the offense charged.

"(3) Under the crimes act of this state, any person who shall willfully remove or displace any switch connected with the track of any railroad in this state is guilty of a crime, punishable by imprisonment in the penitentiary; but a mere accidental or ignorant displacement of any such switch is not a crime, nor punishable as such, even if done through negligence or carelessness.

"(4) A man has no right to put the criminal law in motion against another, and deprive him of his liberty, upon mere conjecture that he has been guilty of a crime. He cannot be allowed to put a false and unreasonable construction on the conduct of another, and then justify himself for causing an arrest by claiming that he acted upon appearances.

"(5) Before the plaintiff can recover in this case, the jury must be satisfied from the evidence introduced—*First*, that the prosecution was commenced by filing a complaint, and the issuance of a warrant thereon; *second*, that such complaint was made without probable cause therefor; *third*, that said complaint was filed and said warrant was procured, maliciously, for the purpose of injuring the plaintiff; *fourth*, that the plaintiff was acquitted or discharged.

"(6) The burden of proof rests on the plaintiff to establish, by a preponderance of testimony, every material fact charged in his petition, and necessary to a recovery; and if in your opinion, under the evidence, he has failed to establish any one of such material facts, then your verdict must be for the defendants.

"(7) The mere fact that the plaintiff was acquitted or discharged, or the further fact (if you shall believe from the evidence that is the fact) that the plaintiff was not guilty of the offense charged against him, will not authorize you to find a verdict for the plaintiff. You are not called upon to determine the plaintiff's guilt or innocence. The principal questions for your determination are whether the prosecution against him was malicious and without probable cause.

"(8) This action is prosecuted against both the railroad company and William Higgins. It is shown by the pleadings and by the testimony that said Higgins was the agent of the railroad company in instituting the prosecution

complained of, and in carrying it on to its close. While such agency cannot release or excuse him from any wrongful or illegal act, if you shall find that his acts were wrongful or illegal, the fact of his agency as stated, as well as the acts of other agents as they may be proven, may be considered in determining the liability of the defendant railroad company. The defendant company, being a corporation, acts only by and through its officers, agents, or servants. It is in law held responsible for the wrongful, unlawful, and malicious acts of its officers, agents, and servants, acting within the scope of their authority. Their acts, in such cases, are the acts of the company. In determining whether the defendant was actuated by malice or not in procuring the arrest and imprisonment of the plaintiff, you may take into consideration the acts of its agents, Foulks and Higgins, their opportunities to investigate and ascertain the connection of the plaintiff with the supposed offense charged against him, and any failure on their part, if any, to make the fullest investigation proper to be made before commencing judicial proceedings against the plaintiff, and, if you shall believe that there was want of probable cause for procuring the arrest and imprisonment of the plaintiff, you are at liberty to infer the malice of the defendant from such want of probable cause, if the same be reasonably inferable therefrom.

"(9) Malice, in its popular sense, means hatred, ill will, or hostility to another; but in its legal sense it has a very different meaning. In law, malice means a wrongful and unlawful motive or purpose,—the willful doing of an injurious act without lawful excuse; and it is in this sense that the word 'malice' is used in these instructions, except so far as respects the question of exemplary damages, of which you will be advised presently.

"(10) If you believe that the plaintiff was arrested and imprisoned by the defendant upon mere guess, or that the proceedings taken against him were commenced recklessly, and without exercising that care and caution necessary to justify a prudent man in commencing a criminal prosecution against another, then I instruct you that the arrest and imprisonment was without probable cause.

"(11) If you shall find for the plaintiff in this action, you may find against either or both of the defendants, as their liability shall be shown by the evidence.

"(12) If you should find from the evidence that the defendants, or either of them, are liable, it will be your duty to consider the question of damages. Damages are distinguished as nominal, compensatory, and exemplary or vindictive. Where the legal right of a person is infringed, but no appreciable loss or injury is suffered, such person is entitled to recover some trifling sum at least; and that is known as nominal damages, for the law implies some damages for the infringement of every legal right. Where the violation of a legal right is accomplished by actual loss and injury, the sufferer is entitled to recover so much as will compensate him for all the loss and injury which flows directly from the illegal act; and this is known as compensatory damages. Where the illegal act for which redress is sought is not only tortious, but is dictated by malice or evil intent, or is attended with circumstances of intentional oppression, insult, or outrage, the law, while it does not require, yet permits, a jury, within its reasonable discretion, to go beyond the measure of compensation, and award in damages such sum as they may deem just and proper by way of retribution for the wrong, and of example to deliberate wrong-doers. Such damages are denominated as punitive, or exemplary, or vindictive damages.

"(13) If you find for the plaintiff, it will be your duty to award him such damages as will adequately compensate him for the loss and injury which, from the evidence, you shall find he has suffered. The plaintiff should be made whole for his loss of time, his anxiety and suffering, and for his pecuniary losses and expenditures accompanying and caused by his arrest and

imprisonment, including attorney fees for counsel employed to defend him against such prosecution.

"(14) If you should find from the evidence that William Higgins, either alone or in connection with other agents of the defendant company, corruptly and fraudulently resorted to the machinery of the law to oppress the plaintiff, it would be a case in which, if you find for the plaintiff, you might, if you chose, award exemplary damages.

"(15) But although the criminal prosecution against the plaintiff complained of in this action was terminated in favor of the plaintiff, and he was wholly discharged therefrom, yet, if you shall find from the evidence that such prosecution was malicious, and without probable cause, within the rules already stated, you may nevertheless, if you shall find that the defendants were not actuated by actual malice or evil intent towards the plaintiff, but only from insufficient testimony, and without proper care and caution, then their good faith in commencing such proceedings may be considered by you in respect to the question of damages; for where one acts in good faith, in an honest though mistaken effort to discharge a public or official duty, he ought not to be called upon to respond in more than compensatory damages.

"(16) If you shall believe from the evidence that the throwing of the switch by the plaintiff, which caused the collision at Osage City, was an accident, and not done with the intention of doing a wrong, and if you further find that the criminal proceedings begun against him by the defendants were without probable cause, and with malice, then and in such case the injury done, or supposed to be done, to the property or person of the defendants or others, should not be considered by you, in assessing plaintiff's damages for such malicious prosecution, neither to increase nor diminish the same.

"(17) You are the exclusive judges of the credibility of the witnesses, and of the weight of the evidence; and it is your province to determine what facts are proven, and what facts as claimed are not proven, by the evidence.

"(18) If you find in favor of the plaintiff, you will assess his damages at such sum as you may deem proper under the instructions already given you; not to exceed the amount claimed in the petition, namely, \$10,000.

"(19) If you find in favor of the defendants, a simple finding in their favor will be sufficient.

"(20) The letter offered and read in evidence from the board of railroad commissioners to the general manager of the defendant railroad company affords no lawful grounds or excuse for the arrest and prosecution of the plaintiff for defendants. Said board of commissioners had no authority to direct any such prosecution, even if they had attempted or pretended to do so; but the letter seems to be a mere suggestion, rather than a direction.

"(21) Four forms of verdict will be prepared and handed to you,—one suitable for a finding in favor of the plaintiff against both defendants; one in favor of plaintiff, and against the defendant corporation alone; and one in favor of the plaintiff, and against defendant Higgins alone; and the fourth suitable for a finding in favor of the defendants. When you shall have agreed upon a verdict, you will sign by your foreman, and return it into court."

The jury returned a verdict against the railroad company for \$2,500, and found for William Higgins. The railroad company filed a motion for judgment on the verdict, on the theory that as the railroad company acted only through agents, and could only be bound by the acts of its agents within the scope of their authority, and as the jury had found that their agent Higgins had done no wrong, no liability attached to the company. The motion was overruled. A motion for a new trial was filed, alleging all statutory causes, and overruled. All exceptions were saved and noted, and the case brought here for review. In this court two propositions were strongly insisted upon: *First*, that the verdict was illogical, absurd, and wrong; and, *secondly*, that

the facts constituting probable cause were undisputed, and the court erred in submitting that question to the jury.

Geo. R. Peck, A. A. Hurd, and W. C. Campbell, for plaintiff in error. Welch & Welch and S. S. Lawrence, for defendant in error.

SIMPSON, C. 1. The first complaint made by counsel for plaintiff in error, in their brief, is that the verdict of the jury is an illogical one. The line of reasoning by which they arrive at such conclusion is about this: The plaintiff below sought to hold the railroad company liable for the act of its agent William Higgins under the doctrine of *respondet superior*. Higgins was joined with the railroad company as defendant in the action, both for this purpose, and the additional reason that he was personally liable for the wrong committed. The liability of the railroad company is predicated upon that of its agent, for whose act it was responsible. Now, as the jury found a verdict in favor of Higgins, thus saying that he committed no wrong, there is no liability of the agent to predicate that of the superior upon. If the major premise of this proposition is true, there seems to be no escape from the conclusion. The first inquiry, then, involves the construction of the pleadings in the case, to determine whether or not it is sought to hold the company liable solely for the act of its agent under the doctrine of *respondet superior*. Before judgment, the most unfavorable construction is to be given the pleadings, but after judgment that construction must be given them that will best harmonize with the whole record. The allegations of the petition in this respect are as follows: "That the defendants procured the arrest of the plaintiff by said William Higgins as the agent, and at the instance and request of the defendant company, making and filing with L. J. WEBB, a justice of the peace, an affidavit," etc. In the answer of the railroad company it is alleged: "*Second*, that on September 17, 1883, it did, through and by its proper officer, notify the board of railroad commissioners of the facts with reference to the plaintiff throwing a certain switch on the railroad of the defendant, and for which said plaintiff was subsequently arrested, at the time mentioned in the plaintiff's amended petition, and that said defendant requested instructions from said board of commissioners; that on the twenty-first day of September, 1883, said board did in writing request and direct this defendant to proceed to capture the plaintiff herein, and turn him over to the proper authorities, to be held accountable for his conduct, and, in pursuance of such authority and direction of the board of railroad commissioners aforesaid, this defendant caused the complaint mentioned in plaintiff's amended petition to be made and filed; and the defendant says that said arrest was made so as aforesaid solely at the suggestion and request of the said board of railroad commissioners." Higgins' answer, in substance, is the same as the railroad company's, with the additional averment "that he filed the complaint, and caused the warrant to issue at the instance and request of the company." In this state of the pleadings, there can be no successful contention against the primary liability of the railroad company. The petition charges that the criminal prosecution was instituted at the instance and request of the defendant company. The defendant company states, in its answer: "This defendant caused the complaint mentioned in plaintiff's amended petition to be made and filed." Higgins, the agent, says in his answer that he filed the complaint, and caused the warrant to issue, at the instance and request of the company. The fact that the prosecution was begun at the instance and request of the railroad company, and that the company caused it to be instituted, is admitted by the pleadings. A tort which one directs, or advises another to commit, he is always responsible for. Cooley, Torts, 534. The liability of the railroad company for the wrong in this case, if any wrong there was, is based upon its direct connection with the prosecution, not only as adviser, but because it directed the institution of it, caused it to be begun, and set it in motion.

There is no question here of dependency of liability upon the subordination of the agent, because the agent acted under the express direction and in strict obedience to the orders of the company. The agent may be responsible for his participation in the wrong committed by the orders of the principal, but this is an independent question for the jury, and does not necessarily involve the liability of the principal. If, in this case, the railroad company had been the only defendant, and the petition and answer had contained the same allegations, could there be any doubt about the liability of the company for the commencement of the prosecution? Then the case does not fall within the ordinary doctrine of *respondet superior*, in the sense it is assumed to fall by counsel for the plaintiff in error. The verdict is not illogical or absurd, for a jury could consistently say, on the facts admitted by the pleadings, that the railroad company having caused the institution of these proceedings, and its agent only done as he was expressly directed to do by his superior, the consequences shall rest on the company alone. Probably the strict view of this question is that, as a railroad corporation can only act by its agents, when the head of a department directs one of its subordinates to do an act, from the performance of which injury is done a third party, abstract justice requires that the corporation shall suffer the consequences that follow the obedience of the subordinate to his superior.

2. The question of probable cause was left to the jury, and counsel for plaintiff in error claim that the evidence in this case was undisputed, and it was therefore for the court to determine whether probable cause existed or not. This involves an examination and determination as to what the facts are, and what are the reasonable deductions from them. If the facts are not in dispute, the question is for the court; if they are disputed, the jury must be left to pass upon the existence or want of probable cause. Now, in the determination of this question, two propositions must constantly be kept in view. The first is that the burden of proving the want of probable cause in this action was upon the plaintiff, who alleged it; the second is that the conduct of Foulks, the claim agent of the railroad, and the officer who ordered a criminal prosecution against Watson, "must be weighed in view of what then appeared to him to be the acts and declarations of Watson, and not in the light of subsequently appearing facts." *Stewart v. Sonneborn*, 98 U. S. 194. The very many things introduced for the purpose of establishing actual malice and other issues must not be taken into consideration, or allowed to have any bearing on the question of the existence or want of probable cause. The belief of Foulks as to the existence of probable cause is to be determined by the state of facts existing before and up to the time of the arrest, and not to be influenced by the other evidence in the case, or the state of facts developed subsequent to the arrest.

Out of considerations of this character has grown an unbroken line of authorities establishing one of the most important and beneficial rules that govern in actions for malicious prosecution. The rule is that, in a case where there is a substantial dispute about facts constituting the existence or want of probable cause, it is for the jury to determine what facts are proved, and for the court to say whether or not they amount to probable cause. It is therefore generally the duty of the court, in such a case, when evidence is given tending to prove or disprove the existence of probable cause, to submit to the jury its credibility, and what facts it proves, with instructions that the facts found amount to proof of probable cause, or that they do not. The court should group the facts together in the instructions which the evidence tends to prove, and then instruct the jury, if they find such facts have been established, they must find that there was or was not probable cause. *Johnson v. Miller*, (Iowa,) 17 N. W. Rep. 84; *Owen v. Owen*, 22 Iowa, 271; *Shaul v. Brown*, 28 Iowa, 37; *Gee v. Culter*, (Or.) 6 Pac. Rep. 775; *Haddrick v. Heslop*, 12 Q. B. 275; *Castro v. De Uriarte*, 16 Fed. Rep. 93; *Stewart v. Sonneborn*,

98 U. S. 187; *Heyne v. Blair*, 62 N. Y. 19; *Sutton v. Johnstone*, 1 Term R. 493. This rule must not be made a pretext by which a question primarily for the court is transferred to the jury. There must be a substantial dispute about the existence of probable cause before it can properly go to the jury; and if about the facts that are claimed to prove or disprove probable cause there can fairly be said to be a dispute, a conflict of testimony, irreconcilable statements of witnesses, a strong flavor of improbability, then the jury are the sole judges of these, as of every other material fact in the case. But if the evidence on this question, fairly considered and impartially weighed, produces in the mind of the court a reasonable conviction of the existence or want of probable cause, then it is the clear duty of the court to instruct the jury accordingly. The dispute must be of such character as to compel the court to weigh evidence, and determine the credibility of witnesses, before it ceases to be a question of law for the court, and becomes an issue of fact for the jury. Whenever the evidence of the existence or want of probable cause produces in the mind of the court a reasonable doubt as to its proper determination, then it should be submitted to the jury. It is said in the case of *Stewart v. Sonneborn*, 98 U. S. 187, that in all cases in which the question of the defendant's belief of the facts relied on to prove want of probable cause is involved, what that belief was is always for the jury to determine.

Proceeding to ascertain from the record whether or not there was such a substantial dispute about the facts tending to prove a want of probable cause, we will first state what the evidence shows to be the material facts in the whole case, then examine such facts as are alleged to have produced in the mind of Foulks an honest belief of the guilt of Watson of willfully and maliciously throwing the switch. The main facts are that on the first day of September, 1883, at Osage City, on the line of the Atchison, Topeka & Santa Fe Railway, and about 2 o'clock in the morning of that day, a passenger train going west on the main track left that track, and ran into and collided with an extra freight train that was standing on a side track headed to the east, severely injuring several of the employes of the company, and destroying some of the property. While the general course of the line of railroad is from the east to the west, at the depot and yards at Osage City the course of the main track was from the north-east to the south-west, parallel with the main track, for quite a distance, and on both sides of it were side tracks,—one to the north-west, called the "North Siding;" and one to the south-west, called the "South Siding." The main track and each of the side tracks were connected, about midway of the side tracks, by a cross or spur track, running diagonally across the main track from the side tracks, and connected with the main track by switches. This spur track was located some distance east of the depot. The general course of the line being east and west, trains going over the road were called "east-bound" and "west-bound" trains. The extra freight train, to whose crew Watson belonged, was running from Emporia to Topeka. It had left Emporia with orders to side track at Osage City, to let three extra freight trains pass, and to get orders about the passenger train. Arriving, it had stopped on the north siding, close to the spur or cross track, awaiting signals from the conductor to go ahead. Watson was the head brakeman on this train, and one of his duties was to throw switches ahead of it. He states that, as soon as the three extras had passed on the main line, he went up to the switch and unlocked it, and took the pin out of the lever, and sat down on the switch-block facing the depot. The depot was located some distance west of the switch-block upon which he was sitting, and hence, when he sat down on the switch-block facing the depot, he was facing west. This switch is located on the south side of the main track, and, the freight train being on the north siding, he could plainly see the depot, or at least that train would not obstruct his view. He sat down there on the switch-block facing the depot, waiting for his conductor to give the signal to the engineer of the freight

train to move ahead; and to do this the train would have to leave the north siding, go on to the spur track, and from that on to the main track. He states: "While sitting there I went to sleep, and must have turned over, for I was leaning back this way; I must have turned clear over; the first thing I heard, I never heard no train whistle. I don't know whether the train whistled or not; I heard a noise and looked up and saw a head-light coming. Well, I jumped up—I thought it was our train pulling out—and throwed the switch. Well, after I did it, I could see the lights of the passenger train, and knew what I did, and tried my best to throw the switch under the baggage car, so that they would go onto the ties and stop. I was dazed and frightened." Throwing the switch let the passenger train from the main track onto the spur, and from there onto the north siding, when it collided with the freight train, and did great damage, and severely wounded the fireman on the passenger train, and hurt some other persons. The distance from the switch to the north siding, where the freight train stood headed to the east, was about three car-lengths. Immediately after the collision occurred, Watson ran towards the wreck and told both the engineer of the passenger and the conductor of the freight that he had thrown the switch under the supposition that the approaching train was the freight. He assisted to carry the wounded man to the station-house, hunted up a surgeon to attend him, and then disappeared. Martin Myers, the engineer on the passenger train, says: "Approaching Osage City yards, I saw the switch-lights were all right for the main track; they were all burning all right for the main track. As I neared the middle of the north siding there was a train standing on the siding, and about there is a spur or cross track. The engine of the freight train was standing near the spur, and, as I approached the engine, I saw that gentleman [Watson] there start from the engine, and run directly across the track in front of me, about one or two car-lengths in front of me; and he grabbed the switch, and threw it around, and run me right directly into the freight train that was standing on the siding. I was unable to hold the train in such a short distance. I applied the air-brakes, and reversed the engine, but I was too close to the freight on the siding, and went into them. He was not at the switch as I approached. He ran across the track from the opposite side of the switch, from the same side his train was standing on; he run across the track with a lamp in his hand." "There was a rule in force then, and is now, and is on all roads that I am acquainted with in the United States, instructing brakemen that when the approaching train is expected, to keep entirely away from the switches, and not unlock them until after the approaching train has passed." Perdue, the conductor of the freight train, says: "I had been to the office to get the orders for my train. I got the order, and started out to take it to my engineer, when this passenger train came in sight in the Osage City yards. I got opposite my way-car when I saw this brakeman give this passenger train signals to stop. When he did that, I stopped too. I knew there was something wrong, but I could not any more than say 'Jack Robinson' before they struck. It did not seem more than two seconds to me; just as quick as could be done. I did not see anybody throw a switch there that night just before the passenger train came in. I saw the signal to stop. It looked to me like the light had left about the front of my engine or train; it looked like it had left my engine, but it was on the main track when signal was given. I was back of the engine about twenty cars." This was all of the material evidence of the circumstances connected with the immediate cause of the wreck.

C. M. Foulks was the claim agent of the defendant railway company. It was a part of his duty as such claim agent to investigate the cause of all wrecks, look after the wounded, take charge of the damaged property, and report to the company how they occurred, their cause and results. He made an investigation in the case, and found this state of facts: *First*, that Leon Watson

was the employe who misplaced the switch; *second*, that a day or two prior to the wreck, Watson had called for his time; *third*, that, immediately after the wreck, Watson had disappeared, and could not be found, although he caused a search to be instituted, and caused inquiries to be made of other roads "if such a man was in their employ;" *fourth*, Myers, the engineer of the passenger train, had given to Foulks his version of the circumstances attending the misplacement of the switch, substantially as he testified; *fifth*, Perdue, the conductor of the freight train, had made a report about the wreck, and the cause of it, substantially as he testified; *sixth*, the witness Frank Brown had made a statement, in presence of Foulks, of the declaration of Watson on the street, that "he had done the company up at Osage City, and would do it again," as Brown testified at the trial; *seventh*, Foulks had investigated the train-sheets at division head-quarters, and alleged to have found by these that the claim of Watson that the cause of falling asleep on the switch-block was by reason of continuous work, which gave him no time to rest and sleep, was not supported by the reports. Foulks, on the witness stand, swore that at the time he ordered Higgins to file a complaint, and have Watson arrested, he had an honest belief of the guilt of Watson, produced by the facts above stated. On the other hand, it is in evidence that, before the arrest, Watson's deposition had been taken in the case of *Amick v. A., T. & S. F. R. Co.*, in which action Amick, who was a fireman on the passenger train, sues the company for damages for an injury he received at the time the collision occurred at Osage City; and in that deposition he had given his version of the cause of the wreck, in substance the same as his testimony on this trial. The theory of the counsel for Watson was, in the pleadings and at the trial, that the search and arrest of Watson was to prevent him from testifying in the case of *Amick v. A., T. & S. F. R. Co.*, and not belief in his guilt. The correspondence between the railroad company and the board of railroad commissioners, shortly after the occurrence, is relied upon by both parties. The counsel for Watson claim that it presents a strong indication of the belief in the mind of Foulks, at the time he addressed the letter to the board, as to the circumstances that caused Watson to misplace the switch, because in that written communication Foulks says: "An accident occurred, caused by a brakeman by the name of Watson carelessly and negligently throwing a switch." The counsel for the railroad company claim that as the correspondence stated that "Watson had escaped," and that "the railroad company would endeavor to effect a capture, and turn him over to the board of railroad commissioners, to be dealt with according to law," and as the railroad commissioners advised "that the absconding brakeman be captured and turned over to the proper authorities of Osage county, to be held accountable for his conduct," the fair construction of the correspondence is that, while Foulks had not technically described a criminal offense as having been committed by Watson, that was his evident meaning.

There are, perhaps, other facts and deductions relied upon by both parties to prove the want and existence of probable cause; but these are sufficient to show that there was such a substantial dispute about it that, under the rule hereinbefore cited, the question as to what facts were established by the evidence was for the jury to determine. But the facts were nowhere in the instructions grouped together, and the jury were not told what facts they should consider in the determination of the question of probable cause. They were not instructed that the conduct of Foulks in this respect must be weighed by the facts that came to his knowledge from responsible and reliable sources before arrest, and not in the light of all the facts subsequently developed on the trial of the case; and hence we think that the question of the want or existence of probable cause was not fairly submitted to the jury, with the limitations and restrictions imposed by the rule, and that was material error, to the prejudice of the plaintiff in error. The trial judge gives an admirable

definition of probable cause, but fails to segregate the evidence on that question from the other evidence in the case, and leaves the jury to determine it in the light of the facts and circumstances subsequent to the arrest. This is error, and because of it we recommend that the case be reversed, and remanded to the district court of Shawnee county for a new trial.

BY THE COURT. It is so ordered; all the justices concurring.

(38 Kan. 83)

ELERICK v. BRADEN.

(*Supreme Court of Kansas. December 10, 1887.*)

1. APPEAL—REVIEW—WEIGHT AND SUFFICIENCY OF EVIDENCE.

Where only a general finding is returned by a jury upon disputed testimony, it must be treated as a finding of everything necessary to sustain the general one; and if such finding has received the sanction of the trial court, it cannot be disturbed here.

2. SALE—TRANSFER IN FRAUD OF SELLER—EVIDENCE TO SHOW.

The testimony in the case examined, and held to be sufficient to support a finding that the transfer of a stock of goods was made by the parties with the intent to defraud the creditors from whom the goods were purchased.

(*Syllabus by the Court.*)

Error to district court, Crawford county; CHANDLER, Judge.

Cowley & Wiswell, for plaintiff in error. *Ware & Ware*, for defendant in error.

JOHNSTON, J. This is an action of replevin, brought by C. F. Elerick against W. H. Braden, the sheriff of Crawford county, to recover the possession of a stock of general merchandise. Braden had attached the goods as the property of J. W. Kinsey, under an order of attachment issued in the action of George W. Stevenson against J. W. Kinsey. The plaintiff claimed that he purchased the stock in good faith, for a valuable consideration, from J. W. Kinsey, about the tenth of February, 1885, and was lawfully in the possession of the goods when they were seized. On the other side, it is claimed that J. W. Kinsey transferred the goods to Elerick for the purpose of defrauding his creditors, and that Elerick, not only had knowledge of the fraudulent purpose, but connived with and aided Kinsey in carrying it out. The jury has, by a general verdict, found the transaction to be fraudulent, and the court below has given its sanction and approval to that verdict.

The principal contention of the plaintiff is that the verdict is not sustained by the testimony. It is conceded that the case was fairly presented to the jury by the instructions of the court; and, in this state of the case, we have only to inquire whether the testimony tends to sustain the general finding of the jury. Taking the testimony against Elerick, and viewing it in the light most favorable to the defendant, as we must, we have no hesitancy in upholding the verdict. Only a few of the facts disclosed by the testimony need be mentioned. In October, 1884, Elerick was engaged in the mercantile business in the town of McCune, and was carrying a stock of general merchandise valued at about \$1,600. There is testimony to the effect that on October 10, 1884, he sold the goods to J. W. Kinsey, who, at that time, came to McCune from Lawrence, and was unacquainted with merchandising. He had no money of his own, but claimed to have brought with him about \$600 of his wife's money, although he was uncertain about the amount. He says that he carried this amount on his person. No inventory was made at the time of this purchase, and he only claims to have then paid \$300 on the stock. Elerick remained in the store and sold goods for about 40 days, and until the stock was reduced in value to about \$900. During this time Kinsey worked for Elerick in the store. Then Kinsey says that he paid Elerick about \$300 more,

and gave his note for the balance due on the stock, and took possession, at which time Elerick became a salesman for Kinsey. Elerick says that shortly after he delivered the possession of the goods, and upon which there was considerable due, he loaned Kinsey \$900, and a little later he loaned him \$200; Kinsey giving no security for its repayment. Soon after Kinsey took possession, the plaintiff, Elerick, invited and urged wholesale dealers to sell Kinsey goods, representing that he was a good man, and financially responsible, who had a stock worth from \$2,000 to \$3,000, and that his indebtedness did not exceed \$300. During the short time that Kinsey was in charge, he bought from the jobbers about \$2,500 worth of goods, for which he did not pay, and Elerick was the active man in selecting and purchasing the goods, and in trying to assure dealers that they might safely sell to Kinsey. Less than two months after Kinsey took control, and after he had stocked up his store pretty well on the credit plan, he retransferred the entire stock to Elerick. There was no inventory taken, and the goods were lumped off at the stated value of \$1,783.15, and a bill of sale was carefully made and placed on record. No cash was paid on this alleged sale except the sum of \$81.96, and then Kinsey took some goods out of the store for future use, which they say did not exceed in value \$50. It is said that the balance of the payment of this sale was made by the notes and obligations of Kinsey which Elerick held. That these obligations were real is denied. The notes for \$900 and \$200 heretofore mentioned formed the larger part of the payment. Those loans were made, if at all, by Elerick, without security, and while Kinsey was considerably indebted to him. Notwithstanding these notes, Elerick was representing to wholesale men that Kinsey was substantially out of debt. Elerick says that the money loaned on these two notes was not taken from the bank, but that he was carrying the same around in his pocket. They were unable to explain the purpose for which the money was loaned, and Kinsey, upon an effort, failed to account for its disposition, or for the receipts from the daily sales. He says that he paid \$300 for a patent stove-polish receipt; that he spent some for lottery tickets; that he lost some upon a wheel of fortune; and that he purchased a check or draft from the McCune bank, but could not say positively whether it was \$5.60 or \$560. He paid a few small bills that accrued during the brief time that he was proprietor, and Elerick was clerk; but, whether clerk or proprietor, it is manifest that Elerick was well acquainted with the business done in the store. He knew of the purchases made by Kinsey and assisted in making them. He knew that the goods were bought on credit, and knew of Kinsey's financial straits; and the facts and circumstances that have been mentioned, as well as others in the record not named, are strongly indicative of a preconceived plan of Elerick and Kinsey to defraud the parties from whom the goods were purchased. True, Elerick offers testimony tending to show good faith on his part; but we have only a general verdict, which, being based on disputed facts, and having received the approval of the trial court, must, under a well-established rule, be treated as a finding of everything necessary to sustain the general finding, and held conclusive in this court. *Knaggs v. Mastin*, 9 Kan. 532; *Railroad Co. v. Blackshire*, 10 Kan. 477; *Railway Co. v. Kunkel*, 17 Kan. 146; *Winter v. Sass*, 19 Kan. 556; *Gibbs v. Gibbs*, 18 Kan. 419; *Stout v. Townsend*, 32 Kan. 424, 4 Pac. Rep. 805; *Higginbotham v. Fair*, 36 Kan. 742, 14 Pac. Rep. 267.

There were some objections to the rulings on the testimony, but an examination of them plainly shows that no prejudicial error was committed, and we do not regard them as sufficiently important to require special mention.

The judgment of the district court will be affirmed.

(All the justices concurring.)

(38 Kan. 78)

CHICAGO, I. & K. R. CO. v. TOWNSDIN, (three cases.)

(Supreme Court of Kansas. December 10, 1887.)

1. TRIAL—SPECIAL FINDINGS—NEW TRIAL.

When the special findings of a jury are in conflict with the general verdict, and are inconsistent with each other, and are so uncertain and incomplete that this court cannot render judgment on them, it is not error in the court below to grant a new trial for these reasons.

2. EMINENT DOMAIN—APPEAL FROM AWARD—TRIAL—SPECIAL FINDINGS.

On an appeal from the award of commissioners on an assessment of damages to land appropriated for the right of way of a railroad company, it is error for the trial court, when requested, to refuse to submit special interrogatories to the jury, as to the value of the land immediately before and immediately after the location of the right of way. The case of *Railroad Co. v. Feckheimer*, 36 Kan. 45, 12 Pac. Rep. 382, cited and approved.

(Syllabus by Simpson, C.)

Commissioners' decision. Error to district court, Cloud county; E. HUTCHINSON, Judge.

W. W. Guthrie and Sturgis & Kennett, for plaintiff in error. L. J. Crans, for defendant in error.

SIMPSON, C. This was an appeal to the district court of Cloud county, from an award of commissioners appointed by the judge of the Twelfth judicial district of the state, on application of the plaintiff in error, to lay off a route for such a railway in Cloud county, and to appraise the value of and assess the damage to land appropriated to its right of way, etc. The case was tried by a jury, at the August term of said court, 1885. Before the trial, the railroad company offered in open court to confess to a judgment for \$300, and accrued costs, which offer was in writing, but the appellant, Townsdin, refused to accept it. The material facts are: The defendant in error was the owner of a quarter section of land near the city of Concordia; a completed railroad line ran through the land, and cut off a portion on the north side, estimated to contain 12 acres. It was across this 12 acres that the plaintiff sought to appropriate its right of way. The amount of land occupied by the track of the defendant railroad company across the 12 acres amounted to three and three-fourths acres.

The jury, in answer to special interrogatories, found that the value of the perpetual use of the land taken for the right of way was \$187.50; that the market value of the land (12 acres) lying north of the other railroad, immediately before the location of the plaintiff in error's right of way, was \$40 per acre, and immediately after the location, irrespective of benefits, was \$30 per acre; that the land lying south of the other railroad was not damaged by the location of the plaintiff in error's right of way. The jury returned a general verdict for defendant in error for \$292.67 $\frac{1}{2}$. On the rendition of this verdict, the railroad company filed a motion for judgment on the verdict against itself, for the amount found by the jury, and costs to the time of its filing a written offer to confess judgment. Townsdin, by his attorney, filed a motion for a new trial for error in the assessment of the amount of recovery, and for error of law occurring at the trial, and excepted to at the time. The court overruled the motion of the railroad company for judgment on the verdict, and sustained that of Townsdin for a new trial. The railroad company bring the case here, and urge, as reasons for reversal, that the court erred in sustaining the motion for a new trial filed by the defendant in error. It is shown affirmatively in the record, at one place, that the motion for a new trial was sustained because the special findings were contrary to the general verdict;

¹In this case there were three appeals, the numbers of which, as referred to in the opinion, are 4,033, 4,078, and 4,252.

and in another place it is recited "that the court, having heard the motion of the appellant, on consideration, do allow the same." It thus affirmatively appears that the court passed upon both of the grounds for a new trial embodied in the motion of Townsdin. In this state of the record, we will not undertake to say that the ruling of the court below was based solely on one of the reasons given. The natural inference from the record is that both were sustained. But, be that as it may, we do not feel authorized to reverse the ruling. The special findings were inconsistent with the general verdict, and we have not been able to reconcile them, either mathematically or otherwise. This inconsistency could be taken advantage of by either party. If the ruling of the court was induced by this reason, we cannot say it was wrong; but, if it was based upon the other ground, we cannot reverse it, for the reason that the evidence and rulings complained of are not in the record, and we are bound to presume that the ruling of the court was right. If this ruling was to be complained of here, all the evidence and the other proceedings of the trial should have been preserved in the record. When the jury returned their special findings into court, either party could have called the attention of the court to their inconsistency, and objected to their reception; but, this not having been done, and they having been received without objection, then the only question left was the one presented in the motion for a new trial.

The special findings in the case, as compared to the general verdict, come within the decision of this court in *Harvester-Works v. Cummings*, 26 Kan. 367. There the court say: "We are unable to enter judgment upon the special findings, because they are conflicting, inconsistent, uncertain, and not complete;" and the case was reversed. Here there is an irreconcilable difference in the value of the land taken, and its value before taken. The railroad company ought not to be adjudged to pay a greater sum than the value of the land. It is true, the company is not complaining of this, but it is equally true that the trial court cannot be compelled to render a judgment on special findings that are not only contrary to the general verdict, but grossly inconsistent with each other. We think the court below was right in granting the new trial, so far as the record we have before us declares the reason of the ruling; and the result is that we recommend the affirmance of the judgment.

BY THE COURT. It is so ordered.

No. 4,078. When the motion for a new trial was sustained, as set forth in the opinion in No. 4,033, the railroad company was granted 40 days from the twenty-first day of August, 1885, to prepare and serve a case for the supreme court; 20 days were allowed Townsdin to make and suggest amendments; and the same was to be presented for settlement and signature at Concordia, on the first day of the October term, 1885. It was presented at that time, but, the court being engaged in other business, postponed the settlement from time to time, until February 26, 1886, when it was certified and filed with the clerk of the district court, on the twenty-seventh of February, 1886. On the first day of March following this case was called for trial in the district court. The railroad company made an application for a continuance. That was refused, and the case was tried by a jury. After the evidence on the part of Townsdin was closed, the railroad company requested the court to send the jury out to view the premises, and this the court refused to do. The plaintiff in error then requested the court to submit the following special interrogatories to the jury, to-wit: (1) What was the market value of the perpetual use of the land taken by the appellee for its right of way over the land in question? (2) Before the location of appellee's right of way was the land in question divided by any other railroad? (3) If No. 2 is answered "Yes," how much of the land in question was on the north side of such other rail-

road? (4) What was the market value of the land lying north of such other railroad at and immediately before the time of the location of appellee's right of way? (5) Was appellee's right of way located north of and adjoining said other railroad's right of way across the land in question? (6) If the last question is answered "Yes," then how much of the quarter section of land in question lies north of appellee's right of way? (7) What was the market value thereof immediately after the location of appellee's right of way, irrespective of any benefits from the construction and operation of the railroad of appellee?

The court refused to submit the special question numbered 4 and special question numbered 7 to the jury, to which refusal and ruling the appellee excepted. We think this was such a substantial error as compels us to reverse the case. "It is the right of the parties to have important questions of fact, that are based on competent testimony, and which are within the issues of the case, submitted to the jury, and answered upon request, and the refusal of this right is material error." *Railroad Co. v. Fechtheimer*, 36 Kan. 45, 12 Pac. Rep. 362. As this reverses the case, and sends it back for a new trial, we will not discuss the other questions called to our attention in the brief of counsel for the plaintiff in error. It is recommended that the case be reversed, with instructions to the court below to sustain the motion for a new trial.

BY THE COURT. It is so ordered.

In case No. 4,252. This is an action by Townsden against the railroad company, based upon the judgment rendered in case No. 4,078. As that case is now reversed, and sent back for a new trial upon its merits, there is no cause of action. It is therefore recommended that it be remanded to the district court of Cloud county, with instructions to dismiss the case.

BY THE COURT. It is so ordered; all the justices concurring.

(38 Kan. 26)

LEAVITT v. FILES.

(*Supreme Court of Kansas*. December 10, 1885.)

INSANITY—CIVIL DISABILITIES—RELIEF AGAINST FORECLOSURE OF MORTGAGE—PLEADING.

L. borrowed a sum of money from F., and gave him a mortgage on real estate as security. Default was made by L., and F. regularly obtained a judgment foreclosing the mortgage and decreeing a sale of the land to satisfy the debt. In due time, and upon the required notice, the land was sold to F. at a sale which was open and fair. The guardian of L. brought an action alleging the foregoing facts, and that at the time the loan was made, and ever since, L. was insane, and that F. knew of his insanity, but that the transaction was *bona fide* on the part of F. He claims that the transaction was invalid on account of his ward's insanity; but instead of offering to restore the amount paid, and asking that the contract and proceedings be annulled, he averred that the land was sold for less than its value; and he prayed a recovery of the difference between the selling price and the actual value. *Held*, that the petition was insufficient, and that the plaintiff was not entitled to the relief prayed for.

(*Syllabus by the Court*.)

Error to district court, Bourbon county; C. O. FRENCH, Judge.

On November 13, 1884, the plaintiff in error, who was plaintiff below, filed a petition in the district court of Bourbon county, alleging that "under and by virtue of proceedings commenced in the probate court of Bourbon county, Kansas, one John H. Leavitt, who in that proceeding was called Holland Leavitt, was, on the sixteenth day of May, 1884, by the verdict of a jury impaneled to try that issue, declared an insane person, and incapable of managing his affairs. This plaintiff was, thereupon, by said court, appointed

guardian of the person and estate of the said John H. Leavitt, and duly qualified as such by taking the oath and giving the bond required by law, and he still is such guardian; the said John H. Leavitt being at that time, by order of said court, committed to the asylum for the treatment of insane persons, at Osawatomie, Kansas, where he now is. The plaintiff further states that on December 1, 1881, and for several years prior thereto, the said John H. Leavitt was, and had been, the owner of a parcel of real estate in Bourbon county, Kansas, described as follows, to-wit: The south-east quarter of section No. thirty-two, (32.) township No. twenty-six (26) south, of range No. twenty-five (25) east, containing one hundred and sixty (160) acres. The said John H. Leavitt was then and is now an unmarried man. On said December 1, 1881, he executed his promissory note to the defendant, Benjamin Files, for the sum of \$975, due twelve months thereafter, and with interest at the rate of 10 per cent. per annum from date. The said John H. Leavitt also executed a mortgage of same date upon said real estate above described, to secure the payment of said note. The said John H. Leavitt failed to pay said note at its maturity, and immediately after the maturity thereof the said Benjamin Files, the defendant herein, commenced an action in this court for the purpose of obtaining a judgment on said note, and to foreclose said mortgage on said real estate. Such proceedings were thereafter had in said action as that on the nineteenth day of May, 1883, judgment was rendered therein in favor of said Files and against said John H. Leavitt for the sum of \$1,122.65, and costs of suit, taxed at \$43.25, and for foreclosure of said mortgage, and directing a sale of said real estate to pay the judgment thus rendered within six months thereafter, if the said judgment was not paid before that time; appraisal of said real estate having been waived in said note. Afterwards the said Benjamin Files procured an order of sale to be issued on said judgment. Said real estate was advertised for sale by the sheriff of Bourbon county, and sold by him to said Benjamin Files on January 24, 1884, at and for the price and sum of \$1,050, and afterwards said Files procured an order of this court confirming said sale, and directing the sheriff of Bourbon county to make to him a deed to said real estate; which deed was thereafter made by said sheriff, and delivered to said Files, who caused the same to be recorded in the office of the register of deeds of Bourbon county. Said Files also shortly thereafter took possession of said real estate. Plaintiff is advised and charges that the said sum of \$1,122.65, for which judgment was rendered in favor of said Files on May 19, 1883, included, in addition to the principal and interest of said note, some taxes which said Files claimed to have paid on said real estate. Said plaintiff is not advised and does not know whether the sum set forth in said note was actually and *bona fide* due from said John H. Leavitt to said Files or not, but he is willing to so treat and consider it. The plaintiff further states that the said John H. Leavitt did not file any answer or make any appearance whatsoever in the case of the defendant, Files, against him, either before or after judgment, nor did he appear, either at the sale of said lands, or at the time when the sale was confirmed, as hereinbefore set forth. The plaintiff further states that the said John H. Leavitt, for many years prior thereto, and at the time of the execution of said note and mortgage, had been and was a person of unsound mind, and has so continued up to the present time; that he has, during all of said time, been utterly incapable of appreciating or understanding the transactions which he had with said Files, or the effect thereof, and was wholly unfit, because of unsoundness of mind, to properly conduct and transact such business as was involved between him and said Files. The plaintiff further states that the defendant, Files, during all the time hereinbefore mentioned, from the execution of said note and mortgage to the present time, was fully aware that the said John H. Leavitt was a person of unsound mind, and utterly incapable of understanding such transactions as were had by said Files with him, as hereinbefore set

forth. The plaintiff further states that the real estate hereinbefore described, at the time it was sold by the sheriff of Bourbon county to said Files, on January 24, 1884, was of the value of \$3,200. Wherefore the plaintiff prays judgment against said Files for the sum of \$2,034.10, the same being the difference between the value of said real estate and the amount due said Files by virtue of the judgment of May 19, 1883, and the costs thereon." The defendant demurred to the petition of the plaintiff, stating as a ground of demurrer that the petition did not state facts sufficient to constitute a cause of action against the defendant. At the December term, 1884, of said court, the demurrer was heard and sustained. Leave was given to the plaintiff to amend his petition, but he neglected and refused to amend, and elected to stand upon the petition as filed; and thereupon the court entered judgment in favor of the defendant. This proceeding has been brought, assigning for error the rulings of the court upon the sufficiency of the petition.

A. A. Harris, for plaintiff in error. J. D. McCleverty, for defendant in error.

JOHNSTON, J. According to the allegations of the petition, the plaintiff was not entitled to the relief prayed for. He does not ask to set aside the contract and the proceedings under which the defendant obtained the land, but he virtually seeks a confirmation of these by asking for the difference between the price paid by the defendant for the land at the judicial sale and the sum which it is alleged to have been then actually worth. From the allegation concerning the *bona fide* character of the indebtedness, we must assume that the original transaction between Leavitt and Files was free from fraud or unfairness. Leavitt borrowed \$975 from Files on December 1, 1881, more than two years before he was adjudged to be insane. He then gave a note payable in one year from date, with interest at 10 per cent., and executed a mortgage upon a tract of land which he owned to secure the payment of the money. Default being made, the mortgage was foreclosed in May, 1883, and the land was not sold under the decree of foreclosure until January 24, 1884. Leavitt was not adjudged to be of unsound mind until all these proceedings had taken place, nor until May 16, 1884. The proceedings to recover the money, and for the foreclosure as well as in selling the property to satisfy the debt, appear to have been orderly and deliberate. There is no allegation that Files took or sought to take any advantage of Leavitt in any of the proceedings. The sale was not made for more than eight months after the order directing the sale had been made. It was then duly advertised, and the land sold to the defendant, Files, but there is no intimation that he attempted to stifle competition, or that the sale was not openly and fairly conducted in all respects. There is an allegation that Leavitt was insane and utterly incapacitated to make a contract, and that the defendant had knowledge of his incapacity; but this averment is coupled with one alleging the fairness and good faith of the defendant. Generally speaking, the contract of one insane is invalid, for the reason that the rational consenting mind is lacking.

The rules respecting such contracts, and the liability thereon, were quite fully considered and stated in *Gribben v. Maxwell*, 34 Kan. 8, 7 Pac. Rep. 584. That was an action to set aside a conveyance made by an insane person before an inquisition and finding of lunacy. The party with whom he dealt had no knowledge of his incapacity, and made the purchase in good faith and for a reasonable consideration, and it was decided that, before the conveyance could be set aside, the consideration received must be returned, or offered to be returned. The result of that consideration, and the authorities there cited, is that a contract made as this one was may be set aside if the parties can be placed *in statu quo*; but where it is entered into in good faith, and without taking advantage of the lunatic, there should be a tender, or an offer to restore the amount paid. It would be inequitable and unjust to allow him to recover

the property, and to retain the price paid by the purchaser besides. No offer to return the amount paid by the defendant was made. Indeed, as has been stated, the plaintiff does not repudiate the contract, or seek to have it set aside. He attacks the contract on account of his ward's incapacity, but does not ask that it be annulled. He both repudiates and confirms. He would have the contract and proceedings held sufficient to give the defendant a good title to the land, but too defective to relieve him from liability to Leavitt's estate. In effect, the plaintiff asks the court to modify the contract of purchase made by the defendant by requiring him to pay \$1,150 more than he agreed to pay, and, when the contract is so modified, to enforce it. He seeks to compel the making and enforcement of a new and entirely different contract than was made by the parties; and this, although the contract has been fully executed. This cannot be done. No obstacle seems to lie in the way of a redemption of the land, as it was sold to, and, so far as the record shows, is yet owned by, the defendant. This is the plaintiff's remedy, and in such an action the rights of the insane person may be fully protected without doing injustice to the defendant, who confessedly dealt fairly and in good faith with him. The judgment will be affirmed.

(All the justices concurring.)

(38 Kan. 36)

MILLER v. EDGERTON and another.

(*Supreme Court of Kansas. December 10, 1887.*)

1. EVIDENCE—PAROL TO CONTRADICT WRITING.

Proof of a contemporaneous parol agreement is inadmissible to alter or contradict a contract in writing.¹

2. DEED—CONSIDERATION—PAROL EVIDENCE TO SHOW.

The consideration of a deed may be shown to be different from that expressed on its face by parol evidence, but it cannot be admitted for the purpose of varying or defeating the conveyance itself.²

3. CONTRACT—CONSTRUCTIONS—REFERENCE TO OTHER CONTRACTS.

Where a contract is made in writing between two parties, and reference is made therein to another contract also in writing between the same parties, as a part of the consideration of the contract then being executed, both instruments constitute the agreement of the parties, and should be construed together.

(*Syllabus by Holt, C.*)

Commissioners' decision. Error to district court, Cherokee county; GEO. CHANDLER, Judge.

Cowley & Wiswell and *F. M. Tracewell*, for plaintiff in error. *Fred Basom*, for defendants in error.

HOLT, C. This action was tried to a jury in the Cherokee district court at the April term, 1885. There was a verdict in favor of plaintiffs below, defendants in error, for \$5,000. On a motion for a new trial the court overruled such motion, upon the condition that the plaintiffs would remit all of

¹Concerning the admissibility of parol testimony, in an action upon a written contract, to establish a contemporaneous verbal agreement, see *Graffam v. Pierce*, (Mass.) 9 N. E. Rep. 819, and note; *Carr v. Hays*, (Ind.) 11 N. E. Rep. 25; *Blair v. Buttolph*, (Iowa,) 33 N. W. Rep. 349; *Farwell v. Ensign*, (Mich.) 1d. 734; *Barnett v. Barnett*, (Va.) 2 S. E. Rep. 733, and note; *Mason v. Mason*, (Iowa,) 34 N. W. Rep. 208.

²Parol evidence is admissible to show a consideration different from that recited in a contract. *Bolles v. Sachs*, (Minn.) 33 N. W. Rep. 862; *Wilkinson v. Parmier*, (Ala.) 3 South. Rep. 4; *Scoggin v. Schloath*, (Or.) 15 Pac. Rep. 635. But, under an agreement that plainly purports to set forth the full consideration which prompted its execution, parol evidence is inadmissible to show a consideration not mentioned or referred to in it. *Parker v. Morrill*, (N. C.) 3 S. E. Rep. 511.

the verdict in excess of the sum of \$1,187.41. Plaintiffs consenting, a judgment was rendered for such amount.

This action was based upon the following alleged facts: John N. Miller died at Cherokee county, Kansas, in August, 1882, leaving as his heirs his widow, Mary V. Miller, defendant, and Mary E. Edgerton, his adopted daughter, one of the plaintiffs. The day before his death he attempted to make his will, but before it was completed he was taken with a chill, and never signed it. He left property to the value of between \$10,000 and \$20,000. By the terms of his proposed and partially completed will, he left \$300 to his adopted daughter, \$1,000 in money and his homestead and all his personal property, excepting his money and credits, to his wife, also small bequests to other relatives and friends. In that part of the will, the last he was able to dictate, he left all the residue of his property to his wife. At the time of his death, his adopted daughter was about to be delivered of a child, and about the first of September following the widow went to her home, carrying with her the paper, partially prepared, as a will of John N. Miller, and on the back thereof she had written an instrument which she wished her and her husband to sign. She told Mrs. Edgerton at that time that it had been the earnest and long-cherished desire of her husband to aid poor and deserving children in obtaining an education. Mrs. Edgerton was probably well acquainted with her father's intentions in this direction before this time. Mrs. Miller stated to her his efforts in making the will, and said she had drawn up a contract on the back of the proposed will, and wished her to sign it, so that his wishes might be fulfilled. At this time Mrs. Edgerton was in bed with a babe a few days old, and, after a little conversation, Mrs. Miller left the papers with Mrs. Edgerton, in order that she might talk the matter over with her husband, and went away, returning the next day, when the papers were handed back to her unsigned. Nothing was said on that day about signing the contract. Some ten days after she again went to see Mr. and Mrs. Edgerton, and, after some conversation, the contract on the back of the will was signed by Mrs. Miller, Mrs. Edgerton, and her husband. A few days after this, and after Mrs. Miller had consulted with her attorney, she went again to Mrs. Edgerton to get a new contract in regard to the estate of John N. Miller. After considerable discussion, a contract, or indenture as it was called, was made, by which Mr. and Mrs. Edgerton sold and conveyed all their right and interest in the estate of John N. Miller to Mary V. Miller, the consideration expressed in the contract being \$1,321, and "other considerations hereinafter mentioned." At that time Mrs. Miller paid Mrs. Edgerton \$100, and very shortly thereafter \$400 more, and in addition gave her note for \$500, which was paid the year following. She also delivered up a note amounting to \$321, which John N. Miller had held against her in his life-time. Afterwards this action was brought by the Edgertons against Mary V. Miller, they claiming that they were entitled to one-half of the estate of John N. Miller; and said that at the time of the last above named contract between themselves and Mary V. Miller there was a contemporaneous oral agreement, which provided that, as rapidly as the estate of Mr. Miller was reduced to money, and collected by Mary V. Miller, one-half of the net proceeds were to be turned over to them.

The case was tried upon the theory that there was a contemporaneous oral agreement made at the time of the contract between Mrs. Miller and the Edgertons in regard to the disposition of the proceeds of the estate. The plaintiff in error complains of several of the rulings of the court, but we shall consider but one question in reviewing the case, and that is whether it was error to admit proof of the contemporaneous oral agreement alleged by the plaintiffs. It is contended by the defendant that such parol agreement did not explain, or in any manner tend to facilitate, the performance of the contract in writing between these parties. She claims that the subject-matter sought to be controlled by the parol agreement was embraced in their written

contract, and insists that the well-known rule that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument is applicable. That rule must govern our decision, unless the evidence brings it within one of the exceptions to it. The plaintiffs say, however, that the parol agreement is concerning the consideration nominated in the written contract, and can be fully inquired into, and cite a long list of authorities to show that the consideration expressed in a deed is not conclusive between the parties, and that proof may be given to show a different state of facts than that expressed, although it may vary, enlarge, or even contradict in that respect the written contract. We shall refer only to those authorities that apparently most strongly tend to support the claim of the plaintiffs.

In *Hannan v. Oxley*, 23 Wis. 519, the action was for partition of land, in which two daughters claimed the land as heirs at law of their father, and the widow as defendant claimed the entire estate by virtue of a deed from her husband to herself. The consideration named in the deed was \$600, but in the trial the defendant was permitted to show, after the money consideration expressed in the deed had been attacked, that there was the further consideration of love and affection named as a consideration at the time of the executing the deed, but not expressed therein. It was contended because the deed recited no such consideration that it could not be proven. Mr. Justice PAINE, speaking for the court, says: "I shall not attempt to review the authorities upon the subject, but refer to the following as showing that the recitals in a deed are not conclusive between the parties as to the consideration or its payment, but that, in a case like this at least, where there is no question as to the rights of creditors, parol evidence may be introduced to show an additional consideration to that expressed and consistent with it, for the purpose of sustaining a deed;" and cites authorities. It will be noticed that the evidence was admitted to show a consideration consistent with the one expressed, and, for the purpose of sustaining a deed. It is obvious that the rule therein enunciated is not applicable to the facts proven in this action.

In the case of *Laudman v. Ingram*, 49 Mo. 212, it was attempted to show by parol that, in addition to the consideration expressed in the deed, there was a further agreement that the grantee was to pay the taxes on the land. In the opinion of the court, delivered by Mr. Justice ADAMS, it is said: "We know the general rule to be that all stipulations and declarations anterior to and contemporaneous with a written agreement are merged in the writing, and cannot be proved by parol. But the exception, if it be an exception, is equally as well established, that one may by parol evidence prove additional considerations not inconsistent with those recited in a deed."

In the case of *Morris v. Tillson*, 81 Ill. 607, the question arose whether a consideration expressed in a lease for rent of three years in advance did not include a debt already due. Although it was expressed on the face for rent to become due, it was there held that the recital of payment of the consideration in a lease might be contradicted, provided it is not sought by the evidence offered to impair the lease, or vary its legal effect.

In the celebrated case of *McCrea v. Purmont*, 16 Wend. 460, the question was whether, when the consideration expressed in the face of the deed was acknowledged to have been paid in money, it could be proven by parol that it was in fact paid in a different manner. It was held it could be shown, and the authorities upon the question were collated and reviewed. Among other authorities cited was *Morse v. Shattuck*, 4 N. H. 229, and the language in that opinion is copied with approval. Mr. Chief Justice RICHARDSON says in this connection: "It is perfectly well settled that a consideration expressed in a deed cannot be disproved for the purpose of defeating the conveyance, unless it be upon the ground of fraud."

The case of *Rhine v. Ellen*, 36 Cal. 362, was an action for the purchase money for the sale of a mine. The mine was sold to several parties for \$32,-

000. In the petition it was averred that the defendant, Ellen, bought one-eighth part, and was to pay therefor \$4,000, and that, instead of the consideration being jointly due from all the grantees, each one was to pay his proportionate share. The defendant denied the consideration to be as alleged by plaintiff, but says that if after one year he should elect to take the share then, he was to pay for it, but if he declined to take it then plaintiff was to pay him for all moneys expended by him in organizing a stock company to operate the mine, and all assessments and expenses paid for improving it. The distinction between that action and this one is best shown, perhaps, by quoting a portion of the opinion: "The action is not brought upon any express covenant or promise found in the instrument. The promise is implied by law from facts shown *dehors* the instrument, and contrary to its express acknowledgment. * * * In fact the suit is not upon the conveyance at all. The whole agreement relied on for the recovery is outside of the conveyance, and that instrument is not offered as the contract sued on. But it is offered for a collateral purpose, as an item of evidence, to show a performance on his part. * * * The words of conveyance of land are the operative words of the contract, and constitute the contract itself. But the acknowledgment of payment of the consideration and of its amount are but the acknowledgment of the existence of facts. The former cannot be contradicted, but the latter may be shown to be otherwise than as acknowledged." We have examined the authorities carefully, and stated them at considerable length, to show that they do not sustain the theory contended for by plaintiffs.

The evidence offered of a parol contract in this action not only tends to change radically the consideration of the indenture, which would probably be permissible, but it defeats and destroys the written contract itself. This action was brought to recover money had and received out of the estate of John N. Miller, deceased, and appropriated wrongfully to defendant's own use. In their petition plaintiffs claimed that the "pretended deed" was obtained from them by deception, misrepresentation, and fraud. The charge of fraud was, however, abandoned at the trial of this action. Of course, if *that* had been established, an action could have been sustained. It was tried on the theory that plaintiffs were entitled to one-half of the value of the estate under a parol contract. If there had been no contract or conveyance that would have been Mary E. Edgerton's share in the estate, as one of the heirs of John N. Miller. It is not disputed that there was a contract entered into between the parties about the estate after Miller's death. The defendant claims that it was all expressed in writing. The plaintiffs say, and introduced evidence and tried the action on the theory, that there was a contemporaneous parol contract about the consideration, different from that expressed in the deed. Let us examine the part of the deed relating to its consideration. First it provides "that the said Mary E. Edgerton, and William Edgerton, her husband, for and in consideration of the sum of thirteen hundred and twenty-one dollars to them duly paid by Mary V. Miller, and other considerations hereinafter mentioned, do by these presents sell," etc. The other considerations are further set forth in the deed as follows: "It is further agreed and understood that said Mary V. Miller agrees and promises to settle the estate of said John N. Miller, deceased, and apply the proceeds thereof in accordance with the terms and stipulations of a certain instrument drawn by direction of the said John N. Miller in his life-time, dated August 15, 1882, and intended by him as his last will and testament, but not signed by him, and the said promise and agreement of said Mary V. Miller to so settle and apply the proceeds of said estate, as directed in said will, and the contract of the parties hereto, indorsed on said will, forms a part of the consideration for this conveyance."

The parts of the will that are applicable are as follows: "I give, devise, and bequeath unto my beloved wife, Mary V. Miller, the homestead property where I now live, in Baxter Springs, Kansas, also my household property of

every description, and all my other personal property, excepting my moneys and credits; and also one thousand dollars in money to be paid her by my executors hereinafter named, to have and to hold the same, to her and her executors and administrators and assigns, forever. I give and bequeath to my adopted daughter, Mary E. Edgerton, three hundred dollars at my wife's decease, unless she shall choose to pay it sooner. I give and bequeath to my beloved wife, Mary V. Miller, all the residue of my personal property for her use and benefit so long as she shall remain my widow. And, lastly, I do nominate and appoint my said wife, Mary V. Miller, to be my executrix of this my last will and testament."

The contract indorsed on the back of same was as follows: "Know all men by these presents, that we, Mary V. Miller, Mary E. Edgerton, and William Edgerton, the sole heirs of or to the estate of John N. Miller, deceased, do here enter into a solemn agreement that his, (the said John N. Miller's) last will and testament, as dictated by him, and not signed as appears in the above and foregoing instrument, be carried into effect as nearly as possible according to his expressed provisions, and, further, that after his funeral expenses and just debts are paid, and the several donations that are made by said will are paid out, that the income of his estate, except that that is needed for the maintenance of his widow, shall be used for charitable purposes, mostly the education of poor children; it being the fervent desire that the aim and ambition of his very busy life be now answered, that the income of his estate be used to relieve suffering, and to assist in educating those who cannot educate themselves."

We suppose it will be conceded that the instrument intended as the last will of John N. Miller, and the contract indorsed thereon, are a part of this contract or conveyance. They all constitute but one contract. They were evidently treated as such by the parties, and the unfinished will, and the contract indorsed thereon, are as much a part of this contract signed upon the fourteenth day of September, 1882, as though they had been written out in full, and embodied in its face.

It has been said that the doors have been thrown open wide when the consideration of a deed is to be inquired about, and that oral evidence is admissible to show its actual consideration; but, in the absence of fraud, accident, and mistake, it has this limitation at least. Such evidence is not competent when it alters and defeats the deed itself. In that case all contemporaneous stipulations and agreements are merged in the written instrument, and cannot be established by parol evidence. The oral evidence admitted on the trial, in effect, would change this instrument from a deed, which it purports to be, into an agreement whereby the defendant is bound to reduce the estate to money, and give the plaintiff one-half of the proceeds, without compensation for services in so doing. This indenture not only conveyed all the interest the plaintiffs had in the estate of John N. Miller to defendant, but it was, in addition thereto, a contract which provides for the application of its proceeds. The very consideration of the conveyance mentioned on its face is a written contract of the parties. It stipulates that the income of the estate shall be used to relieve suffering, and assist in educating those who cannot educate themselves.

The plaintiffs claim by virtue of a parol agreement that one-half of the estate is to be paid to them as a consideration for their deed to defendant. They ask that it shall defeat and destroy their written contract made at the same time. This ought not to be allowed. Their pretext for this is that it is a part of the consideration of a deed, and therefore it can be contradicted. Their reason assigned is not sound. The consideration of a deed may be contradicted in certain cases to be sure, but this contract, although a part of the consideration, still retains its nature, and should be governed by the ordinary rules relating to contracts in writing. It follows that the evidence admitted

to establish a contemporaneous parol agreement was incompetent; it was error to admit it.

We recommend that the judgment of the court below be reversed.

BY THE COURT. It is so ordered; all the justices concurring.

(37 Kan. 756)

CLARK v. MONTFORT.

(*Supreme Court of Kansas.* December 10, 1887.)

ATTACHMENT—DISSOLUTION—TRUTH OF AFFIDAVIT—ACTION FOR RENT.

An attachment issued in an action to recover rent for farming land is subject to the general rule in respect to a discharge, for the reason that it is not true, as stated in the affidavit for attachment, that the rent is due and unpaid.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Error to district court, Johnson county; J. P. HINDMAN, Judge.

John T. Little, B. P. Noteman, and S. T. Seaton, for plaintiff in error.
A. Smith Deveney, for defendant in error.

SIMPSON, C. A motion was filed to discharge the attachment issued in this case, for the reason "that it is not true that at the commencement of this action, nor at the time of the issuance of said order of attachment in this cause, the said defendant was indebted to the plaintiff herein in the sum of \$365, nor in any other sum of money." The plaintiff sued for the yearly rent of a leased farm, and caused an attachment to issue, and he levied on the crops growing and gathered, under section 28, c. 55, Comp. Laws (Dassler) 1885, alleging as a cause for the attachment that the sum of \$365, one year's rent, was due and unpaid. The court below heard the evidence on the motion to discharge, and sustained it, and this is the error complained of here. It is urged that this ground of attachment cannot be inquired of, because that is the cause of action, and, if the court should discharge the attachment, it would be virtually a decision of the case on its merits.

Without stopping to point out the distinction between a ruling on a mere ancillary question and a decision on its merits, we have only to refer counsel to what is printed in their own brief as the declaration of this court in the case of *Bundrem v. Denn*, 25 Kan. 430, and to declare that we are bound and concluded by the opinion in that case. It but announces the familiar law of the state, and the ruling of the learned judge below was in accord with it, and must be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

(38 Kan. 45)

KANSAS CITY, ST. J. & C. B. R. CO. v. RUDEBAUGH.

(*Supreme Court of Kansas.* December 10, 1887.)

1. ABATEMENT—OBJECTIONS TO JURISDICTION—WAIVER OF DEFECT.

Where an action against a railroad company is brought under the provisions of section 50, Code Civil Proc., before a justice of the peace, and judgment is rendered against said company, and an appeal taken to the district court, and said cause is again tried, without objection to the jurisdiction of the court, and judgment is again rendered against the defendant, and thereupon the defendant moved for a new trial, upon the ground that the court had no jurisdiction, *held*, that the objection to the jurisdiction comes too late to be available.

2. CARRIERS—OF PASSENGERS—PASSENGERS' EFFECTS—LIMITING LIABILITY BY STIPULATION ON TICKET.

Where a limitation is inserted in a railroad ticket, limiting the liability of the company to \$100 in case of loss of baggage checked by virtue of the purchase of said ticket, *held*, that said limitation is not binding on the purchaser of said ticket unless, with a knowledge of such limitation, he agrees to it.¹

(*Syllabus by Clogston, C.*)

Commissioners' decision. Error to district court, Atchison county; DAVID MARTIN, Judge.

This action was brought by the defendant in error, before a justice of the peace in Atchison county, to recover the value of a trunk and its contents. Trial, and judgment for the plaintiff, and the defendant appealed to the district court of Atchison county. Trial by the court, findings of fact and conclusions of law, and judgment thereon in favor of the plaintiff, defendant in error, for \$211.25 and costs, and defendant brings the case here for review. The opinion states the facts.

E. S. Gosney and Jackson & Royse, for plaintiff in error. *Tomlinson & Eaton*, for defendant in error.

CLOGSTON, C. This action was brought to recover the value of a trunk and its contents, which plaintiff in error received as baggage to be transported over its road and connecting lines to Mitchell, Dakota Territory. The findings of fact by the court show the following: That on the twenty-eighth day of August, 1884, plaintiff, defendant in error, desiring to go from Atchison to Mitchell, Dakota Territory, applied to the defendant at Atchison for a ticket from Atchison to Mitchell, and was by the agent informed of the price of a ticket or fare between said points, which amount the plaintiff paid, and was given a ticket. The ticket received by the plaintiff was what is called a "skeleton ticket," with coupons attached, giving the names of the different roads over which plaintiff would travel in going from said Atchison to said Mitchell. At the time of receiving said ticket the agent made no statement of the contents of the ticket to the plaintiff, and she made no examination of the ticket. The heading of the ticket contained these words: "Special limited ticket. Good for one continuous first class passage, when (——) stamped by the company's agent, subject to the following contract: In selling this ticket for passage over other roads, this company acts only as agent, and assumes no responsibility beyond its own line. None of the companies represented in this ticket will assume any liability on baggage except for wearing apparel, and then only for a sum not exceeding \$100." Below this printed matter was left a blank space for the signature of the purchaser, and also for a witness. Plaintiff was not required to and did not sign said ticket, and it was not witnessed or signed by any one. No reduction of fare was made by reason of the stipulation contained in the ticket. This ticket was for a passage, first, over the defendant's road from Atchison to Council Bluffs; from Council Bluffs, over the Chicago & Northwestern Railway and the Sioux City & Pacific Railroad, to Sioux City; from Sioux City, over the Chicago, Milwaukee & St. Paul Railway, to Mitchell, Dakota. After receiving this ticket,

¹ With regard to the limitation of the liability of a carrier, a distinction is to be made between a bill of lading for the shipment of goods and a passenger ticket for the carriage of a traveler and his baggage. The latter is ordinarily regarded as a mere voucher, and a passenger is not bound by a special contract embodied in the ticket for the carriage of his baggage, when he has no notice that the ticket is intended for anything more than a voucher, or the circumstances are not such as to make the omission to read the conditions of the ticket negligence *per se*. *Mauritz v. Railroad Co.*, 23 Fed. Rep. 765. But see *Betha v. Railroad Co.*, (S. C.) 1 S. E. Rep. 372. As to the limitation of a carrier's liability by stipulations in a bill of lading, see *Railroad Co. v. Trawick*, (Tex.) 4 S. W. Rep. 568; *Hill v. Railroad Co.*, (Mass.) 10 N. E. Rep. 836; *Grogan v. Express Co.*, (Pa.) 7 Atl. Rep. 134.

the plaintiff presented it to the baggage agent at the union depot at Atchison, and with it her trunk, containing the usual wearing apparel of the plaintiff, and requested that the same be checked, which was done, and she received a check for the transportation of said trunk from Atchison to Mitchell over the lines named in said ticket. Plaintiff boarded the defendant's train at Atchison, and defendant took charge of and placed said baggage upon the train, and the same was transported to Council Bluffs. When it arrived there the trunk was, by the defendant's agents in charge of the train, assisted by the employes of the union depot at Council Bluffs, unloaded from the baggage car, and placed upon a truck for the purpose of being transported into the depot. The defendant had also received as baggage, somewhere between Atchison and Council Bluffs, a box containing three jugs of sulphuric acid. The top of this box was covered with a cloth only. In unloading the baggage, this box was placed on the top of the truck containing the trunk of the plaintiff, and in this condition the truck was rolled into the baggage-room of the union depot by the employes of said depot, and, in removing the baggage from the truck, they first attempted to remove the box containing the sulphuric acid, and the contents of one of the jugs was spilled, and run over the baggage and the trunk of the plaintiff, the acid escaping by reason of the cork having been eaten up or destroyed by the acid, and the trunk and its contents were saturated by the acid, and all of its contents destroyed and burned up, save and except two or three articles. Plaintiff, on arriving at her destination, presented her check, and was informed that her trunk had not arrived; whereupon she went to a hotel, and remained nine days, at an expense of \$11.25, waiting for her trunk to arrive. Finding that it did not come, she returned to Council Bluffs, and there learned of the destruction of the baggage, and the articles saved therefrom were turned over to her. Afterwards she returned to Atchison, and commenced this action for the value of the trunk and its contents.

The first objection to this judgment is that the court had no jurisdiction of the defendant; contending that as this action was brought under section 50, Code Civil Proc., it (the defendant) did not come within the provisions of said section, under the facts shown in this case. The evidence shows, and the court found, that the defendant run its train over its main line in Missouri, and at Atchison crossed the bridge owned by the bridge company to the union depot, over the tracks owned by the Union Depot Company, which company was composed of seven railroad companies, among which was the defendant. Defendant backed its train over the bridge to the union depot, where it received baggage and passengers for transportation over its line. No evidence was shown that there was any lease by which the defendant run its trains over the bridge, and to the depot at Atchison. Under this evidence, the defendant insists that it cannot be sued in the county of Atchison, for the reason that it does not lease, own, or control any line of road in the city of Atchison. The record shows that this action was brought in justice's court, and appealed by defendant to the district court, where the case was tried upon the bill of particulars as filed in the justice's court. Nowhere does the record disclose any objections to the jurisdiction of the court, either before the justice of the peace or the district court; and the first objection made to the jurisdiction of the court was made in the motion for a new trial. This seems to us to be too late to raise that question. If the defendant desired to challenge the jurisdiction of the court, it ought to have done so at an earlier period in the history of this case. *Miller v. Bogart*, 19 Kan. 117; *Railroad Co. v. Akers*, 4 Kan. 453; *Shuster v. Finn*, 19 Kan. 114.

The second reason assigned why this judgment should be reversed or modified is that the ticket issued by the defendant, and under which this baggage was checked, was a contract limiting the liability of the defendant, in case of loss of baggage, to \$100. It is perhaps true that the defendant might, by a special contract, limit its liability so as not to be responsible in case of loss of

baggage beyond a given sum, provided the contract was a reasonable restriction. In this case, there was no contract on the part of the plaintiff, and no knowledge was conveyed to her of any intention on the part of the defendant to limit its liability, save and except what the ticket itself contained; and this was not read, or its contents made known, to the plaintiff. Can this be called or implied a contract? We think that before the plaintiff can be bound by the declarations in the ticket for transportation on a passenger train, the restrictions or limitations sought to be made must be known to her, and she must have accepted the ticket with a full knowledge of the restrictions contained therein. This ticket contained a blank for the signature of the purchaser, and that signature was to be witnessed by some one. This was not done in this case. The object of that blank space being left there was, doubtless, that the attention of a purchaser might be called to the conditions of the ticket, and when called to sign it he would then know its contents. This would constitute a contract between them, but without it there would be no contract, and no restriction or limitation of the liability of the company. The ticket is not a contract of itself; it is simply evidence of a contract. *Lawson, Cont. §§ 106, 107.* Before the giving of this ticket there was nothing said between the parties that one was to limit his liability under certain conditions or circumstances, and consequently the ticket could not be evidence of a contract that did not exist. Again, where a person purchases a ticket, he does not expect that thereby he is making a contract limiting the liability of the railroad company, but simply that he is receiving a check showing that the fare has been paid over the line to the place of destination, wherever that may be. *Railroad Co. v. Campbell*, 36 Ohio St. 657; *Railroad Co. v. Fra-loff*, 100 U. S. 24; *Railroad Co. v. Roach*, 35 Kan. 740, 12 Pac. Rep. 93, and cases there cited.

But defendant insists that this baggage was not destroyed or injured while in its possession or under its control, but after it had been transferred to the employes of the union depot at Council Bluffs. True, the baggage was in the union depot when it was destroyed, but it was there in the same condition that it was left or placed in by the agents of the defendant. Its employes had placed it upon the truck, and after it was placed there, with other baggage, nothing was done to it by the employes of the union depot company to cause its destruction, but it was destroyed by reason of improper baggage having been placed on top of the trunks, the contents of which when placed in the depot were spilled over the baggage, thus destroying it. Then it was the act and negligence of the defendant that caused the injury. It had received a box not in condition to be taken as baggage, containing a jug of acid, which was liable to be broken, and its contents spilled over the baggage, and had carelessly and negligently placed such box on the trunk of the plaintiff. Without passing upon the question as to the liability of the defendant had the baggage been transferred to a connecting line, and then by the negligence of the employes of said connecting line the baggage had been lost, we hold that the defendant, by its negligence and carelessness, caused the destruction of this baggage, and is liable therefor.

It is recommended that the judgment of the court below be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

(38 Kan. 120)

STOUT and others v. McLACHLIN and others.

(*Supreme Court of Kansas.* December 10, 1887.)

1. MECHANIC'S LIEN—WHO MAY CLAIM—GOODS ORDERED BY CONTRACTOR.

Where mill-owners contract with A. to change their mill from an old to a new process, and A. agrees to make such change, and furnish all the material and machinery, and to guaranty results before said mill-owners are to pay for said work;

but A., without the authority or knowledge of the mill-owners, orders the mill machinery necessary to make said change of the plaintiffs in the name of the mill-owners; and said plaintiffs bill and ship said machinery to said mill-owners, but said machinery is received by A., and placed in the mill; and, when the mill is completed, plaintiffs demand payment of the mill-owners for the purchase price of said machinery, and this demand is the first notice or knowledge said mill-owners have that A. had ordered said mill machinery in their name; and when payment is refused, but more than 60 days after the completion of the mill, plaintiffs file a mechanic's lien upon said mill property as contractors furnishing said machinery, and afterwards bring this action to foreclose said lien: *held*, that the court committed no error in finding for the defendant upon said facts.

2. SAME—CHARGING GOODS TO OWNER—EVIDENCE OF CUSTOM.

And it would make no difference even if plaintiffs had adopted a custom by which they charged all mill-owners for the machinery ordered by millwrights or contractors, required in changing or repairing mills, without they also show that such custom was known to the mill-owners, and that they contracted for such repairs with reference thereto.

3. SAME—PAYMENT OF FREIGHT BY OWNER.

And the fact that the machinery is billed and shipped to said mill-owners, and the freight bill is paid by them, would not constitute a ratification of A.'s order and purchase in their name, unless, at the time, they also had knowledge that A. had ordered the machinery in their name.

(*Syllabus by Clogston, C.*)

Commissioners' decision. Error to district court, Miami county; W. R. WAGSTAFF, Judge.

The Barnard & Leas Manufacturing Company commenced their action against McLachlin Bros. to recover for the value of certain mill machinery alleged to have been sold and delivered by them to the defendants, and praying for a foreclosure of a mechanic's lien on the milling property of McLachlin Bros., situated at Paola, Kansas, and all of the plaintiffs in error were made defendants, except Stout, Mills & Temple. Subsequently, Stout, Mills & Temple commenced their action against McLachlin Bros., asking judgment for the value of certain mill machinery alleged to have been sold and delivered to the defendants, McLachlin Bros., and for the foreclosure of their mechanic's lien on the same property, in which they made all the parties in the first suit defendants. These two cases were afterwards, by order of the court, consolidated; and afterwards A. W. Walburn and the Milwaukee Dust Collector Manufacturing Company filed their separate answers, each alleging indebtedness for machinery sold and delivered by them to the McLachlin Bros., and A. W. Walburn, in addition, alleged that he had performed labor and furnished material, and both prayed for the foreclosure of their mechanics' liens on the same milling property. By agreement of the parties, a jury was waived, and trial had by the court. No special findings were made, and none were requested by either party. The court found generally in favor of the McLachlin Bros., and against all of the defendants except A. W. Walburn, and gave judgment in his favor in the sum of \$543.72. All of said plaintiffs in error now complain of the judgment of the court, and have brought the case here for review.

Thos. M. Carroll, Blair & Perry, John C. Sheridan, and W. H. Browne, for plaintiffs in error. *W. T. Johnson and Benson & Baker*, for defendants in error.

CLOGSTON, C. The only error alleged by the plaintiffs is that the court erred in his general findings in favor of the defendants. The general rule so often announced by this court is that where there was any evidence given tending to support all the material findings of the court, it will not be disturbed; or, in other words, before this court would be warranted in reversing a case, there must have been an entire failure of evidence to support the spe-

cial or general findings of fact, or some one material finding or element necessary to support the judgment. Governed by this general rule, we will examine the evidence in this case. On May 27, 1884, defendants entered into the following written contract with one A. C. Wilson:

"First party agrees to build them a 125 bbl. capacity roller-mill, furnishing all material and labor, start it up, guaranty it to make 1 bbl. flour from four and one-half bus. No. 2 Kansas City wheat; flour to be as good quality as any mill in the country can produce, and to perform as good and satisfactory results. To use all the regular hands now employed by McLachlin Bros., paying them the regular wages they are worth. Also to draw plans, and superintend the raising of stories and roof of mill-building, and building bins on top of warehouse, superintending all work, and completing same in ninety days from date,—for the sum of (\$4,500) four thousand five hundred dollars, payable when mill is completed, started, and the satisfactory results above obtained. McLachlin Bros. agree to furnish the building, and all the old machinery they now have in use in the mill that can be used to advantage, but to furnish nothing new; to furnish all material and work necessary in raising roof and stories of mill, and in building bins on top of warehouse.

"A. C. WILSON.

"McLACHLIN BROS."

That afterwards, on the third day of June, 1884, the defendants turned over to A. C. Wilson, under said contract, their mill. On June 10, 1884, Wilson sent the following order to Stout, Mills & Temple, at Dayton, Ohio: "Please send H. M. McLachlin & Bro., of Paola, Kansas, one pair double 9x15 rolls cut for first and second brake, one pair 9x24 double, one smooth, and one pair cut for bran. He has a pair of double 9x18 Nordyke rolls I put in his mill two years ago for smooth roll. These rolls are sold on a guaranty to do as good work as the rolls I put in the Hammond mill at Springfield. To be paid for when started up, unless he should want ninety days on part of the pay, then you are to give it." Similar orders to this were sent to each of the plaintiffs in error in ordering the mill machinery in question. This machinery was charged to McLachlin Bros. by plaintiffs, and shipped in their name to them at Paola, Kansas, and was received by Wilson and his foreman, and placed in the mill under Wilson's contract. About the time of the completion of the mill, plaintiffs drew sight drafts for the price of this machinery, payment of which was refused by the defendants. To the first of these drafts the defendants made the following reply:

"PAOLA, KANSAS, October 3, 1884.

"Stout, Mills & Temple—GENTS; Yours to hand, and contents noted. Mr. Wilson had a contract to build us a mill, payable only when completed and result obtained. He had no authority to use our name in any manner, nor will we pay drafts for stuff ordered by him.

"Very truly,

McLACHLIN BROS."

A similar notice was sent to each of the plaintiffs when sight drafts were made upon the defendants for like purchases of mill machinery. In reply to this letter of October 3d, Stout, Mills & Temple wrote as follows:

"DAYTON, OHIO, October 11, 1884.

"McLachlin Brothers: In reply to your favor, we do not know anything about the matter. We took Mr. Wilson to be your agent. We billed and shipped the goods to you. You will please return them, or accept them as billed. Yours, truly, STOUT, MILLS & TEMPLE."

The evidence of the defendants was clear that they had no notice or knowledge that the goods so ordered by Wilson were ordered in their name, other than what the bills of lading or invoices may have informed them, and as to these bills of lading and invoices they say that when received, if Wilson was present, they were turned over to him unopened; if not present, they were opened, and, upon ascertaining that they related to machinery ordered by Wilson, they were turned over to him when he returned to the work. It is also

shown that they paid the freight upon all of this mill machinery, but that it was paid by them on account of Wilson, and charged up to him on his contract. The evidence further discloses that the mill was completed about the third of October. All the plaintiffs were notified in ample time after the completion of the mill, so that they might have filed subcontractors' liens, but no liens were filed until more than 60 days thereafter, and then not a subcontractor's lien, but direct liens against McLachlin Bros. for the goods delivered. Plaintiffs also offered evidence to show that it was a custom in furnishing mill machinery and material of the kind furnished, when ordered by a millwright for the repair of a mill, to ship the goods invoiced to the owner or proprietor of the mill, and payment was always demanded of such owner.

Plaintiffs insist that as they established the fact of the custom of charging up to the mill-owner the goods when ordered by Wilson and other millwrights who were repairing mills over the country, and save the agent a commission on the sale of the goods, this custom of trade supersedes, as far as they are concerned, the contract made by the defendants with Wilson, without their knowledge; and we are asked, as a matter of law, to say that, by reason of this custom of trade, there was not sufficient evidence to sustain the findings and judgment of the court. Upon consideration, we think there is no foundation for this claim. It is true that usage and custom, under some circumstances, determine the liability of a party, but, before it can, the party must have had knowledge of such custom. It is only on the ground that the party knew of the usage, and therefore supposed that he contracted with reference to it, that usage becomes admissible. This knowledge may be inferred in some cases from the nature of the business. The length of time the custom has been in existence, and the fact that the custom has become general in its application, and the like, are competent to be shown. But whether such a state of facts has been proven, is a question of fact for the court or jury, and the proof of usage can only be received to show the intention or understanding of the parties, in the absence of specific agreement, or to explain the terms of a written contract. In *Partridge v. Insurance Co.*, 15 Wall. 578, Justice MILLER, speaking for the court, said: "This usage is confined to the establishment of an implied contract; and when the knowledge of the usage is brought home to the other party the evil is not so great. But when it is sought to extend the doctrine beyond this, and incorporate the custom into an express contract, whose terms are reduced to writing, and are expressed in language neither technical nor ambiguous, and therefore needing no such aid in its construction, it amounts to establishing the principle that a verbal contract may add to, vary, or contradict the well-expressed intention of the parties made in writing. No such extension of the doctrine is consistent either with authority, or with the principles which govern the law of contracts." Mr. Phillips, in his work on Evidence, says: "Evidence of usage has been admitted in the foregoing instance of contracts relating to transactions of commerce, trade, farming, or other business, for the purpose of defining what would otherwise be indefinite, or to interpret a peculiar term, or to explain what was obscure, or to ascertain what was equivocal, or to annex particulars and incidents which, though not mentioned in the contracts, were connected with them, or with the relations growing out of them; and the evidence in such cases is admitted with a view of giving effect, as far as can be done, to the presumed intention of the parties." (10th Ed.) 415; *Barnard v. Kellogg*, 10 Wall. 383; *Dixon v. Durham*, 14 Ill. 324.

Now, in this case, by applying these rules, can it be contended that the judgment of the court below ought to be set aside, where there is an entire failure to show that the defendants had any knowledge of the custom and usage of the plaintiffs in their business relations with millwrights, or with their arrangements with Wilson, the contractor in this case, and in the face of this written contract between defendants and Wilson? To do otherwise

than to affirm this judgment would be to allow this usage of trade to step in and change the position of the parties, and to impose upon the defendants conditions and liabilities never contemplated by them. A new contract would by this means be made for them, and this cannot be done. The parties by their contract left nothing to be interpreted by the laws of trade. They agreed to pay Wilson a certain stipulated sum for the completion of this mill; nothing was to be paid until the work was satisfactorily finished. Wilson agreed to furnish all labor, material, and machinery to do the work with. This was definite and certain; no misunderstanding could arise that required custom or usage to interpret or make it plain.

Plaintiffs, however, say that they thought that Wilson was the agent of the defendants, and treated his order as the order of the defendants, and say that they would not have sold the goods to Wilson on his own account. The plaintiffs show more than this; they show that they had an arrangement with Wilson and other millwrights by which they could sell machinery for the plaintiffs, and plaintiffs agreed with them to retain a certain per cent. for commission on said sales, to be paid to Wilson or others who ordered the machinery. In the face of this, and with this knowledge, plaintiffs insist that they supposed Wilson was defendant's agent, when in fact their own declarations go to prove that Wilson, for the purpose of selling this machinery, was their agent, and that this was a sale through him to the defendants under his contract; for it is a well-established rule of law that where one party is authorized to sell a given article, and is to receive compensation therefor, that he cannot be treated and held as the agent of the purchaser in the same transaction. *Raisin v. Clark*, 41 Md. 158. This question of agency was a question of fact to be found by the court.

Again, plaintiffs contend that as they charged the bill for the machinery, and shipped the same, to the defendants, and the machinery was afterwards put in the defendants' mill for defendants' benefit, that they are estopped from denying Wilson's authority, and did by their silence ratify the order he gave for the machinery. In this claim the plaintiffs have more grounds for complaint. We find many of the elements of ratification clearly shown by the evidence, and in fact we see but one element wanting; that is, the want of knowledge by the defendants. In *Bank v. Drake*, 29 Kan. 311, it was said: "The effect of ratification is to create a new contract; but a contract implies assent, and how can there be assent without knowledge?" Again: "While the acts of an agent, though unauthorized at the time, may become binding upon the principal by ratification and adoption, to make such ratification effectual it must be shown that there was previous knowledge on the part of the principal of all the material facts and circumstances attending the act to be ratified; and, if the principal assents to the act while ignorant of the facts attending it, he may disaffirm it when informed of such facts." *Express Co. v. Trego*, 35 Md. 47; also *Coombs v. Scott*, 12 Allen, 493. The defendants, at the time the goods were shipped, knew nothing of the order Wilson had sent to the plaintiffs, and, being ignorant of that fact, supposed that the goods were shipped to them because of Wilson's frequent absence from the mill, and for his convenience, so that they might be received and placed in the mill at once. They paid the freight bill, but charged the amount to Wilson; and, when the knowledge did come to the defendants that the plaintiffs sought to charge them with the machinery so ordered by Wilson, they then at once notified the plaintiffs that they had a contract with Wilson, and that nothing was to be paid until after the completion of the mill, and refused the payment demanded. This notice was given plaintiffs in ample time for them to have protected themselves by filing subcontractors' liens, and thus they might have saved whatever was due Wilson on the contract from the defendants. This question of ratification is another question of fact that falls within the rule set out at the commencement of this opinion. It was a ques-

tion submitted to the court, and the court found for the defendants. We therefore cannot disturb the findings and judgment of the court.

It is recommended that the judgment of the court below be affirmed.

By THE COURT. It is so ordered.

(37 Kan. 761)

FINCH v. MAGILL.

(*Supreme Court of Kansas.* December 10, 1887.)

MORTGAGE—FORECLOSURE—PARTIES.

S., the patentee of a tract of land, conveyed the same to A., taking from A. a mortgage to secure the purchase money; and afterwards A. conveyed said land to F., and, as part consideration, F. agreed to pay the mortgage debt due from A. to S.; and, to secure said payment, there was inserted into the deed the following words: "It is fully agreed and understood by all the said parties that said tract of land shall be and remain fully bound to secure full payment of the above sum of seven hundred and fifty dollars, with interest on the same; but, on full payment thereof, this deed shall become indefeasible and absolute;" and afterwards S. sold the land to W., and, as part consideration, W. agreed to pay the mortgage debt to S., which F. had agreed to pay, and W. went into possession of the land, and received from F. a contract in writing, which written contract was afterwards lost, and not placed of record, and no evidence was introduced showing clearly the nature and character of this contract. No part of the mortgage debt being paid, S. brought foreclosure proceedings, and made A. and W. parties, and S., at the foreclosure sale, purchased the land; and afterwards W. abandoned the land, and it was afterwards duly conveyed to the plaintiff. *Held*, that in the absence of proof clearly showing the nature and character of the contract or conveyance from F. to W., it will be presumed and held to be of as high a character as the conveyance from A. to F., and that whatever title F. had, was by the said conveyance transferred to W., and that F. was not a necessary party to the foreclosure proceedings of S.

(*Syllabus by Cogston, C.*)

Commissioners' decision. Error to district court, Miami county; W. R. WAGSTAFF, Judge.

This action was commenced by defendant in error to quiet his title to a quarter section of land situate in Miami county, Kansas. Plaintiff alleged that he was the owner of the land in controversy, and in possession thereof, and that the defendant, plaintiff in error, claimed to own the east half of said land; that said claim of title was a cloud upon plaintiff's title which plaintiff asked to have removed, and his title quieted against said defendant. The defendant answered, denying plaintiff's title, and setting up title in himself; alleging that he purchased the land from one W. A. Arnold, subject to a mortgage given by Arnold to one Sharp of \$750, and asked that he be allowed to redeem said land from said mortgage, and that there be an accounting of the rents and profits, and that he was willing and ready to pay the balance found due, if any, and that his claim of title was founded upon the following conveyance:

"This deed, made this seventh day of October, A. D. 1870, between William A. Arnold, and Elizabeth Arnold, his wife, of the first part, and George W. Finch, of the second part, witnesseth, that the said William A. Arnold, and Elizabeth, his wife, this day, for and in consideration of the sum of one thousand dollars, to be paid in manner as follows, viz., two hundred and fifty dollars in hand paid, receipt whereof is hereby acknowledged, and the balance, consisting of seven hundred and fifty dollars, to be paid on a mortgage given by said Arnold to Joshua W. Sharp, and now of record in the city of Paola, when said mortgage becomes due, with interest at ten per cent. per annum, to be paid annually by said Finch, do bargain, grant, sell, and convey by these presents unto the said Finch, his heirs and assigns, the east half of the southwest fractional quarter of section number fourteen, (14,) in township sixteen, (16,) of range number twenty-five, (25,) situated in Miami county, and state

of Kansas, to have and to hold the said tract or parcel of land, with all the appurtenances thereunto belonging, unto the said George W. Finch, his heirs and assigns, forever, with general warranty of title: provided, and it is fully agreed and understood by all said parties, that said tract of land shall be and remain fully bound to secure full payment of the above-named sum of seven hundred and fifty dollars, together with the interest on the same; but on full payment thereof this deed shall become indefeasible and absolute.

"In witness of all of which the said William A. Arnold and Elizabeth, his wife, have hereunto set their hands and seals, the day and year first above written.

WILLIAM A. ARNOLD. [Seal.]

her
"ELIZABETH X ARNOLD." [Seal.]
mark.

This action was tried by the court, and findings of fact and conclusions of law and judgment for the plaintiff, quieting his title as prayed.

Brayman & Sheldon, for plaintiff in error. *J. A. Hoag*, for defendant in error.

CLOGSTON, C. The facts as found by the court, show that one J. W. Sharp was the patentee of the land, and that he conveyed the same to W. A. Arnold, and in part payment therefor received a note for \$1,500, secured by mortgage on the land; that on the seventh day of October, 1870, Arnold and wife conveyed, by the instrument attached to defendant's answer, the east half of the land in controversy to the defendant, for a consideration of \$1,000; \$250 cash, and \$750 with interest, to be paid on the mortgage executed by Arnold and wife to Sharp. Defendant went into possession of the land, and retained possession until 1872, when defendant entered into a contract, in writing, for the sale and transfer of the land to John Q. White; but said contract was never of record. White took possession of the land, and remained in possession until about the first of January, 1875. The consideration of the contract between defendant and White was that White was to pay the defendant \$550, for which sum he executed his notes, and was also to pay the Arnold mortgage to Sharp of \$750, which Finch had agreed to pay as purchase money for the land. White abandoned the land, and the same remained unoccupied until 1881. Neither Finch nor White paid any part of the \$750 Sharp mortgage, except one installment of interest, and one year's taxes on the land. In 1874 Sharp brought an action to foreclose the mortgage, making Arnold and wife and John Q. White defendants. A decree of foreclosure was entered, and the land sold thereunder, and was purchased by Sharp. Sharp, by will, conveyed the land to Davidson, who conveyed the land by deed to plaintiff. In 1881 plaintiff took and retained possession of the land, and made valuable improvements thereon. The land at the time of the foreclosure was of the value of \$1,200; it is now of the value of \$2,500.

Defendant now claims that he was not made a party to the foreclosure proceedings in the suit by Sharp; that he still has a title and interest in the land, and a right to redeem from the mortgage. It will be remembered that White was in possession of the land at the time of these foreclosure proceedings, under some contract in writing, and that he had executed his notes for the balance of the purchase money after deducting the Sharp mortgage. What the nature of this written instrument was, is not clearly shown by the evidence. In fact, the only evidence given of this instrument was by the defendant, and he testified that it was lost, and that he did not recollect what it contained, or whether it was signed by his wife, or acknowledged, but thought it was a contract to convey the land upon the payment of the purchase money. The burden of establishing the character and nature of this instrument was upon the defendant. He had conveyed the land by some instrument to White. White was in possession, claiming title to the land. If this contract or deed,

or whatever it was, was of the same character as the conveyance by Arnold to Finch, then it would have conveyed all the interest and right that Finch had to the land, and White would have been a necessary party in the foreclosure; but Finch would not be. This conveyance from Arnold to Finch was not an absolute conveyance; it was coupled with conditions; it was only to become absolute and indefeasible upon the payment of this \$750, and that was never paid; and, in the absence of better evidence than that given by the defendant, we shall presume that the transfer of what right Finch had to the land was of as high a character as that received by him from Arnold.

Taking into consideration the lapse of 10 years since the sale of the land under the mortgage, its increased value, and the fact that the defendant paid no part of the mortgage debt, but seemingly abandoned the land, we do not think that he now ought to be heard to urge his right to redeem, when all the presumptions are against that claim. *Fowler v. Marshall*, 29 Kan. 665.

It is therefore recommended that the judgment of the court below be affirmed.

By THE COURT. It is so ordered; all the justices concurring.

(37 Kan. 379)

LIMERICK and others v. GORHAM and another.

(Supreme Court of Kansas. December 10, 1887.)

INSURANCE—NOTE FOR INSTALLMENT—ACTION ON—STIPULATION OF FORFEITURE.

An insurance company may recover against a policy-holder on an installment note for any premium earned prior to any default of the policy-holder in paying the installments, although the policy stipulates "that, in case of non-payment of any one of the installments herein named at maturity, the company shall not be liable for loss during such default, and the policy for which the note is given shall lapse until payment is made to the company."

(Syllabus by the Court.)

Error to district court, Wabaunsee county; R. B. SPILMAN, Judge.

The plaintiffs in error commenced an action on January 20, 1886, before a justice of the peace in Wabaunsee county upon a promissory note, of which the following is a copy, together with all the indorsements thereon, viz.:

"\$———. For value received, in policy No. 150,005, dated the seventh day of April, 1882, issued by the Burlington Insurance Company of Burlington, I promise to pay to said company, or order, at their office in Burlington, Iowa, twenty-four dollars in installments as follows: Six dollars and —— cents upon the first day of April, 1883; and six dollars and —— cents upon the first day of April, 1884; and six dollars and —— cents upon the first day of April, 1885; and six dollars and —— cents upon the first day of April, 1886, without interest if paid when due. And it is hereby agreed that in case of non-payment of any one of the installments herein named at maturity, this company shall not be liable for loss during such default; and the policy for which this note was given shall lapse until payment is made to the company in Burlington. And on the event of non-settlement for time expired as per terms on short rates, the whole amount of installments remaining unpaid on said policy may be collected.

E. A. GORHAM.

"I. E. GORHAM.

"Pay to Tom E. Guest, without recourse.

"JOHN G. MILLER, Prest.

"Pay to J. F. Limerick & Co. Collection guaranteed.

"TOM E. GUEST."

On January 20, 1886, the justice issued a summons to the sheriff of Wabaunsee county, and also on the same day he issued another summons to the sheriff of Shawnee county. The defendants, E. A. and I. E. Gorham, were served in Shawnee county, and after such service they especially appeared before the justice of the peace, and moved the justice to dismiss the action for

want of jurisdiction. This motion was overruled; but they made no other appearance, and judgment was rendered against them. The case was then taken upon proceedings in error to the district court of Wabaunsee county. The district court reversed the ruling of the justice, but held the case for trial upon its merits. Trial had March 27, 1886, before the court, without a jury. Judgment was rendered by the court for the defendants. The plaintiffs excepted, and bring the case here.

A. H. Case and *George G. Cornell*, for plaintiffs in error. *J. J. Hitt*, for defendants in error.

HORTON, C. J. In the case of *State v. Brayman*, it was held that the jurisdiction of a justice of the peace is limited in civil actions to the county in which he resides, and for which he has been elected; and where an action is brought before him, and service obtained upon one defendant, he has no authority to issue a summons in such action to an officer of another county, there to be served upon another defendant; and that the provisions of the Civil Code authorizing the issuance of a summons to a county other than the one in which the action is brought, are not applicable to proceedings before a justice of the peace. 35 Kan. 714, 12 Pac. Rep. 111. This disposes of the alleged error of the district court in reversing the decision of the justice of the peace.

After the defendants obtained a judgment of reversal, the court retained the case for trial and final judgment, as in cases of appeal. Section 566, Civil Code. To this the defendants took no exception, and subsequently both parties appeared and announced themselves ready for trial. By agreement of the parties, a jury was waived, and the case was submitted to the court for trial. It is now too late for the defendants to question the jurisdiction of the district court. That court is one of original general jurisdiction, and if parties come voluntarily into that court to litigate a matter of which it could take cognizance, and which is within the scope of its jurisdiction, and make no objection to the form of the proceedings, they will not be heard to say that the court had no jurisdiction, or that its judgment is not binding. *Reedy v. Gift*, 2 Kan. 392; *Jones v. School-Dist.* 8 Kan. 362; *Haas v. Lees*, 18 Kan. 449; *Miller v. Bogart*, 19 Kan. 117; *Shuster v. Finan*, Id. 114.

On the part of the defendants it is contended that the payment of the premium installments mentioned in the note was optional with the insured; and that, as he made default, the insurance company cannot recover upon the note; that its only remedy is the avoidance of the policy. *Yost v. Insurance Co.*, 39 Mich. 531, and *Insurance Co. v. Stoy*, 41 Mich. 385, 1 N. W. Rep. 877. We do not think that we are called upon in this case, as it is now presented, to determine whether the condition of forfeiture for non-payment inserted in the note was a condition precedent to a further continuance of the policy, or a condition subsequent and merely voidable at the option of the company. The insurance policy for which the note was executed was not offered in evidence, and is not contained in the record. If this is a test case, which has been brought here to determine the rights of parties in a great number of claims awaiting the result of this one, we ought to have before us the written policy, as well as the note given by the assured. These instruments are all parts of one and the same transaction. They must be resorted to and treated as but one instrument for the purpose of ascertaining the rights of the parties.

Again, there is nothing upon the face of the note, or in the record, showing, or tending to show, that the first year's premium was paid in cash, or otherwise than by the note in controversy, or that the installments therein named are for advance insurance. As the insurance policy is dated April 7, 1882, and the first installment of the note was not due until April 1, 1883, it would seem to us that this installment, when it became due, was for an

earned premium. Then, again, the note states "that on the event of non-settlement for time expired, as per terms on short rates, the whole amount of installments remaining unpaid on said policy may be collected." If there was no cash, or other actual payment made upon the policy for the year commencing April 7, 1882, and ending in April, 1883, and the installment payable April 1, 1883, was not an advance payment, then, as the risk began to run April 7, 1882, a part of the premium therefor was earned prior to April 1, 1883. From April 7, 1882, to April 1, 1883, the policy was neither null, nor void, nor suspended. During all that time it protected the assured. The neglect or default of the assured did not occur until after April 1, 1883; therefore, under any circumstances, the insurance company would be entitled to collect for *the earned premium*, even if we concede to the fullest extent that the policy was void during the subsequent period of default in payment. May, Ins. § 341a.

The judgment of the district court will be reversed, and the cause remanded for a new trial.

(All the justices concurring.)

(38 Kan. 1)

HEAD v. DANIELS and another.

(*Supreme Court of Kansas.* December 10, 1887)

1. JUDGMENT—VALIDITY—COLLATERAL ATTACK.

A judgment, when attacked collaterally, will not be held to be void merely because the pleading upon which it is based seems to show upon its face that the action, when commenced, was barred by some statute of limitations.¹

2. CORPORATIONS—LIABILITY OF STOCKHOLDER—PLEADING.

The petition sufficiently alleged the defendant's liability as a stockholder in a corporation, upon a judgment rendered against the corporation, and sufficiently alleged that no property of the corporation could be found whereon to levy an execution.

3. WRITS—SERVICE OF SUMMONS—BY PUBLICATION—SUFFICIENCY OF NOTICE.

A publication notice need not necessarily mention the names of any of the defendants except those against whom it is desired to obtain service of summons by publication; and generally, where the publication notice is sufficient to advise the defendant against whom the service of summons is sought, of the nature and character of the action brought against him, and of his interests which are sought to be affected by the action, it is sufficient.

4. SAME—AFFIDAVIT OF NON-RESIDENCE.

The sufficiency of a certain "affidavit of non-residence" discussed, and the affidavit held to be sufficient as far as it goes; and further held, that in this case it is immaterial whether such affidavit is sufficient or not.

5. SAME—LOSS OF AFFIDAVIT—PRESUMPTION ON COLLATERAL ATTACK.

Where two affidavits are filed in a case, one to authorize the issuing of an order of attachment, and the other to authorize the service of summons by publication, and afterwards an order of attachment is issued and served, and service of summons by publication is made, and a judgment is rendered, and afterwards the affidavits are lost or destroyed, held that, in the absence of anything to the contrary, and when attacked collaterally, it will be presumed that the affidavits were sufficient.

6. ATTACHMENT—ON THE GROUND OF NON-RESIDENCE—BOND.

Where all the defendants against whom an order of attachment is issued are non-residents of the state of Kansas, it is not necessary that any undertaking should be given, although there may be other defendants in the case who are not non-residents.

¹ Respecting the grounds on which the court will permit a judgment to be collaterally attacked, see *Jasper Co. v. Mickey*, (Mo.) 4 S. W. Rep. 424; *Crawford v. Wilcox*, (Tex.) 3 S. W. Rep. 695, and note; *Grimmett v. Askew*, (Ark.) 2 S. W. Rep. 707, and note; *Rollins v. Love*, (N. C.) 2 S. E. Rep. 166; *Jones v. Coffey*, Id. 165; *Seamster v. Blackstock*, (Va.) 2 S. E. Rep. 36; *Hollingsworth v. State*, (Ind.) 12 N. E. Rep. 490; *Strieb v. Cox*, Id. 481; *Hall v. Durham*, (Ind.) 9 N. E. Rep. 926, and note; *Fahey v. Mottu*, (Md.) 10 Atl. Rep. 68; *Hawley v. Simons*, (Ill.) 14 N. E. Rep. 7; *Kleyla v. Hasket*, (Ind.) 14 N. E. Rep. —.

7. SAME—CONSTITUTIONALITY OF ACT.

That clause of section 192 of the Civil Code, which provides that "no undertaking shall be required where the party or parties defendant are all non-residents of the state, or a foreign corporation," is not unconstitutional or void.

8. SAME—RETURN OF OFFICER—PRESUMPTION.

Where the officer's return of an order of attachment shows that the officer attached certain real estate, and when he attached the same, and that he posted a copy of the order of attachment in a conspicuous place upon the attached premises, but does not show whether there was any occupant or not of the premises, *held* that, in the absence of anything to the contrary, it will be presumed that the officer did his duty when he attached the property, and that there was in fact no occupant of the premises.

9. EXECUTION—SALE—DEED BY SUCCESSOR OF SHERIFF.

Where a sheriff levies an execution upon real estate, and advertises the property for sale, he may then sell the same, although his term of office expires two days before the sale; and where the sale is afterwards confirmed, and the sheriff ordered to make a deed to the purchaser, and the purchase money is all paid, and the sheriff executes a deed to the purchaser, and the purchaser takes the possession of the property, *held*, that the purchaser obtains such an equitable title to the property that he cannot afterwards be ejected from the premises by the defendant in the execution, or by any person claiming under him, whether such sheriff's deed is valid or not, and, *query*, is not such sheriff's deed valid?

10. SAME—COLLATERAL ATTACK—PRESUMPTION.

Collateral attacks upon judicial proceedings are never favored; and when such attacks are made, unless it is clearly and conclusively made to appear that the court had no jurisdiction, or that it transcended its jurisdiction, the proceedings will not be held to be void, but will be held to be valid. Irregularities alone are not sufficient to destroy the validity of judicial proceedings, nor are mere omissions from the record. On the contrary, it will generally be presumed, in the absence of anything to the contrary, that all that was necessary to be done with respect to any particular matter, by either the court or its officers, was not only done, but rightly done.

(Syllabus by the Court.)

Error to district court, Shawnee county; JOHN GUTHRIE, Judge.

Waters & Chase and *J. S. Ensminger*, for plaintiff in error. *A. Bergen* and *C. M. Foster*, for defendants in error.

VALENTINE, J. This was an action in the nature of ejectment brought by L. W. Head on May 12, 1883, in the district court of Shawnee county, against A. T. Daniels and A. J. Ryan, to recover certain real estate situated in said county. The case was tried before the court without a jury, and judgment was rendered in favor of the defendants, and against the plaintiff, and the plaintiff, as plaintiff in error, brings the case to this court.

The principal facts, stated briefly, are substantially as follows: The land in controversy belonged originally to Mary E. Denton. The plaintiff claims under her by virtue of a quitclaim deed, and the defendants claim under her by virtue of a sheriff's deed executed to A. T. Daniels, together with other facts connected therewith. The sheriff's deed was executed and recorded more than a year before the quitclaim deed was executed. The facts upon which the sheriff's deed is founded are substantially as follows: On April 6, 1874, Newton Maxwell recovered a judgment in the district court of Osage county, against the Osage Coal & Mining Company, for \$1,144, with interest and costs. On September 26, 1874, an execution was issued on such judgment, and was returned, in proper time, not satisfied. On September 26, 1879, another execution was issued on such judgment, and it also was returned in proper time, not satisfied. On January 28, 1881, Maxwell filed a petition in the district court of Shawnee county, ostensibly for the purpose of commencing an action against Charles Rath, Mary E. Denton, and others, to recover the amount of the aforesaid judgment, and alleged therein, among other things, that the Osage Coal & Mining Company was a corporation, and that the defendants

were stockholders therein. Service of summons was made personally upon Rath, and was made by publication upon Mrs. Denton, but no service of summons of any kind was ever made upon any one of the other persons named in the petition; nor was any summons issued against any one of them; nor did any one of them ever appear in the case. Charles Rath appeared, but the action was afterwards dismissed as to him, and thereafter it was prosecuted only as an action against Mrs. Denton. On June 7, 1881, an order of attachment was issued in the case against Mrs. Denton, and on June 8, 1881, it was levied upon the property in controversy, and service of summons was then made upon Mrs. Denton by publication; the first publication being on June 10, 1881. She made no appearance in the case. On October 4, 1881, judgment was rendered in the case against her. On December 6, 1881, an order of sale was issued on such judgment, and placed in the hands of W. D. Disbrow, who was then the sheriff of the county. He immediately gave notice that the property would be sold on January 17, 1882. His term of office expired on January 15, 1882, and H. E. Bush became sheriff. On January 17, 1882, Disbrow, as sheriff, and in the manner prescribed by law, sold the property to A. T. Daniels for \$1,281 cash, and on the same day the sale was confirmed by the court, and said "sheriff" was ordered to make a deed for the property to the purchaser; and on January 18, 1882, Disbrow, in pursuance of such order, and as sheriff of the county, executed such deed, which is the sheriff's deed under which the defendants now claim. It is regular in form, and was recorded on the same day on which it was executed. Daniels immediately took the possession of the property under this deed, and has remained in the possession thereof ever since. From the proceeds of said sale, Maxwell's judgment was paid, and the surplus of the proceeds, to-wit: \$183.15, was paid to somebody, but whether to Mrs. Denton or not is not shown; but it is shown that it was not paid to Daniels or to his attorneys. The quitclaim deed from Mrs. Denton to the plaintiff was executed on May 5, 1883, and was recorded on May, 12, 1883.

The first ground for reversal urged by the plaintiff is that the judgment rendered in favor of Maxwell, and against Mrs. Denton, is void, and this claim is urged upon the further claim that the petition in the action of Maxwell against Mrs. Denton did not state facts sufficient to constitute a cause of action, and this claim is urged upon the following grounds: *First*, the petition shows upon its face and affirmatively that Maxwell's cause of action was barred by a three-years statute of limitations; *second*, such petition did not allege, as is required by section 32 of the act relating to corporations, that "there cannot be found any property whereon to levy such execution."

1. It is believed that no decision can be found wherein it is held that a judgment is void merely because the pleading upon which the judgment is based seems to show upon its face that the action was barred by some statute of limitations. Certainly no such decision has ever been made by the supreme court of Kansas. In Kansas it has been held that where the petition or bill of particulars in a justice's court shows upon its face that the cause of action is barred by some statute of limitations, such petition or bill of particulars will be held to be insufficient, provided the question of the statute of limitations is specifically raised in the trial court. *Zane v. Zane*, 5 Kan. 134. But courts do not hold that a cause of action is barred by a statute of limitations unless the question has been raised in some manner before judgment. There are so many exceptions which will take a cause of action out of the statute, that the courts will presume, unless the question is specifically raised before judgment, that the cause of action is not barred. Besides, the moral obligation to pay a debt after it is legally barred by some statute of limitations is as binding upon the debtor as it was before such debt was so barred, and hence it would seem proper, where the question of statutory bar has not been raised in the trial court, and before judgment, to consider it as having been waived.

It was shown in the case of Maxwell against Mrs. Denton that she was a non-resident of the state of Kansas, and therefore in all probability no statute of limitations ever even commenced to run in her favor, and in such a case it would have been futile for her to have interposed the defense of any such statute; but what statute could she rely on? What statute, if any, could have commenced to run in her favor,—a two-years statute or a three-years statute, or a five-years statute, or some other statute? And when did such statute commence to run? When does a cause of action accrue against a stockholder in a corporation? Is it when the cause of action first accrues against the corporation itself, or when the judgment thereon is rendered against the corporation, or when the first execution is returned unsatisfied, or when some subsequent execution is returned unsatisfied, or *may the action be brought against a stockholder at any time while the judgment against the corporation is in force?* All these questions are judicial in their character, and none of them has ever been determined by this court. Mere defects in a petition do not render the judgment subsequently rendered upon it void. Even a petition which might be held to be insufficient, if challenged by a demurrer, or in some other manner before judgment, might in many cases be held to be sufficient to sustain a judgment subsequently rendered upon it, where the demurrer is attacked only indirectly and collaterally. If the petition sets forth facts sufficient to challenge the attention of the court with regard to its merits, or authorize the court to deliberate with respect thereto, then the judgment subsequently rendered upon it is not void, but, at most, is only voidable, and it cannot even then be held to be voidable, except when it is attacked directly, and in a direct proceeding. *Greer v. Adams*, 6 Kan. 203; *Roue v. Palmer*, 29 Kan. 337; and cases hereafter cited.

2. The petition in the action of Maxwell against Mrs. Denton alleged, among other things, "that both of the said executions remain wholly unsatisfied by reason that there cannot be found any property belonging to said corporation whereon to levy;" also the returns of the sheriff on the executions were attached to and made a part of the petition; and both of such returns show that no property could be found whereon to levy. This we think sufficiently answers the point made by the plaintiff, that the petition does not allege that "there cannot be found any property whereon to levy such executions."

3. The next ground for reversal, numbered "second" in the plaintiff's brief, is that the publication notice in the case of Maxwell against Mrs. Denton is not sufficient; and this for the reason that the notice does not give the names of all the defendants in the action. The notice, in its title, gives the names of the parties as follows: "*Newton Maxwell, Plaintiff, v. Charles Ruth, Mary E. Denton, et al., Defendants.*" There were really no defendants in the action except Charles Ruth and Mrs. Denton, for no service of summons upon the other persons whose names are found in the petition was ever made, and the notice gave the names of Ruth and Mrs. Denton, except that the name of Ruth was given as "Charles Ruth." Mrs. Denton was the only person upon whom it was desired to obtain service of summons by publication, and, after giving the title of the case in the publication notice, as above stated, the notice then proceeded as follows: "Mary E. Denton, of Middleton, New York, is hereby notified that she has been sued," etc. The notice was in all respects, except as above mentioned, formal and sufficient; and we think it was sufficient in every respect and valid. It was sufficient to advise Mrs. Denton of the nature and character of the action brought against her, and of her interests which were sought to be affected by the action, and was to her a substantial compliance with all the requirements of the law. This was certainly sufficient.

4. It is claimed by the plaintiff that a certain affidavit found in the case of Maxwell against Mrs. Denton, and entitled "Affidavit of Non-Residence," is void. We think however, that this affidavit is valid as far as it goes; and in

this connection, and in answer to the plaintiff, we might also state that in this state "all contracts which by the common law are joint only shall be construed to be joint and several;" and, "in all cases of joint obligations and joint assumptions of copartners or others, suits may be brought and prosecuted against any one or more of those who are so liable." Comp. Laws 1885, c. 21, §§ 1, 4; and the affidavit, as given in the record of this case, sufficiently shows that service of summons could not be personally made upon Mrs. Denton within this state. But, even if this affidavit were void, it could make no difference in this case, for there were two other affidavits presumably sufficient.

5. But it is claimed by the plaintiff that the two affidavits above mentioned are void, and that all the subsequent proceedings based thereon are also void. One of these affidavits was to authorize the issuing of the order of attachment, and the other was to authorize the service of summons by publication. These affidavits were made and properly filed in the case of Maxwell against Mrs. Denton, but afterwards they were lost or destroyed, and consequently could not be introduced in evidence on the trial of this case. There is nothing in the record, however, tending to show that either of them was not sufficient, and, from anything appearing in the record, both of them may have been amply sufficient. As to what evidence was introduced with regard to their sufficiency or insufficiency, or as to the sufficiency or insufficiency of their contents, the record is silent; and for this reason the plaintiff claims that we should presume that they are void, and cites the case of *Hargis v. Morse*, 7 Kan. 415, as authority. That case, however, hardly goes to the extent claimed for it; and, besides, the principles enunciated in that case have been greatly modified, and some of them overruled by subsequent decisions. *Shields v. Miller*, 9 Kan. 390, 396, 397; *Bixby v. Bailey*, 11 Kan. 359; *Bartlett v. Feeney*, Id. 593; *Ogden v. Walters*, 12 Kan. 282, 292; *Haynes v. Cowen*, 15 Kan. 637, 645. Indeed, about all there is in the case of *Hargis v. Morse*, 7 Kan. 415, which can be considered as favoring the contention of the plaintiff, has been overruled. *Haynes v. Cowen*, 15 Kan. 645. Now, as there is nothing in the record tending to show that the affidavits were insufficient; and as the attack now made upon them is collateral, and not direct, we think it must be presumed that they were amply sufficient. See, also, the authorities hereafter cited.

6. In attachment cases, where the defendants are residents of the state of Kansas, the statute requires that an undertaking shall be given on the part of the plaintiff; "but no undertaking shall be required where the party or parties defendant are all non-residents of the state or a foreign corporation." Civil Code, § 192. Section 190 of the Civil Code provides that attachments may be had against any one or more of several non-resident defendants; and we think the above-quoted clause of section 192 of the Civil Code, which provides that "no undertaking shall be required where the party or parties are all non-residents," simply means to provide that no undertaking shall be required where the party or parties defendant in the attachment proceedings, or the party or parties against whom the order of attachment is issued, are all non-residents, and does not necessarily include all the parties defendant in the case. In this state, and with respect to the defendants, all causes of action, all suits, and all judgments are several, although in many cases they may also be joint. But from anything appearing in this case all the parties defendant, indeed all persons that were mentioned in the petition, may have been non-residents. But even if all the persons mentioned in the petition were parties, and even if they were all residents of Shawnee county, and even if an attachment bond was required in this case, would the failure to give it render the judgment subsequently rendered void when attacked collaterally, as in this case? In Ohio it has been held that it would not render even the attachment void. *O'Farrell v. Stockman*, 19 Ohio St. 296.

7. It is also claimed by the plaintiff that the foregoing provision of section

192 of the Civil Code, dispensing with the undertaking in attachment proceedings, where the defendants in the attachment are all non-residents, is unconstitutional and void; and this claim is made upon the ground that such provision violates section 2 of article 4, and section 1 of article 14, of the constitution of the United States, and section 17 of the bill of rights of the constitution of Kansas. We think the statute is constitutional and valid.

8. The plaintiff further claims that the entire proceedings in the case of Maxwell against Mrs. Denton are void for the reason that the officer's return on the order of attachment shows that he served the order by simply posting a copy of the order in a conspicuous place upon the premises, and that it fails to disclose any reason for such substituted service. He claims that, because the officer did not state in his return that there was no occupant of the premises, the return, and all the subsequent proceedings in the case, are void. Section 198 of the Civil Code provides that "when the property attached is real property, the officer shall leave with the occupant thereof, or, if there be no occupant, in a conspicuous place thereon, a copy of the order," and section 205 of the Civil Code provides that "the officer shall return upon every order of attachment what he has done under it. The return must show the property attached and the time it was attached." And there is no statute requiring that the officer shall state what he did not do under the order of attachment, or that he shall give any reason for doing what he did in fact do under the order. The presumption always is, in the absence of anything to the contrary, that an officer does his duty; and in all probability he did his duty in this case. In all probability there was no occupant of the premises in question. Mrs. Denton was a non-resident of the state. We think the sheriff's return in the present case is sufficient. As lending support to the correctness of these views, see the following cases: *Wilkins v. Tourtellott*, 28 Kan. 835; *Rowan v. Lamb*, 4 G. Greene, 468; *Redus v. Wafford*, 4 Smedes & M. 579; *Ritter v. Scannell*, 11 Cal. 238, 247, 248; *Porter v. Pico*, 55 Cal. 165, 172; *Watt v. Wright*, 66 Cal. 208, 5 Pac. Rep. 91.

9. The next and last claim urged by the plaintiff is that the sale of the land was made by an ex-sheriff, and the deed was executed by an ex-sheriff, and therefore that the sale and deed are void. The sale and deed were made by the sheriff, who received the writ, who levied upon the property, and who advertised the same for sale; but the sale was made two days after his term of office expired, and the deed was executed three days after his term of office expired. It is a general rule that the officer who commences to execute a writ of execution or an order of sale must complete the execution thereof; and it is also held that the execution of the writ is not fully completed until the deed for the property sold has been executed. *Tuttle v. Jackson*, 6 Wend. 218; 224. It is therefore generally held that the officer who levies upon the property and advertises the same for sale, should not only sell it, but should execute the deed therefor, although his term of office may expire before the sale is made, or before the deed is executed. See case last cited, and also *Anthony v. Wessel*, 9 Cal. 108; *Lemon v. Craddock*, Litt. Sel. Cas. 252; *Porter v. Mariner*, 50 Mo. 364. And in California it is also held that, where a sheriff's term of office has expired, the court may, independent of the statute, appoint a suitable person to execute the deed. *People v. Boring*, 8 Cal. 406. In Kansas it is provided by statute as follows:

"Sec. 109. Sheriffs, under-sheriffs, and deputies may execute and return all such writs and processes as shall be in their hands at the expiration of their office, or at the time of their removal from office, which they shall have begun to execute by service, levy, or collection of money thereon." Comp. Laws 1885, c. 25, § 109.

"Sec. 459. The sheriff or other officer who, upon such writ or writs of execution, shall sell the said lands and tenements, or any part thereof, shall make the purchaser as good and sufficient deed of conveyance of the lands and

tenements sold as the person or persons against whom such writ or writs of execution were issued could have made of the same at or any time after they became liable to the judgment." Civil Code, § 459.

There is nothing in any of the statutes of Kansas that tends in the least to modify the provisions of the first section above quoted. The provisions of the second section above quoted may, however, be modified to some extent by the provisions of section 465 of the Civil Code. Section 465 provides, among other things, that when the term of office of the officer who made the sale has expired, or if he "*shall be absent*, or be rendered unable by death or otherwise, to make a deed," "any succeeding sheriff or other officer," may, by order of the court, make the deed, and then the statute provides: "Such deed shall be as good and valid in law, and have the same effect as if the sheriff or other officer who made the sale had executed the same." Civil Code, § 465. We think the sale in the present case was unquestionably valid; and as it was confirmed by the court, and a deed ordered to be executed thereon, and as the purchase money was all paid by the purchaser, and as he immediately took the possession of the property, and has been in the possession thereof ever since, we think he obtained at least a valid, equitable title to the property, whether the deed itself is valid or invalid. And this is all that the court below decided in the case; and hence it is not necessary for us to express any opinion with reference to the validity or invalidity of the deed. We would think, however, under the statutes construed in connection with the common law, that the deed made by the ex-sheriff who sold the property is valid. We are inclined to think that in cases like the present the purchaser is entitled, at his election, to obtain his deed, either from the ex-sheriff who sold the property, or, by order of the court, from his successor in office. However, we shall not now determine this question.

10. In conclusion we would say that collateral attacks upon judicial proceedings are never favored; and when such attacks are made, unless it is clearly and conclusively made to appear that the court had no jurisdiction, or that it transcended its jurisdiction, the proceedings will not be held to be void, but will be held to be valid. Irregularities alone are not sufficient to destroy the validity of judicial proceedings. Nor are mere omissions from the record. On the contrary, it will generally be presumed, in the absence of anything to the contrary, that all that was necessary to be done with respect to any particular matter by either the court or its officers was not only done, but rightly done. *Paine v. Spratley*, 5 Kan. 525; *Bowman v. Cockrill*, 6 Kan. 311, 324; *Armstrong v. Grant*, 7 Kan. 285, 291, 292; *Burke v. Wheat*, 22 Kan. 722; *Pracht v. Pister*, 30 Kan. 568, 573, 1 Pac. Rep. 638; *Pritchard v. Madren*, 31 Kan. 38, 50, 51, 2 Pac. Rep. 691; *Rounsaville v. Hazen*, 33 Kan. 71, 76, 5 Pac. Rep. 422; *Merwin v. Hawker*, 31 Kan. 222, 1 Pac. Rep. 640; *Cross v. Knox*, 32 Kan. 725, 732, 733, 5 Pac. Rep. 32; *Stetson v. Freeman*, 35 Kan. 523, 532, 11 Pac. Rep. 431; and other cases hereafter cited. With respect to petitions or first pleadings, see the following cases: *Greer v. Adams*, 6 Kan. 203; *Entreken v. Howard*, 16 Kan. 551; *Bryan v. Bauder*, 23 Kan. 95; *Rowe v. Palmer*, 29 Kan. 337, 340. With regard to service by publication, and all the proceedings based thereon, we would refer to the following cases: *Gregg v. Thompson*, 17 Iowa, 107; *Gemmell v. Rice*, 13 Minn. 400, (Gil. 371); *Paine v. Mooreland*, 15 Ohio, 435; *Gary v. May*, 16 Ohio, 66; *Nash v. Church*, 10 Wis. 303, 312, 313; *Quarl v. Abbott*, 102 Ind. 233, 240, 1 N. E. Rep. 476; *Lawler v. White*, 27 Tex. 250; *Loring v. Binney*, 38 Hun. 152; *Voorhees v. Bank*, 10 Pet. 449; *Cooper v. Reynolds*, 10 Wall. 308; *Ludlow v. Ramsey*, 11 Wall. 581. With reference to the attachments and all the proceedings based thereon we would refer to the following cases: The three last cases above cited, and the following: *Ritter v. Scanell*, 11 Cal. 238, 247; *Porter v. Pico*, 55 Cal. 165, 172; *Harvey v. Foster*, 64 Cal. 296; *Scrivener v. Dietz*, 68 Cal. 1, 8 Pac. Rep. 609; *O'Farrell v. Stock-*

man, 19 Ohio St. 296; *Rowan v. Lamb*, 4 G. Greene, 468; *Redus v. Wofford*, 4 Smedes & M. 579.

We think no material error was committed in this case, and therefore the judgment of the court below will be affirmed.

HORTON, C. J., concurring. JOHNSTON, J., not sitting, having been of counsel in the court below.

(37 Kan. 677)

STEWART v. FOWLER *et al.*

(*Supreme Court of Kansas. December 10, 1887.*)

1. CONTRACT—VERBAL—ACTION ON—DISPUTE AS TO TERMS—INSTRUCTIONS.

Where two parties make a parol contract, and they disagree about its terms, it is the duty of the court, in an action arising thereon, to explain to the jury, when requested, the legal effect of each party's recollection of the terms of the same.

2. BROKERS AND FACTORS—REAL-ESTATE AGENTS—RIGHT TO COMMISSIONS.

Where a contract for a commission for the sale of land provides that the land must be sold to a person ready, willing, and able to buy, it is not enough that there has been a contract to sell made; there must have been a sale, before the commission is earned.

3. VENDOR AND VENDEE—CONTRACT OF SALE—WHAT CONSTITUTES.

Where S. and N. make a contract about the conveyance of the farm of S. to N., who pays a certain sum in cash, and agrees to pay a further sum at a future time, and execute a mortgage for the balance of the purchase price, at which time S. agrees to make a deed to the farm, and give possession of the same; and at the same time it is further agreed that if N. fails to pay the further sum of money, and execute the mortgage, then the money already paid shall be forfeited to S.: *held*, such an instrument is a contract to sell, and not a sale itself.

(*Syllabus by Holt, C.*)

Commissioners' decision. Error to superior court, Shawnee county; W. C. WEBB, Judge.

Tried in the superior court of Shawnee county, at the June term, 1885. Verdict for defendants in error, plaintiffs below, for \$500, and judgment thereon. The material facts are stated in the opinion.

Overmeyer & Safford, for plaintiff in error. *Welch & Welch* and *S. S. Lawrence*, for defendants in error.

HOLT, C. The defendants in error, plaintiffs below, brought their action against plaintiff in error, in the superior court of Shawnee county, for their commission for selling lands for defendant. They allege that they were real-estate agents; that the defendant came to them in the spring of 1884, and placed his farm in their hands for sale. The agreement entered into between the parties was not in writing, and the parties differ in regard to its terms. The plaintiffs claim that if they should procure a purchaser, ready, willing, and able to buy, that they would receive a commission of 5 per cent. upon the price for which the land should be sold. The defendant stated that he placed the farm in their hands to sell; that he was to pay them a commission of 5 per cent, when a sale was made to a person willing and able to pay for the same. Some time in October of that year, M. J. Riley, one of the plaintiffs, took a man by the name of Neiswinder, a stranger, to the house of the defendant, to show him the land. Defendant states that Riley told him he had found out that Neiswinder wanted a farm, was able to buy, and had brought him over for the purpose of making a trade; that he had "looked him up," and he was worth \$25,000. He said this statement was made to him in the absence of Neiswinder. Riley testifies, however, that Neiswinder and Stewart talked over the financial standing and ability of Neiswinder to pay, and, after investigation, Stewart seemed to be satisfied that he was able to pay for the farm. An agreement was entered into that day by which Neiswinder paid Stewart \$350 in hand, and the next day it was reduced to writing in the office

of plaintiff in Topeka. By that agreement Neiswinder was to pay Stewart \$650 in addition to the \$350 already paid; and on the seventeenth day of February following was to pay the further sum of \$4,000 in cash; give security by first mortgage on the property for \$5,000, due in three years, at 8 per cent.; and upon the payment of the money, and the execution of the mortgage, Stewart was to give a deed to the place, and give him the possession thereof, on the first day of March following. The \$650 was paid, but there was no further payment made, nor demand for a deed by Neiswinder of Stewart, nor any demand by Stewart for the \$4,000 or the execution of the mortgage.

The first complaint of defendant is to the ruling of the court, excluding a letter written by Neiswinder to Stewart in regard to the payment for the land. There is no offer to show the contents of the letter, and we are left to presume what it contained. We would not be justified in presuming an ordinary business letter, written by Neiswinder to this defendant, could have been competent and relevant evidence in this action between the agents of the defendant and the defendant himself.

The defendant claims there was error in the charge given by the court to the jury. We do not find any exception taken to the general instructions, or any part thereof. The defendant, however, offered three instructions, which were refused. We shall examine the instructions given, only for the purpose of seeing whether the instructions asked and refused were given elsewhere in substance by the court. The first instruction asked by defendant, and refused by the court, is: "If the plaintiffs agreed and undertook to sell the defendant's farm for a commission upon the price realized, then, in order to earn their said commission, it must appear by a preponderance of the evidence that they effected a sale of the farm to a party ready, willing, and able to perform the conditions of the sale. The mere procuring of a person to enter into a contract to purchase the land, without such purchaser was ready, willing, and able to make the cash payments named in the contract, and to make the mortgage therein named for the deferred payments, would not be sufficient to entitle the plaintiffs to their commission." We think that instruction ought to have been given, under the testimony of the defendant about the terms of his agreement with plaintiffs, unless he had in some manner waived his rights by entering into a sale with Mr. Neiswinder. This necessitates an examination of the contract entered into between Stewart and Neiswinder on the twenty-fifth day of October, 1884. The contract is substantially as follows: "This agreement made and entered, into this twenty-fifth day of October, 1884, by and between J. N. Stewart and Reuben Neiswinder, witnesseth, that said party of the first part, for the consideration hereinafter mentioned, covenants and agrees to sell unto the said party of the second part, his heirs and assigns, the following property. [Here follows description.] The considerations and conditions of this agreement are as follows, to-wit: The party of the second part is to pay in full consideration for said premises the sum of ten thousand dollars, in the manner and upon the conditions hereinafter expressed, to-wit: Three hundred and fifty dollars (350) cash in hand; the further sum of six hundred and fifty dollars (650) in notes, secured by first mortgage, fifteen days from date; the further sum of four thousand dollars (4,000) cash, to be paid on or before the seventeenth day of February, 1885; the further sum of five thousand dollars (5,000) to be secured by mortgage on said premises, and held by said Stewart for three years, to draw eight per cent. interest, payable semi-annually; the said party of the first part to give possession on March 1, 1885, upon compliance with the within agreement. In consideration of which, said party of the second part covenants and agrees to pay unto said party of the first part for the same the sum of ten thousand dollars, as follows, in the manner, and within the time, and with the interest, as hereinabove mentioned and specified. * * * If default be made

in fulfilling this agreement, or any part thereof, by or on behalf of said party, of the second part, this agreement shall, at the option of the first party, be forfeited and determined, and said party of the second part shall forfeit all payments made by him on the same; and such payments shall be retained by said party of the first part in full satisfaction of all damages by him sustained, and he shall have the right to enter and take possession of said premises."

Was this a contract to sell, or was it a sale within itself? Certainly it was not a conveyance; at most, it was only a contract to convey by deed, when Neiswinder should perform certain conditions specified in the agreement. There was something to be done by each party before there could be a complete sale. Neiswinder was to pay in the future a definite sum of money, and execute a mortgage upon the land; and, on the other hand, the defendant, upon the payment of the money and the delivery of the mortgage, should execute a deed, and give possession of the farm to him. There was, however, a part of the consideration named in the contract paid in cash at the time it was entered into. Whatever effect such payment would ordinarily have in contracts relating to real estate, we think the conditions in this agreement about the payments made by Neiswinder shows clearly the intentions of the parties. It is therein provided that if Neiswinder should fail to pay the \$4,000, and execute the mortgage, then all payments made by him should be retained by the defendant in satisfaction and liquidation of all damages he had sustained. We think this provision of the agreement was decisive of its character. It was a contract to sell. It appears by the evidence in this case that it has been treated by the parties thereto as a contract to sell, rather than a sale. No sale having been made, it would follow, if the defendant's statement of the contract for commission between himself and plaintiffs were true, that he had the right to insist that at the time specified for the sale to-wit, on the seventeenth day of February, 1885, Neiswinder should have been ready, willing, and able to purchase the farm of defendant. It might fairly be inferred from the evidence that he was unable to buy at that time. His ability to pay should have been shown affirmatively; the burden was upon the plaintiff to establish it.

In view of the conflict of evidence about the terms of the contract for a commission, this instruction should have been given. The defendant was entitled to have his theory of the action, when supported by material testimony, fairly presented in the instructions given by the court. It was a matter of vital importance to him, for, if his version of the contract was correct, then the instruction refused stated the controlling rule of law in the case. The court did not elsewhere give an instruction embodying it in substance; on the other hand it did instruct the jury that the agreement between defendant and Neiswinder was a sale, and not a contract to sell. If it had been a sale, then defendant, in making it, would have waived the question of the ability of Neiswinder to pay, and this instruction would have been properly refused; but, if it was a mere contract to sell, there would have been no waiver by defendant, and the question of what the contract for a commission was should have been determined by the jury, under proper instruction of the court.

It is recommended that the judgment of the court below be reversed.

BY THE COURT. It is so ordered. All the justices concurring.

(37 Kan. 671)

GARDNER v. KING.

(*Supreme Court of Kansas.* December 10, 1887.)

1. EXECUTION—EXEMPTIONS—TIME TO CLAIM—SALE AFTER NOTICE.

Where an execution creditor causes an execution to be levied upon exempt personal property of the debtor, and it is advertised and sold, and bought in by the

said creditor, but before the sale he is notified by the owner not to buy it, and that he claims it as exempt property, *held*, that the execution debtor might claim his right to the property, under the exemption law, at any time before the sale of the property, and that, after notice of such claim is given, the property is wrongfully detained by the creditor, and the owner is entitled to the immediate possession.

2. TRIAL—DEMURRER TO EVIDENCE.

Before a demurrer can be sustained to the plaintiff's evidence, the court must find that the plaintiff has entirely failed to prove his case.

(*Syllabus by Clogston, C.*)

Commissioners' decision. Error to district court, Crawford county; GEO. CHANDLER, Judge.

This was an action brought by the plaintiff in error, before a justice of the peace in Crawford county, to recover the possession of certain personal property. The attorney for the plaintiff filed the affidavit in replevin, which is as follows:

"*State of Kansas, Crawford County—ss.:* Henry Gladdis, being duly sworn upon oath says that he is the duly-authorized attorney of the plaintiff in the above-entitled action. That said plaintiff is the owner of the following described and valued property, to-wit: One red two-year-old heifer, of the actual value of twenty dollars; one red two-year-old cow, of the actual value of twenty-five dollars; and one sucking calf with cow, of the actual value of five dollars. That said plaintiff is entitled to the immediate possession of said property. That said property is wrongfully detained by said defendant, J. M. King. That said property was taken in execution on a judgment rendered before W. H. MILLER, a justice of the peace of Sheridan township, in Crawford county, Kansas, against said plaintiff, and that the said property was by law and statute exempt from seizure and sale. HENRY GLADDIS."

This affidavit was the only pleading of any kind filed, and no answer was filed thereto. Trial in justice's court, and judgment rendered; from which judgment an appeal was taken to the district court, and in the district court the cause again went to trial upon the same affidavit, and without any additional pleadings. The plaintiff introduced his testimony, and the defendant demurred thereto, upon the ground that the evidence failed to establish a cause of action against the defendant, and in favor of the plaintiff, and failed to maintain the allegations of said affidavit, the foundation of the action. The demurrer was sustained by the court, and judgment rendered against the plaintiff for costs, and the plaintiff brings the case here.

Wells & Wells, for plaintiff in error. *John T. Voss*, for defendant in error.

CLOGSTON, C. The only question for consideration is whether the court erred in sustaining the demurrer to the plaintiff's evidence. The record shows that there was but very little evidence given at the trial, and what little there was admitted must, when demurred to, be regarded in the most favorable light, and all reasonable presumptions to be drawn therefrom are to be resolved in favor of the plaintiff; and, before a demurrer can be successfully sustained thereto, the court must be able to say that the plaintiff has entirely failed to prove his case. See *Brown v. Railroad Co.*, 81 Kan. 1, 1 Pac. Rep. 605. The plaintiff showed by his testimony that he was a resident of the state, and the head of a family; that the two heifers in controversy belonged to him, and that they were levied upon by a constable on execution in favor of the defendant; that, before the sale of the property, plaintiff notified the defendant not to buy them, and that he claimed them as exempt property; also that the property was advertised and afterwards sold, and the defendant became the purchaser at said sale. This evidence was, we think, sufficient, when so attacked, to prove the plaintiff's cause. If the plaintiff had waived his right to select the property, or had done anything else that would reasonably prevent him from claiming the property as exempt, it would have been a proper defense to his claim. It was not necessary for the plaintiff, in the

first instance, to show that he had not waived his right to claim the property under the exemption. The defendant, however, insists that the testimony of the plaintiff showed that he had no other cattle at the time of the trial, but that he did not show what other cows, if any, he had at the time the execution was levied upon the property in controversy. This was not necessary. If the cows in controversy were the only ones he owned at the time of the levy, then they were exempt; if he had other cattle, then he had the right to select which he would claim as exempt, and this right to select might be exercised by the plaintiff at any time before the sale. *Rice v. Nolan*, 33 Kan. 28, 5 Pac. Rep. 437. The exemption law was made for the benefit of a debtor and his family, and its provisions must be liberally construed in his favor. Where he made the selection before the sale, and informed the defendant of that fact, and that he claimed the property as exempt, if, after that, the defendant retained them, he did so wrongfully; the plaintiff being entitled to their immediate possession.

Defendant claims that the court erred in overruling his motion to quash the affidavit, the foundation of the action, and also in overruling his objection to the introduction of any testimony thereunder. We suggest to counsel that, before he can be heard to urge errors in his own behalf, he must have preserved the rulings of the court in a transcript or case made. The defendant has filed no cross-petition in this case, and therefore none of the errors, even if they existed as claimed by him, can avail or be considered by this court. The demurrer was erroneously sustained.

We therefore recommend that the judgment of the court below be reversed.

BY THE COURT. It is so ordered; all the justices concurring.

(37 Kan. 696)

WEIL and others v. ECKARD and others.

(Supreme Court of Kansas. December 10, 1887.)

APPEAL—REVIEW—FINDINGS OF FACT BY THE COURT.

In a case tried by the court, wherein special findings of facts are made, the same effect is to be given them as if found by the jury; and, if there is any evidence to sustain them, they will not be disturbed by this court.

(Syllabus by Simpson, C.)

Commissioners' decision. Error to district court, Pottawatomie county; R. B. SPILMAN, Judge.

L. H. Finney, for plaintiff in error. Thos. Fairchild and D. V. Sprague, for defendant in error.

SIMPSON, C. John W. Eckard and N. Pettinger, partners as Eckard & Pettinger, were in business and owned a stock of goods and a store building in Westmoreland, Pottawatomie county. On the fourth day of October, 1884, Pettinger sold out his interest in the partnership to Eckard, the other partner, and took notes of \$1,225 each, one secured by a chattel mortgage on the stock of goods, and the other by a real-estate mortgage on lot 30, and east half of lot 29, in Cochran's addition to Westmoreland. The store building was on these lots. At the time of this sale of the interest of Pettinger to Eckard, the firm was largely indebted, and, from the evidence in the case, may be said to have been insolvent. The matter in question here is the real-estate mortgage. It was recorded October 4th, and on the same day was assigned by Pettinger to his son Vernon Pettinger, who had been in the employment of the firm, and who knew all the circumstances under which it was executed. On the seventh of October he sold and assigned the note and mortgage to Trout & Leach, bankers at Wamego. Vernon Pettinger was indebted at the bank of Trout & Leach, and he was paid by the surrender of his own paper, to the amount of \$800; and he received in addition \$200 in cash.

The paper on which Vernon Pettinger was responsible to Trout & Leach was the paper of the partnership. Trout & Leach knew of the partnership; had dealt with it; knew that this mortgage was on the partnership property, Leach having been at Westmoreland some time before and examined it; and knew that the mortgage was given in some settlement between the parties; and they knew also that the firm of Eckard & Pettinger was "hard up;" that they carried too much on their books; that they had not money to pay their bills; that Trout & Leach had loaned them money. At the time of the execution and the delivery of the mortgage by Eckard to Pettinger, the firm of Eckard & Pettinger were indebted to the plaintiffs in error in the sum of \$1,530.23; to Tootle, Hanna & Co. \$140.72; to another firm, \$165; to another, \$1,008.33; to A. J. Gray, \$300; to A. Grimes & Co., \$1,093; to Roll, Thayer, Williams & Co., \$205.78; to Kendall & Emery, \$700; for which chattel mortgages were given on the stock of merchandise by Eckard on the eleventh day of October. The plaintiffs in error were also secured by a mortgage on the lot 30, east half of lot 29, the same being the lots on which the store building was situated. The indebtedness on the firm, as shown by this record, including the judgment of Freyschlog of \$243.33, and the amount due Trout & Leach, for which Vernon Pettinger was responsible, say \$800, amounts to over \$6,000, exclusive of interest and the costs of litigation. The value of the lots and the store building and of the entire partnership property was from \$4,500 to \$5,000. The object of this action was to set aside the mortgage made by Eckard to Pettinger, and assigned through the son of Pettinger to Trout & Leach, as fraudulent against the plaintiffs in error, who are creditors of the firm of Eckard & Pettinger, and who have a mortgage on the store property executed and recorded on the eleventh day of October.

The case was tried by the court without the intervention of a jury, and the findings of fact and conclusions of law are as follows: "(1) That John W. Eckard and N. Pettinger were partners in business at Westmoreland, Pottawatomie county, Kansas, under the firm name of Eckard & Pettinger, up to about the first day of October, 1884, at which time the partnership was dissolved, and Pettinger sold all his interest in the partnership property to Eckard. (2) That lot No. 30, and the east half of lot No. 29, in Cochran's addition to Westmoreland, in Pottawatomie county, Kansas, was a part of the partnership property of said firm of Eckard & Pettinger, and that Pettinger sold his interest therein to Eckard on or about the third day of October, A. D. 1884. (3) That on the third day of October, A. D. 1884, John W. Eckard, and Annie E. Eckard, his wife, executed and delivered to N. Pettinger their promissory note for \$1,225, a part of the purchase money of his interest in the partnership property, due 18 months after date, drawing interest at the rate of 10 per cent. per annum from date, and on the same day executed and delivered to said N. Pettinger a mortgage upon said real estate to secure the payment of said note, which mortgage was duly filed for record on the fourth day of October, 1884, at 11 o'clock A. M. (4) That on the fourth day of October, 1884, the said N. Pettinger sold and indorsed said note, and assigned said mortgage to V. Pettinger, and that said assignment of said mortgage was duly filed for record the fourth day of October, 1884. (5) That on the seventh day of October, 1884, the said V. Pettinger sold and indorsed said note, and assigned said mortgage to the defendants Trout & Leach, and that said assignment of said mortgage was duly filed for record the seventh day of October, 1884. (6) That the said Trout & Leach bought said note and mortgage in good faith, and for a valuable consideration, and then became and still are the *bona fide* owners and holders thereof; and that said mortgage is the first lien upon said estate. (7) That on the third day of October, 1884, John W. Eckard and N. Pettinger, as partners as Eckard & Pettinger, were indebted to the plaintiffs I. Weil & Co. in the sum of \$1,530.23, and that no part thereof has since been paid. (8) That on the eleventh day of Octo-

ber, 1884, the said John W. Eckard, and Annie E. Eckard, his wife, for the purpose of securing said indebtedness of Eckard & Pettinger, to I. Weil & Co., executed and delivered to the said I. Weil & Co. a mortgage on the aforesaid real estate, which was duly filed for record on the eleventh day of October, 1884; and that said mortgage is the second lien upon said real estate, and that appraisement was by said defendants John W. Eckard and Annie E. Eckard duly waived. To each and every of the said findings of fact the said plaintiffs duly excepted separately. And the court do find as conclusions of law: (1) That the said plaintiffs I. Weil & Co. are entitled to recover from John W. Eckard and N. Pettinger the sum of one thousand six hundred and four and 61-100 dollars, and to a foreclosure of said mortgage, and an order of sale of said real estate without appraisement, after the expiration of six months, and that the same be held to be the second lien on said real estate. (2) That when the said sale is made the said Trout & Leach will be entitled to recover out of the proceeds thereof the amount then due upon the aforesaid note of John W. Eckard and Annie E. Eckard, now held by them; and the same be held to be the first lien on said real estate. (3) That when such sale is made the proceeds, after paying the costs of said suit and the said sale, and the taxes, if any then accrued and unpaid on said real estate, must be applied—*First*, in payment of the amount then due upon the aforesaid note of John W. Eckard and Annie E. Eckard, now held by Trout & Leach; and *second*, in payment of said judgment of I. Weil & Co., with interest accrued thereon, up to the time of said sale." To each and every of said conclusions of law the plaintiff at the time duly excepted.

Whereupon the said plaintiffs filed in said court their motion for a new trial of this cause for all the statutory causes. Whereupon the court overruled said motion; to which ruling the plaintiffs at the time excepted. Whereupon it is by the court ordered, adjudged, and decreed that the said plaintiffs do have and recover, of and from the said defendants John W. Eckard and N. Pettinger, the sum of \$1,604.61, and the costs of suit taxed at ———, and hereof let execution issue. And it is by the court further ordered, adjudged, and decreed that the mortgage of the said plaintiffs on the premises lot No. 30, and east half of lot 29, of Cochran's addition to the city of Westmoreland, in Pottawatomie county, Kansas, be foreclosed; that after six months from this date, order of sale of said premises issue, and that said premises be sold without appraisement; and it is further ordered, adjudged, and decreed that the mortgage owned and held by Trout & Leach be, and the same hereby is, declared to be a first lien on said premises, and that the mortgage of the said Weil & Co. be, and the same hereby is, declared to be a second lien on said premises; and it is further ordered, adjudged, and decreed that the moneys arising out of the sale of the said premises be applied—*First*, to the payment of the taxes accrued and unpaid on said premises; *second*, to the payment of the costs of this action; *third*, to the payment of the amount then due to Trout & Leach; *fourth*, to the payment of the judgment of the said plaintiffs. And that the said defendants John W. Eckard and Annie E. Eckard, N. Pettinger, and Vernon Pettinger, be forever foreclosed and barred of and from all and every interest, right, title, or claim in or to said mortgaged premises. And it is further ordered that the injunction heretofore issued in the cause be dissolved, and that the order dissolving said injunction be suspended for 60 days, and until decision of the supreme court, if petition in error be filed. To all of which findings of fact and conclusions of law, order, judgment, decree, and proceeding, the plaintiffs then and there duly excepted.

It makes no practical difference how much we may be impressed with the views of the counsel for plaintiff in error. In the condition of the record, we can do nothing but sympathize with him. There is no special finding requested or even given on the question of the insolvency of the partnership at

the time of the execution of this mortgage by one partner to the other. While we might think the evidence justified such a finding, we must hold, in accordance with established principles and repeated decisions, that the general finding and judgment includes every material fact necessary to sustain such judgment; and that, in legal contemplation, there is a finding that the partnership was not insolvent at that time. This compels an affirmance of the judgment.

BY THE COURT. It is so ordered; all the justices concurring.

(37 Kan. 765)

CHANDLER v. DYE.

(Supreme Court of Kansas. December 10, 1887.)

1. DIVORCE—RIGHTS OF DIVORCED PARTIES—CONTRACT FOR SUPPORT OF CHILDREN.
D. and wife were divorced, and the custody of their minor son was given to the wife, whom she afterwards supported. The evidence discussed, and held, that there was no sufficient evidence to prove a contract between D. and his divorced wife that he should pay her for such support.
2. REFERENCE—REPORT OF REFEREE—SETTING ASIDE.
Where the report of a referee is not sustained by sufficient evidence, the same should be set aside on motion of the aggrieved party, and a new trial granted.
(Syllabus by the Court.)

Error to district court, Miami county; J. P. HINDMAN, Judge.

Thos. M. Carroll, for plaintiff in error. Brayman & Sheldon, for defendant in error.

VALENTINE, J. This action was originally commenced on October 18, 1884, in the probate of Miami county, by Mary I. Dye, by filing an account for \$3,166 against the estate of Byron E. Dye, her former husband, for the support, education, and maintenance of their minor son, Robert C. Dye. The administrator, J. F. Chandler, filed a motion requiring her to itemize her account, which motion was sustained, and on November 11, 1884, an amended statement, containing the various items of her account, amounting to \$3,628.50, was filed. Afterwards a trial was had before the probate court, and the claim disallowed on the authority of *Harris v. Harris*, 5 Kan. 46. An appeal was then taken by Mary I. Dye to the district court, and on February 2, 1885, she filed her first amended petition. To this petition a demurrer was interposed, which was sustained by the court on the authority of *Harris v. Harris*, *supra*. Having failed to establish her account as a claim against the estate of her former husband, she then, with leave of the court, and on March 24, 1885, filed her second amended petition. In this petition, and for the first time, she set up a contract between herself and Byron E. Dye, under which contract, she alleged, he was to pay her for the support, education, and maintenance of their minor son. By the consent of the parties, and the order of the court, the cause was then referred to a referee for trial, and on June 18, 1885, a trial was had before the referee. The referee found that there was such a contract as was alleged in the plaintiff's petition, and found that the sum of \$2,747.50 was a reasonable sum for the support, education, and maintenance of said minor son, and that Mary I. Dye was entitled to a judgment for this amount against the estate of Byron E. Dye. A motion to set aside the referee's report on various grounds, and also a motion for a new trial on the ground of newly-discovered evidence, were filed by the defendant, and overruled by the court, and the defendant then brought the case to this court for review. All the evidence heard on the trial before the referee is preserved in the case and brought to this court.

The only question presented to this court is whether the evidence establishes a contract between Byron E. Dye and the plaintiff, whereby he agreed to pay her for the support, education, and maintenance of their minor child.

The facts in this case, stated in brief, are substantially as follows: Byron E. Dye and Mary I. Dye were married on May 14, 1855, and were divorced on June 16, 1877, by a decree of the circuit court of Jackson county, Missouri. During their marriage they had two children,—one a girl, Frankie Dye, and the other a boy, Robert C. Dye,—aged, respectively, at the date of the divorce, about 18 and 8 years. The father supported and maintained the daughter. The court granting the divorce gave the custody and control of the minor son to the mother. In November following the granting of the divorce, Mary I. Dye left Kansas City, Missouri, and removed to Chicago, Illinois, taking with her the minor son, Robert, where they have since resided. Byron E. Dye continued to reside in Kansas City until March, 1881, having about that time married again, when he, with his wife, removed to Miami county, Kansas, where they continued to reside up to the date of his death, which occurred on September 26, 1883. At the time of the divorce, June 16, 1877, the wealth of Byron E. Dye was variously estimated at from \$40,000 up to \$50,000; his most intimate business acquaintances placing it about \$45,000. By the decree of divorce, Mary I. Dye received of this amount \$5,000 as alimony. This is all that she was shown to have received until after the trial, when it was shown on the hearing of a motion for a new trial that, by an amicable arrangement between herself and Dye, she in fact received in all about \$16,000. Mrs. Dye could not testify in this case in her own behalf with respect to any transaction or communication had personally between herself and Byron E. Dye, which occurred before the divorce was granted. Civil Code, §§ 322, 323. But with respect to all other matters, and all matters transpiring since the divorce, she was as competent to testify as any other person. About the only evidence in the case tending to show that any contract was ever made between Byron E. Dye and Mrs. Dye for the support, education, or maintenance of their minor son, is the following: Mrs. Rilla Webster testified with respect to a conversation had between herself and Mr. and Mrs. Dye, on the day that, but before, the divorce was granted, among other things, as follows: "I started to leave the room, when Byron called me back and said, 'I wish you to hear what I have to say.' He then said he would have to support Robert anyway. This was said by him in connection with what he had been saying about the amount he would give his wife, Mary I. Dye. He seemed to be defending himself on account of the small amount he was giving Mrs. Dye." John F. Gregory, a cousin to Byron E. Dye, testified, among other things, as follows: "I was intimately acquainted with Byron E. Dye during his life-time. I had several conversations with relation to his boy, Robert, since he [Dye] and Mary I. Dye were divorced. He said he had Robert to support, and also that he had his daughter, Frankie, to support. This conversation was after he was married to his second wife, Augusta Kreinhop, and before his daughter was married. At another conversation, about a year afterwards, he spoke in relation to the support of his children. He seemed to speak as though the support of his daughter was costing him too much money. He said it was better for Robert to be with his mother, for he did not want the care of him. That it would cost him less for his mother to take care of him."

On February 29, 1880, Byron E. Dye wrote a letter to Mrs. Dye, which contains, among other things, the following: "MARY: I have made arrangements with Willoughby, Hill & Co., clothiers, cor. Clark and Madison, to furnish Robert his clothes on my credit. * * * I know you do not want to ask me for the money for his clothes, and I cannot tell when he needs them, nor how much to send, and furthermore I neglect it when I am not where he is. I hope to be in a position, when he becomes of the proper age, to give him such education as his tastes and future prospects in life will require. I am highly pleased with his progress. * * * While I do not want to be extravagant, I want him to look nice." On December 12, 1880, Byron E. Dye

wrote a letter to his son, which contains, among other things, the following: "I hope you will write me a letter at least once a month, and not wait until you want some more clothing." H. H. Grimshaw testified with regard to a conversation had between himself and Byron E. Dye in 1880 or in 1881 as follows: "He said he had a boy to support, who was at school." On April 20, 1882, Byron E. Dye wrote a letter to his son, which contains, among other things, the following: "DEAR ROBBIE: Yours of the 22d duly received. Come as soon as you want to. If your mother will advance your ticket and expenses, I will send it to her as soon as I am able to go to town and get a draft." On April 30, 1883, Byron E. Dye wrote a letter to Mrs. Dye, which contains, among other things, the following: "MARY: I wish you would ask your lawyer if your custody of Robert, according to the decree of divorce, affects his heirship to my estate?" After the divorce, and up to the time of the death of Byron E. Dye, he furnished clothing, and money for clothing, to his son, to the amount of \$184.

The evidence tending to show that there was no contract between Byron E. Dye and Mrs. Dye that he should pay her for the support, education, and maintenance of their minor son, is as follows. Mrs. Dye testified on the trial, among other things, as follows: "I always kept a watch and oversight over Mr. Dye, even after he left my house. I kept no rigid account of my bills; no separate account for the boy; no separate account for board. For nearly two years I paid \$10 per week for board, and I count it from that. *I made up the account about the time I brought in my bill.* I never asked Mr. Dye for any pay, so I kept no account, but, as stated before, only since I was appointed guardian. I counted from the last year. I only know in a general way that I paid \$130 per year for his clothing, and from the frequency of his having to have a new suit of clothes. Never asked for any that I did not get. I may have asked for the clothes. Mr. Dye furnished clothes whenever he wished for it. Laundry expenses I paid. It is an estimated account. I never asked Mr. Dye to pay any laundry bill. The doctor's bill,—I paid it. I brought it up to last year in my account. I never gave the boy less than 25 cents per week. Kept no separate account. When he wanted a book I bought it and paid for it,—was charged to nobody. I estimated same as I did the other accounts. I never made out any bills before. * * * The relation between us from the time of the divorce up to the time of his death was a business relation. *Mr. Dye assisted me up to the time of his death.* I can't say that I asked his advice. He offered to reloan the money for me. No, he never demanded the child, but at times felt bitter about it. Frankie's father supported her. * * * The divorce was granted owing to his fault. *Judge, I had no notion to charge until he refused to accept a compromise we had come to.* I accepted the pittance that was offered me. I expected to live until he had used up all his property. I expected the father would take care of all his family as long as he was able. So long as Byron lived we would have had what was just. * * * The conversation spoken of by Mrs. Webster took place in the forenoon. *Nothing was said about the support of the child between me and Mr. Dye.* It would be impossible for me to state everything which occurred, owing to the effect upon my mind. Nothing more was said about the divorce, as I can remember. *He expected me to withdraw the suit.*"

On December 25, 1879, Robert C. Dye wrote a letter to his father, which contains, among other things, the following: "*I thank you for the present.* I think I will buy myself a suit of clothes with the money." On January 14, 1880, Robert C. Dye wrote a letter to his father, which contains, among other things, the following: "I thank you for the money. I can buy myself a nice suit of clothes with it." On June 17, 1880, Byron E. Dye wrote a letter to Mrs. Dye with reference to purchasing clothing for Robert at the clothing-house of Willoughby, Hill & Co., which letter contains, among other things, the following: "If they object, have Frankie pay for them out of my money she has

on hand for fence." On the same day Byron E. Dye wrote a letter to his son, which contains, among other things, the following: "You can go to Willoughby, Hill & Co., and get your clothes. I will write your mother in regard to it." On December 1, 1880, Byron E. Dye wrote a letter to his son, which contains, among other things, the following: "I send you a draft for \$20. I want you to get a nice suit, and then I want you to keep it nice." On December 17, 1880, Robert C. Dye wrote a letter to his father, which contains, among other things, the following: "I received your letter from Frankie, with many thanks. I will give you an account of what I bought with my money. It was as follows:" and then follows an itemized statement of the clothing bought for \$20, together with a statement that his mother was pleased with his clothes. On November 17, 1882, Byron E. Dye wrote a letter to his daughter, Frankie, which contains, among other things, the following: "Suppose I die soon, all I have except Gussie's dower goes to you and Rob. You would not see your mother want. If I live and she should unfortunately lose her money, does anybody think I would ever see her want? I would divide my last dollar with her. I regard my obligations to support her during life just the same as if no divorce had ever been granted." Other letters passed between the father and son of like character to those above quoted.

The burden of proof in this case rested upon the plaintiff, Mrs. Dye, and we do not think that she made out her case. She did not, by the evidence or otherwise, show that any contract ever existed between herself and Byron E. Dye, requiring him to pay her for the support, education, or maintenance of Robert C. Dye. Mrs. Dye virtually testified on the trial that no such contract was ever made. And further, the divorce was granted on June 16, 1877; Byron E. Dye died September 26, 1883; and yet no claim was ever made by her to him that he was liable or in duty bound to pay her for anything furnished by her to Robert C. Dye; nor was any such claim ever made against his estate until October 18, 1884, when, for the first time, she made such claim in the probate court. And no claim was ever made that any contract ever existed between Mrs. Dye and Byron E. Dye imposing any obligation upon him to pay her for anything furnished by her to Robert C. Dye, until March 24, 1885, when for the first time she made such claim by setting it up in her second amended petition. And further, Mrs. Dye never kept any account of her expenses in supporting, educating, or maintaining Robert C. Dye, and made no charge for any such things as against anybody, until she filed her claim in the probate court on October 18, 1884. What Mrs. Webster heard Byron E. Dye say on the day the divorce was granted was not said to Mrs. Dye, and in all probability she did not hear it. And, of course, what was said to Mrs. Webster, whether in the presence or absence of Mrs. Dye, could not constitute a contract between Byron E. Dye and Mrs. Dye. The clothing and the money for clothing furnished by Byron E. Dye to his son, Robert, were evidently furnished as presents, and were not furnished in fulfillment of any contract. The son so considered them, and it would be natural that the father should make presents to his son. Besides, it would be bad policy to hold that a father could not give his son a present without becoming liable to pay his divorced wife, the son's mother, for everything which she might furnish to the son. Nothing that was said by Byron E. Dye to Mr. Gregory, or to Mr. Grimshaw, would constitute a contract between Byron E. Dye and Mrs. Dye. Indeed, it is evident from the evidence in the case that no such contract ever existed.

We think there was no sufficient evidence to sustain the report of the referee, and therefore the judgment of the court below will be reversed, and the cause remanded for a new trial.

(All the justices concurring.)

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